

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1158 – 1162 of 2024
& IA Nos.4145-4159, 4941, 5550 & 5554 of 2024

[Arising out of order dated 03.06.2024 passed by the Adjudicating Authority (National Company Law Tribunal, Allahabad Bench, Prayagraj), in C.P. (IB) No. 330/ALD/2018 with IA No. 263 of 2024 & IA No. 406 OF 2023]

IN THE MATTER OF:

Sunil Kumar Sharma

Suspended Board of Director
of Jaiprakash Associates Limited
Having its Office at: E-9/14,
Vasant Vihar,
New Delhi – 110057

...Appellant

Versus

1. ICICI Bank Limited

Having its Office at: ICICI Bank Tower,
Near Chakli Circle, Old Padra Road,
Vadodara 390007, Gujarat.

...Respondent No. 1

2. Mr, Bhuvan Madan

Interim Resolution Professional
For Corporate Debtor
Having its Office at: A-103
Ashok Vihar Phase-3
(Behind Laxmi Bai College),
New Delhi – 110052.

...Respondent No. 2

Present:

For Appellant : Dr. Abhishek Manu Singhvi, Mr. Abhijeet Sinha, Sr. Advocates with Mr. Abhishek Anand, Mr. Sudhir Sharma, Mr. Naman Singh Bagga, Mr. Gaurav Rai, Ms. Astha Agarwal, Mr. Aditya Shukla, Ms. Heena Kochar, Ms. Palak Kalra, Mr.

**Karan Kohli and Ms. Ridhima Malhotra,
Advocates.**

For Applicant : Mr. Sarwar Raza, Mr. Muhammad Zaid, Mr. Nabil Raza, Mr. Arnab Chakrabourty, Mr. Mohd. Waseem, Advocates in IA No. 4941/2024.

For Respondents : Mr. Krishnendu Datta Sr. Advocate with Mr. Madhav Kanoria, Ms. Srideepa Bhattacharya, Ms. Aishwarya Gupta, Ms. Neha Shivhare and Ms. Alina Mathew, Advocates for R-1/ ICICI Bank.

Mr. Sunil Fernandes, Sr. Advocate with Mr. Vaijyant Paliwal, Mr. Anoop Rawat, Mr. Sagar Dhawan, Mr. Aditya Marwah, Ms. Kirti Gupta, Mr. Ahkam Khan, Ms. Rajshree Chaudhary and Ms. Anushree, Advocates for R-2/ RP.

Mr. Gopal Jain, Sr. Advocate with Mr. Ankur Mittal, Ms. Yashika Sharma and Ms. Muskan Jain, Advocates for SBI

J U D G M E N T

ASHOK BHUSHAN, J.

These Appeals have been filed by a Suspended Director of the Corporate Debtor, challenging the Orders dated 03.06.2024 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Allahabad Bench, Prayagraj) in C.P. (IB) No.330/ALD/2018 and different IAs therein. By the Impugned Order dated 03.06.2024, the Adjudicating Authority has admitted Section 7 Application filed by the ICICI Bank Limited by commencing Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, Jaiprakash Associates Limited (JAL).

2. The Appeals also challenges Order passed by the Adjudicating Authority dated 03.06.2024 in CA 120/2019, IA 406/2023, IA 263/2024, IA 291/2024. IA 120/2019 was filed by the Corporate Debtor for dismissal of Company Petition which has been dismissed by separate Order of the same date dated 03.06.2024. IA 406/2023 was filed by the Corporate Debtor, seeking adjournment on the ground of restructuring proposal submitted by Corporate Debtor is under consideration, which IA has been dismissed as infructuous. IA 263/2024 was filed by the Corporate Debtor for replacement of Interim Resolution Professional (IRP) proposed in the Application to Sh. Bhuvan Madan, as IRP, which Application has been allowed by the Adjudicating Authority. IA 291/2024 was filed by the Corporate Debtor to defer the pronouncement of the Judgment which has also been dismissed by separate Order dated 03.06.2024. All the aforesaid Orders passed in the above IAs as well as Order dated 03.06.2024, admitting Section 7 Application are under challenge in these Appeals.

3. Brief background facts, which gave rise to filing of Section 7 Application by the ICICI Bank against the Corporate Debtor are:

- i. The Corporate Debtor is Company registered on 15.11.1995.
- ii. The Corporate Debtor is engaged in large number of businesses including Infrastructure Development. Corporate Debtor for carrying out its various business activities has obtained financial facilities from ICICI Bank and several other Banks (ICICI Bank being the lead Bank).

- iii. On 03.10.2014, the Corporate Debtor was classified under SMA-II category by Banks.
- iv. A Joint Lender Forum (JLF), comprising of all Banks financial institutions was constituted as per Reserve Bank of India (RBI) circular dated 26.02.2014, on 18.12.2014 with a view to overcome liquidity problems of JAL and finalize the Comprehensive Reorganisation and Restructuring Plan (CRRP).
- v. On 31.03.2015, Corporate Debtor was classified as Non-Performing Asset (NPA).
- vi. On 05.10.2016, Debt Realignment Plan (DRP) of Corporate Debtor was approved in principle by the Lenders. Debt and businesses of Corporate Debtor was divided into 3 Buckets under DRP namely (Bucket 1, Bucket 2A & Bucket 2B).
- vii. By the Banking Regulation (Amendment Ordinance 2017) published on 04.05.2017, Section 35 AA was inserted in Banking Regulation Act, 1949, empowering the Central Government to authorise the RBI to issue directions to any Banking Company or Banking Companies to initiate Insolvency Resolution Process in respect of a default under the provisions of Insolvency and Bankruptcy Code, 2016, (for short 'The Code' or 'The IBC').
- viii. By a Notification dated 05.05.2017 in exercise of power under Section 35AA of the Banking Regulation Act, 1949, Central Government authorised the RBI to issue such directions to any Banking Company

to initiate Insolvency Resolution Process in respect of default under the provisions of IBC.

- ix. A draft CRRP was approved in the JLF Meeting on 18.05.2017.
- x. A sanction letter dated 19.05.2017 was issued by ICICI Bank.
- xi. On 13.06.2017, RBI issued a press release recommending that for those account where 60% or more had been classified as NPA as on 30.06.2017, Banks may be directed to implement a viable Resolution Plan within 6 months, failing which the accounts may be treated for a reference under the IBC by 31.12.2017.
- xii. On 22.06.2017, DRP was approved by Lenders in JLF.
- xiii. RBI sent a letter dated 28.08.2017 to the ICICI Bank, directing that ICICI Bank may finalise a Resolution Plan for the JAL. It further directed that in the event that viable Resolution Plan is not finalised and implemented before the said date, Insolvency Proceeding under the provisions of IBC, may be initiated before 31.12.2017.
- xiv. ICICI Bank sent a letter dated 07.12.2017 to the RBI that account of JAL may be treated as resolved.
- xv. On 13.08.2018, ICICI Bank also wrote to the RBI that there is no need for JAL to be referred to IBC.
- xvi. In the meantime, a Writ Petition under Article 32 before the Hon'ble Supreme Court was filed by certain Homebuyers being **Writ Petition (Civil) No.744/2017**, where an Interim Order was passed on 11.09.2017 by the Hon'ble Supreme Court. The JAL, who was a parent Company was directed to deposit amount of ₹2000 Crores. It

further directed that if any Assets or Property of JAL have to be sold that should be done after obtaining prior approval of the Court.

- xvii. The RBI filed an Application in the **Writ Petition (Civil) No.744/2017**, on 10.01.2018, praying to allow the RBI to follow the recommendation of Independent Advisory Committee (IAC) regarding JAL.
- xviii. Hon'ble Supreme Court passed an Order in the **Writ Petition (Civil) No.744/2017** on 09.08.2018, accepting the request made on behalf of the RBI to allow it to follow the recommendation of IAC to initiate a CIRP against the JAL under IBC. After the Order of Hon'ble Supreme Court dated 09.08.2018, the RBI vide letter dated 14.08.2018, directed the ICICI Bank to initiate the Insolvency against JAL within 15 days from the date of direction.
- xix. On 30.08.2018, RBI again wrote a letter to the ICICI Bank that restructuring of JAL has become null and void.
- xx. JAL filed a **Writ Petition No.31329/2018** in the Allahabad High Court challenging the letter dated 14.08.2018 issued by the RBI, directing the ICICI Bank to initiate CIRP against the JAL.
- xxi. On 06.09.2018, an Application under Section 7 was filed by the ICICI Bank against the Corporate Debtor, JAL before the NCLT Allahabad.
- xxii. Section 7 Application relied on 6 financial facilities extended by ICICI Bank to the Corporate Debtor with regard to which facilities a default as on 31.08.2018 was claimed of ₹1,269,10,26,803.6/- (Rupees One

Thousand Two Hundred and Sixty-Nine Crores Ten Lacs Twenty-Six Thousand Eight Hundred and Three and Six Paise Only).

- xxiii. The Adjudicating Authority issued Notice in the Application on 10.09.2018 and directed the Corporate Debtor to file a Reply. Corporate Debtor filed a detailed Reply in Section 7 Application dated 16.09.2018.
- xxiv. ***Writ Petition No.313/2018***, which was filed by JAL challenging the letter dated 14.08.2018 of the RBI came to be dismissed by Allahabad High Court vide Order dated 24.09.2018.
- xxv. A Special Leave Petition challenging the Order of the Allahabad High Court also came to be dismissed filed by JAL on 12.10.2018.
- xxvi. As noted above, the CRRP, which was approved on 22.06.2017, envisaged bifurcation of entire debt of Corporate Debtor into 3 Buckets to the following effect:

*“i. **Bucket 1 Debt of Rs.11,689 Crores** – being part of the **“Other Debt”** is to be discharged against sale of identified Cement Plants of the Corporate Debtor & JCCL to Ultra Tech Cement Limited for which a define agreement has been executed between the parties.*

*ii. **Bucket 2A Debt of Rs.6367 Crores** – being **“sustainable debt”** will continue as debt of the Corporate Debtor.*

*iii. **Bucket 2B Debt of Rs.13,590 Crores** – **which is part of “Other Debt”** to be transferred to a Special Purpose Vehicle (SPV) along with identified land of the Corporate Debtor of the equivalent value.”*

- xxvii. With regard to implementation of Bucket 1 sale of identified Cements Plan to UltraTech Cement was implemented through Scheme of Arrangement. The debt of Bucket 2A which was restructured in terms mentioned in the Master Restructuring Agreement (MRA) dated 31.10.2017, which MRA was executed by 32 Lenders, including the ICICI Bank.
- xxviii. With respect to debt of Bucket 2B for debt of ₹11,833.55 Crores, a Scheme of Arrangement has been framed in consultation with the Banks under the scheme, the debt was to be transferred with equivalent security of equivalent value of land as security to a Special Purpose Vehicle (SPV).
- xxix. First Motion pertaining to Scheme of Arrangement was filed before the NCLT Allahabad on 20.11.2017. NCLT Allahabad in CP (CAA) No.174/2017 approved the First Motion Petition on 08.12.2017.
- xxx. On 23.01.2018, Second Motion Petition CP 19/2018 was filed before the NCLT.
- xxxi. On 30.04.2019, Corporate Debtor filed CA No.120/2019 in Section 7 Application filed by the ICICI Bank seeking dismissal of Company Petition.
- xxxii. On 22.08.2023, IA 406/2023 was filed by the Corporate Debtor, seeking adjournment of the hearing of all matters before the Adjudicating Authority, as discussions were being made between the ICICI Bank and the Corporate Debtor regarding consultation of the restructuring proposal submitted by the Corporate Debtor.

- xxxiii. An IA 263/2024 was filed by ICICI Bank seeking replacement of proposed IRP with Bhuvan Madan.
- xxxiv. Adjudicating Authority heard Learned Counsel for the Financial Creditors and Learned Counsel for the Corporate Debtor on 17.05.2024 and reserve the Orders on C.P. (IB) No. 330/ALD/2018 being CA 120/2019, IA 406/2023 & IA 263/2024. Arguments were also heard on Second Motion Petition filed in the Scheme of Arrangement on the same date. After the Orders were reserved in Company Petition, a One Time Settlement (OTS) Proposal was submitted by Corporate Debtor to the ICICI Bank offering total amount of ₹ 16,016 Crores/- on 29.05.2024.
- xxxv. On 31.05.2024, Corporate Debtor filed an Application being IA 291/2024, seeking to defer the pronouncement of the Order in Company Petition, which was reserved on 17.05.2024, till Judgment of the Hon'ble High Court in **Writ Petition (Civil) No.6049/2020** is pronounced or till decision is arrived by the Financial Creditor on OTS Proposal submitted by Corporate Debtor, whichever is later.
- xxxvi. On 03.06.2024, Adjudicating Authority passed the Impugned Order admitting Section 7 Petition, by separate Order of the same date IA 291/2024, seeking deferment of the Judgment was rejected.
- xxxvii. These Appeals were filed by the Appellant before this Tribunal on 04.06.2024. These Appeals were heard on 10.06.2024 by this Tribunal on which date Notices were issued in the Appeal. Matter was directed to be listed on 24.06.2024, within which period the Bank was

given time to file a Reply and may consider the proposal /OTS submitted by the Appellant by the said date.

- xxxviii. On 12.06.2024, all Lenders Meeting was held where Lenders decided that CIRP of JAL is to continue and any proposal from JAL may be considered under the ambit of IBC.
- xxxix. On 23.06.2024, Appellant submitted a revised OTS Proposal along with clarification.
- xl. On 24.06.2024, this Tribunal granted additional time to the ICICI Bank to consider the revised OTS Proposal.
- xli. On 28.06.2024, Committee of Creditors (CoC) of JAL was constituted as per provisions of the IBC.
- xlii. On 01.07.2024, Lenders discussed the revised OTS Proposal and agreed that revised proposal cannot be accepted at that stage.
- xliii. On 20.07.2024, Appellant submitted an alternate OTS Proposal proceeding to make total payment of ₹18,460 Crores.
- xliv. Joint Lenders held a Meeting and communicated to the suspended Chairman of the JAL that Lenders have unanimously rejected the alternate proposal vide letter dated 25.07.2024.
- xlvi. In pursuance of the Notice issued in these Appeals, ICICI Bank has filed its Reply to which Rejoinder Affidavit has also been filed by the Appellant. State Bank of India (SBI) has filed a detailed Intervention Application in the Appeal. Notices were also issued on the Intervention Application filed by the SBI. Reply to the Intervention Application has also been filed. The Appeals were heard by this

Tribunal on several dates and on 04.11.2024, hearing was completed and Judgment was reserved. Parties were also permitted to file Notes of Submissions.

4. We have heard Learned Sr. Counsels Dr. Abhishek Manu Singhvi & Mr. Abhijeet Sinha appearing for the Appellant, Mr. Krishnendu Dutta appearing for the ICICI Bank, Mr. Gopal Jain appearing for the SBI, Intervenor and Mr. Sunil Fernandes appearing for the Resolution Professional (RP).

5. Learned Counsel for the Appellant in support of the Appeal contends that Impugned Order suffers from legal infirmities as there is no debt or default committed by the Corporate Debtor. It is submitted that CRRP was approved on 22.06.2017, thereafter, MRA was executed on 31.10.2017, which MRA resolved all debt. As per MRA, the previous default and the remedies were specifically waived by the Lenders. The binding nature of sanction letter dated 19.05.2017 issued by ICICI Bank and the MRA has not been questioned by the Lender at any stage, whereas, the Corporate Debtor has taken irreversible steps in terms of the approved CRRP, including settlement of Bucket 1 debt by sale of identifying Cement Plan. The Corporate Debtor has been making payment under the MRA and huge amount has been paid under the MRA, which was duly accepted by Lenders. Previous default having been waived under the MRA, Lenders are debarred and estopped from falling back upon the alleged defaults happening prior to execution of CRRP. Default under Section 7 Application has been claimed

from 30.04.2016 to 15.05.2016, which is reflected from Annexure 6 to the Section 7 Application which dates were prior to approval of CRRP. The debt referred to in Bucket 2B was to be transferred to SPV and is no longer payable by the Corporate Debtor. Interest was also waived after 01.10.2016, hence there was no default within meaning of Section 3(12) of the IBC. Sanction letter was accepted by the Lender and is a binding contract between the Parties. Pursuance to sanction letter, various actions were taken including filing of First Motion and Second Motion for approval of the Scheme of Arrangement for transferring the debt to SPV relating to Bucket 2B.

6. Learned Counsel for the Appellant has also referred to the letter dated 07.12.2017 issued by the ICICI Bank, which was counter signed by SBI and IDBI to RBI stating that account of Corporate Debtor may be treated to be resolved, which letter clearly depicts the understanding of the Lenders themselves regarding resolution of entire debt. Reference to another letter dated 13.08.2018, written by the ICICI Bank to the RBI has also been made by Counsel for the Appellant.

7. Learned Counsel for the Appellant further submits that Judgment of the Hon'ble Supreme Court in the matter of '**Chitra Sharma & Ors.**' Vs. '**Union of India & Ors.**' in **Writ Petition (Civil) No. 744/2017** dated 09.08.2018 at best permitted the RBI to issue direction for initiating the CIRP against the Corporate Debtor. The letter dated 14.08.2018, written by RBI to ICICI Bank to initiate CIRP cannot be treated to be establishment of

the default on the part of the Corporate Debtor. Determination of the default within meaning of Section 3(12) of the IBC has to be done by the Adjudicating Authority under the IBC Process. Any determination of default, *dehors* the IBC Process is not relevant nor can be basis for admitting Section 7 Application. Reliance of the Lender on the Order of the Hon'ble Supreme Court dated 09.08.2018 and letter dated 14.08.2018 by the RBI is misplaced. Hon'ble Supreme Court was not examining the question of default by Corporate Debtor and has only allowed the Application filed by the RBI to act in accordance with the recommendation of IAC. Adjudicating Authority in the Impugned Order has considered the default on the part of Corporate Debtor pertaining to Bucket 2B debt only, which came into existence pursuant to the restructuring of debt by way of CRRP. Section 7 Application although refers to the earlier financing documents executed between the parties, but it does not even mention about the restructuring of the facilities by way of various documents such as CRRP, sanction letter dated 19.05.2017 and MRA dated 31.10.2017. Sanction letter dated 19.05.2017, does not confine to only Bucket 2A rather it covers all the dues shown in all the Buckets. Sanction letter novated all the existing facilities pertaining to the erstwhile debt. The argument of the Lenders that MRA is not relevant for the purposes of Bucket 2B is misconceived. Restructuring document superseded all previous understanding between the Parties. Sanction letter deals with the entire restructuring, including creation of the Buckets manner in which the interest will be levied. Thus, submission that obligation pertaining Bucket

2B did not form MRA is misconceived. As per Clause 8.2 read with 8.3 of the MRA to invoke any default under the erstwhile financing document, a revocation Notice has to be issued by the Lenders, no revocation Notice of restructuring document has ever been issued by the Bank.

8. Learned Counsel for the Appellant referring to Section 62 of the Indian Contract Act, 1872 submits that upon novation of the contract, there is a complete reset of liabilities and amended/novated documents replaced/substitute the erstwhile documents. Respondent Bank in spite of restructuring document has relied on earlier facility documents. There being no revocation of the restructuring document, no reliance could have been placed by the Bank on the earlier financing documents. The claims which have been filed before IRP are inflated claims, ballooning of the claims is clearly not permissible.

9. Learned Counsel for the Appellant has referred to NARCEL's offer dated 07.03.2024 as on 30.09.2023 and submits that as compared to the amounts of default noticed in the said offer, the claims admitted by IRP are inflated and unduly enhanced. Lenders are pursuing the present proceeding to maximise their gains and are not interested in resolution of the Corporate Debtor. IBC is not designed as recovery mechanism. The Corporate Debtor is Asset Rich Company which is fully competent to resolve all its debts, OTS offer given to the lenders required to be accepted so as to wipe out the entire debt of the Corporate Debtor. The receivables of the Corporate Debtor are much more than the debt of the Corporate Debtor. In

the facts of the present case, where Corporate Debtor has various running business, and several assets, discretion would have been exercised by the Tribunal in not admitting Section 7 Application. Promoters of the Corporate Debtor are not rogue Promoters/fly by night operators. Promoters have made effort to resolve the entire debt of the Corporate Debtor. Appellant remains committed to resolve the entire debt of the Corporate Debtor. Intervention Application filed by the SBI is not maintainable. The SBI in the garb of intervention is trying to argue its own Section 7 Petition which had not been entertained. RP is not competent to raise any submission on the merits of the Application under Section 7. RP has no locus to participate in the merits of the Appeal, which is matter solely between the Financial Creditor and the Corporate Debtor. It is submitted that again the Cancellation Order dated 12.02.2020 issued by Yamuna Expressway Industrial Development Authority, Writ Petition has already been filed by the Corporate Debtor in the Allahabad High Court, where an Order of Status Quo passed on 25.02.2020 by the High Court, which Writ Petition is still pending, where Orders have already been reserved by the High Court.

10. It is submitted that NCLT has rejected the Scheme Petition by Order of the same date dated 03.06.2024, whereas the Scheme Petition which was approved by the Lenders ought to have been approved. Order rejecting the Scheme Petition has already been questioned by the Appellant by filing a **Comp. App. (AT) No. 197 & 199/2024**, which is pending consideration before this Tribunal. The report of Credit Information Bureau (India) Limited (CIBIL) and Central Repository on Information on Large Credits

(CRILIC) relied by Financial Creditors are unconfirmed/qualified reports which cannot form any finding with regard to default of the Scheme of Arrangement is relevant for the adjudication of the present Appeal. The OTS Proposal was submitted on 29.05.2024, along with token payment of ₹200 Crores transferred on 27.05.2024 to show the bona fide of the Appellant. OTS Proposal having been submitted, a request was made to the Adjudicating Authority to defer the pronouncement of Order reserved on 17.05.2024, which was not acceded to and Judgment delivered when the OTS Proposal was submitted with upfront payment. Adjudicating Authority, ought to have waited for outcome of the OTS and then proceeded to admit Section 7 Application. There were several valid reasons for not admitting Section 7 Application which were highlighted before the Adjudicating Authority. This Tribunal in large number of cases has given opportunity to Corporate Debtor to submit an OTS Proposal.

11. Shri Krishnendu Datta, Learned Senior Counsel appearing for the Financial Creditor refuting the submissions of the Counsel for the Appellant submits that for admission of Section 7 application, Financial Creditor has to prove debt and default of the amount above the threshold. Both the conditions have been fully proved in Section 7 application resulting to admission of Section 7 application. The submission of the Appellant that there was no default committed by the corporate debtor is incorrect and false. It is submitted that the Central Government has notified the RBI as an authority to issue necessary direction to the Banks to initiate Insolvency Resolution Process against a Corporate Debtor. The RBI having found the

Corporate Debtor committing default under IBC has issued direction to the ICICI Bank on 14.08.2018 for initiating CIRP against the Corporate Debtor which direction was issued in exercise of statutory function by the RBI. It is submitted that the Hon'ble Supreme Court in Writ Petition filed by Chitra Sharma has also delivered a judgment on 09.08.2018 where RBI was granted permission to follow the recommendations of the IAC to initiate a CIRP against the Corporate Debtor under the IBC. The Hon'ble Supreme Court in its order has noted that the account of JAL was declared NPA since 31.03.2015. Default on the part of the Corporate Debtor was writ large. It is submitted that the direction issued by the RBI dated 14.08.2018 was challenged by the Appellant before the Allahabad High Court by means of Writ Petition which was dismissed by the High Court vide its order dated 24.09.2018. SLP against the said judgment of the High Court was also dismissed by the Hon'ble Supreme Court. High Court in its judgment dated 24.09.2018 has held that the directions issued by the RBI vide letter dated 14.08.2018 were in exercise of powers under Section 35 AA of the Banking Regulation Act. It is submitted that the directions of the RBI as well as the judgment of the Hon'ble Supreme Court dated 09.08.2018 in Chitra Sharma's case are relevant material to consider default on the part of the Corporate Debtor. Shri Krishnendu Datta further submits that the Section 7 application which was filed by the ICICI Bank related to facilities of Bucket 2B. It is submitted that the MRA did not relate to Bucket 2B default. Section 7 application in Annexure 6 has listed the six facilities extended by the ICICI Bank to the Corporate Debtor in which default was committed by the

Corporate Debtor. Six facilities on the basis of Section 7 application was founded were not part of the MRA. Submission of the Appellant that MRA covers debts of all the Buckets is misleading and false. The submission of the Appellant that MRA was never revoked by the lender has no relevance. With regard to Section 7 application, since MRA did not relate to facilities which were foundation of Section 7 application, the RBI has declared on 30.08.2018 that MRA is null and void. Even the MRA could not be complied with since securities were not created as per the MRA, in view of the order passed by the Hon'ble Supreme Court in Chitra Sharma's case dated 11.09.2017. Debt under Bucket 2B was to be transferred to an SPV of JAL i.e. Jaypee Infrastructure Development Limited vide scheme which scheme was never approved by the NCLT. The transfer of debt never took place to SPV debt which was subject matter of Bucket 2B continues to be in default in view of the scheme having never been implemented. Real Estate debt was not part of the MRA. Corporate Debtor in its reply filed before the Adjudicating Authority himself has pleaded that for debt of Rs.11,833.55 Cr. a scheme of arrangement has been framed under which scheme the debt is to be transferred with equivalent security to an SPV. The scheme was never approved, hence, default of the debt which is Real Estate debt continues. It is submitted that the Corporate Debtor in the written submission before the Adjudicating Authority has itself admitted that the present petition under Section 7 does not pertain to Bucket 1 or Bucket 2A rather petition under Section 7 pertains to Bucket 2B debt. Adjudicating Authority also in the impugned order has observed that it is admitted position that Section 7

application has been filed with regard to debt under Bucket 2B. It is submitted that the letter dated 19.05.2017 issued by the ICICI Bank has no relevance. Sanction letter stipulated that unless JAL executed an agreement/ documents in connection with the aforesaid facilities within a period of 90 days, no binding obligation shall arise. It is submitted that no documents were executed in relation to facility 2B, hence, default continues and sanction letter dated 19.05.2017 has no consequence with regard to default covered by Bucket 2B. The letter dated 07.12.2017 written by the ICICI Bank to the RBI that account may be considered to be resolved was not accepted by the RBI. The RBI has issued letters dated 14.08.2018 and 30.08.2018 which clearly records default by the JAL and further takes the view that restructuring is null and void.

Coming to the Scheme of Arrangement which was submitted before the NCLT for approval, the scheme has become infructuous and unworkable due to several subsequent events. The ICICI Bank has also filed an Affidavit in the scheme petition stating that the scheme is no more viable and ICICI Bank has objected the sanction of the Scheme of Arrangement. The ICICI Bank has also filed CIBIL Report dated 19.09.2018 before the Adjudicating Authority as well as NeSL Report which proved default on the part of the Corporate Debtor. There was substantial evidence before the Adjudicating Authority proving debt and default on the part of the Corporate Debtor. Adjudicating Authority after considering all materials on the record has returned finding of debt and default. Counsel for the Respondent further submits that the very fact that the Corporate Debtor during pendency of

Section 7 application has filed application before the Adjudicating Authority stating that it has submitted an OTS proposal dated 29.05.2024 to the Financial Creditor to settle the outstanding dues and has made upfront payment of Rs.200 Crore itself indicate clear acknowledgment of debt and default by the Corporate Debtor. Even during pendency of this Appeal, Appellant expressed its willingness to submit a revised OTS which this Tribunal also permitted to be considered by the Financial Creditor. The above facts are ample evidence of debt and default on the part of the Corporate Debtor. It is further submitted that the pendency of Scheme of Arrangement had no impact on admission of Section 7 application which is an independent proceeding instituted by a lender under the IBC. The Code is a special statute enacted in a later point in time than Companies Act, 2013. On default being committed on the part of the Corporate Debtor, lenders were fully entitled to invoke Section 7. More so, in the present case, there are binding directions issued by the RBI to initiate proceeding against JAL under the IBC. There is a huge debt on the part of the Corporate Debtor payable to lenders which is public money in default. Resolution under IBC is the only solution to resolve the Corporate Debtor. The Corporate Debtor has acknowledged its debt time and again. Adjudicating Authority has returned finding of debt and default by a reasoned judgment which need no interference by this Appellate Tribunal in exercise of appellate jurisdiction. The Appeal deserves to be dismissed.

12. Shri Gopal Jain, Learned Senior Counsel appearing for the State Bank of India- Intervenor submits that the outstanding dues of the State Bank of

India against the Corporate Debtor as on 02.06.2024 are Rs.15,456 Cr. The State Bank of India itself has filed Section 7 application being CP (IB) No.108/ALD/2022 before the NCLT, Allahabad for initiating CIRP against JAL which was dismissed vide order dated 04.06.2024. In view of initiation of the CIRP by impugned order dated 03.06.2024, Section 7 petition have not been admitted. The CoC having been formed pursuant to admission order, the present proceedings are proceedings *in rem* and the State Bank of India is fully entitled to point out default committed by JAL. The restructuring i.e. overall debt realignment plan of the Corporate Debtor has failed. Counsel for the State Bank of India has referred to the letter dated 30.08.2018 issued by the Reserve Bank of India where restructuring of JAL has been held to be null and void. Directions issued by the RBI are binding on all banks including the ICICI. Re-structuring having failed, there is no question of revoking any Master Restructuring Agreement (MRA) dated 31.10.2017. As per Clause 3 under the MRA security could not be created due to the various orders passed in Chitra Sharma vs. Union of India including the order dated 11.09.2017. Security having not been created even the implementation of the MRA stood frustrated. Corporate Debtor itself admitted that restructuring failed since it has submitted revised restructuring proposal on 29.05.2023. In the disclosure submitted by JAL before BSE that it has serviced its debt till November, 2018 and partly for December, 2018 under MRA. Counsel for the SBI submits that there being huge debt of the SBI which is public money, CIRP against the Corporate Debtor be not interdicted. It is submitted that the lenders have granted

loans running into thousands and thousands of crores with the current outstanding running close to more than Rs.50,000 Crores which have been waiting for resolution since 2016. The twin test for admission of Section 7 being fully satisfied in the case of JAL, Adjudicating Authority rightly admitted Section 7 application.

13. Shri Sunil Fernandes, Learned Senior Counsel for the Resolution Professional submits that in pursuance of publication issued by the IRP inviting claims, the Resolution Professional has received claims from various Financial Creditors- homebuyers. The Resolution Professional has apprised the CoC that on 17.10.2024 total claimed amount is approximately Rs.69,426 Crores out of which Rs.55,852 Crores has been admitted and Rs.11,597 Crores is under verification. Counsel for the Resolution Professional submits that 30 Financial Creditors have filed their claims and 1811 Creditors in Class have filed their claims. The valuer for conducting the valuation of the Corporate Debtor has been appointed. Transaction review audit has also been directed. It is submitted that the Resolution Professional is obliged to issue Form G in the CIRP of the Corporate Debtor and delay is being caused in the CIRP. In view of the Form G having not yet been issued on account of pendency of these Appeals, thus, urgency to resolve the Corporate Debtor was noticed by the Hon'ble Supreme Court in its judgment dated 09.08.2018. It is submitted that the CoC having been constituted, Appellant needs to follow the process as set out under Section 12A for its endeavour to settle the debt of Financial Creditors.

14. From the submissions of Counsel for the parties and materials on record, following are the questions which arise for consideration in these Appeals:-

- (I) Whether the direction issued by the Reserve Bank of India dated 14.08.2018 to ICICI Bank to initiate CIRP process against the Corporate Debtor is not relevant for determining default by Corporate Debtor within meaning of Section 3(12) of the IBC?
- (II) Whether under the Resolution approved in JLF meeting held on 22.06.2017 for debt of Rs.11833.55 Crore (including interest) a scheme of arrangement was framed to transfer the above debt along with land parcel of equivalent value to an SPV, namely Jaypee Infrastructure Development Ltd., which debt was referable to Bucket 2B, and the Section 7 application filed by the ICICI Bank related to debt of Bucket 2B only?
- (III) Whether Master Restructuring Agreement entered on 31.10.2017 between JAL and lenders also covered the facilities, default of which was claimed by the ICICI Bank in application under Section 7 filed against the Corporate Debtor on 06.09.2018?
- (IV) Whether the Scheme of Arrangement which was to come into effect w.e.f. 01.07.2017 having not been approved, there is default on part of the Corporate Debtor regarding not servicing the debt of Bucket 2B?

- (V) Whether the fact that 1st motion petition, CP (CAA) No.174/ALD/2017 was approved vide order dated 08.12.2017 by NCLT and Second motion petition CP (CAA) No.19(ALD)2018 filed on 23.01.2018 being pending, there shall be no default on part of the Corporate Debtor with regard to debt under Bucket 2B and Section 7 application filed by the ICICI Bank on 06.09.2018 deserved to be rejected?
- (VI) Whether the Corporate Debtor before Adjudicating Authority by filing reply to Section 7 application and other materials had proved that there was no default on part of Corporate Debtor, hence the application under Section 7 did not merit admission?
- (VII) Whether there were sufficient material brought on record by Financial Creditor to prove debt and default on the part of the Corporate Debtor?
- (VIII) Whether sufficient grounds have been made out in this Appeal to interfere with the impugned order dated 03.06.2024?

15. Before we enter into questions, as noticed above, we need to first notice directions issued by the RBI and the order of the Hon'ble Supreme Court in Writ Petition filed by "*Chitra Sharma vs. Union of India*". We have noticed both the above while noticing the background facts which led to filing of Section 7 application by the ICICI Bank.

Directions of the RBI

16. The Banking Regulation (Amendment) Ordinance, 2017 was published on 04.05.2017 inserting Section 35AA in the Banking Regulation Act, 1949.

The opening part of the Ordinance is as follows:-

“WHEREAS the stressed assets in the banking system have reached unacceptably high levels and urgent measures are required for their resolution;

AND WHEREAS the Insolvency and Bankruptcy Code, 2016 has been enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders;”

17. Section 35AA which was inserted by Ordinance is as follows:-

“35AA. *The Central Government may by order authorise the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016.*

Explanation--For the purposes of this section, "default" has the same meaning assigned to it in clause (12) of section 3 of the Insolvency and Bankruptcy Code, 2016."

18. A notification dated 05.05.2017 was issued by the Central Government which is as follows:-

**“MINISTRY OF FINANCE
(Department of Financial Services)**

ORDER

New Delhi, the 5th May, 2017

S.O. 1435(E). *In exercise of the powers conferred by Section 35AA of the Banking Regulation Act, 1949 (10 of 1949), the Central Government hereby authorises the Reserve Bank of India to issue such directions to any banking company or banking companies which may be considered necessary to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016.*

[F. No. 7/32/2017-BOA (pt)]

MOHAMMAD MUSTAFA, Jt. Secy.”

19. The above provision indicates that there was a statutory authorisation on the RBI to issue directions to any banking company to initiate CIRP in respect of default under the provisions of the Insolvency and Bankruptcy Code, 2016. The explanation to Section 35AA provided that for the purposes of section, "default" has the same meaning assigned to it in clause (12) of section 3 of the Insolvency and Bankruptcy Code, 2016. To implement the Ordinance dated 04.05.2017, RBI issued Press Release dated 22.05.2017

and 13.06.2017. Paragraphs 3, 4, 5 and 6 of the Press Release dated 13.06.2017 is as follows:-

“3. The IAC also arrived at an objective, non-discretionary criterion for referring accounts for resolution under IBC. In particular, the IAC recommended for IBC reference all accounts with fund and non-fund based outstanding amount greater than 5000 crore, with 60% or more classified as non-performing by banks as of March 31, 2016. The IAC noted that under the recommended criterion, 12 accounts totaling about 25 per cent of the current gross NPAs of the banking system would qualify for immediate reference under IBC.

4. As regards the other non-performing accounts which do not qualify under the above criteria, the IAC recommended that banks should finalise a resolution plan within six months. In cases where a viable resolution plan is not agreed upon within six months, banks should be required to file for insolvency proceedings under the IBC.

5. The Reserve Bank, based on the recommendations of the IAC, will accordingly be issuing directions to banks to file for insolvency proceedings under the IBC in respect of the identified accounts. Such cases will be accorded priority by the National Company Law Tribunal (NCLT).

6. The details of the resolution framework in regard to the other non-performing accounts will be released in the coming days.”

20. On 28.08.2017, RBI wrote to ICICI Bank which provided that based on IAC recommendation, it has been decided that those accounts which are materially NPA as on 30.06.2017 can be given time till 13.12.2017 for resolution outside IBC. In Annexure-1 to the list of account of Jaiprakash Associates Ltd. was mentioned as Item No.1. Paragraph 3 of the letter stated as follows:-

“3. Based on the IAC recommendations, it has been decided that of the above accounts, those which are materially NPA as on June 30, 2017, i.e., where more than 60 per cent of the total outstanding is classified as NPA on CRILC, will be given time till December 13, 2017 for resolution outside IBC. In the event that a viable resolution plan is not finalised and implemented before the said date, insolvency proceedings under the provisions of the IBC may be initiated before December 31, 2017, unless already initiated.”

21. The RBI issued directions dated 14.08.2018 to the ICICI Bank directing the ICICI Bank to initiate the insolvency resolution process in respect to the default committed by JAL. Letter dated 14.08.2018 reads as follows:-

*“DBR.No.BP ***

August 14, 2018

*The Managing Director & Chief Executive Officer
ICICI Bank Ltd.
Corporate Office
ICICI Bank Towers.
Bandra-Kurla Complex,*

Mumbai 400 081

Madam,

Resolution of stressed assets

*Please refer to our letter **dated December 27, 2017 wherein we had advised the bank, inter alia, to await further instructions on filing the insolvency application against M/s. Jaiprakash Associates Limited.*

2 In this context, it is noted that Hon'ble Supreme Court has placed the final order dated August 6, 2018 on the Writ Petition (s) (Civil) No(s) 744/2017 Chitra Sharma & Ors. Vs. Union of India & Ors. Accordingly, the ICICI Bank is directed to initiate the Insolvency resolution process in respect of the default committed by M/s. Jaiprakash Associates Limited, singly or jointly with other lenders, under the provisions of the Insolvency and Bankruptcy Code, 2016, within 18 days from the date of the direction.

Yours faithfully,

*(Gaurav Sinha)
Chief General Manager-in-Charge"*

22. Another letter of the RBI was issued to the ICICI Bank on 30.08.2018 regarding initiation of CIRP in respect of JAL by which letter the RBI did not accede to the letter dated 07.12.2017 written by ICICI Bank asking that the plan of JAL be treated as resolved. Letter dated 30.08.2018 issued by the RBI is as follows:-

"DBR.No.BP. 1818/21.04.048/2018-19 August 30, 2018

*Ms. Vishakha Mulye
Executive Director
ICICI Bank Ltd.,
Corporate Office,*

ICICI Bank Towers,
Bandra-Kurla Complex, Mumbai 400 051

Madam,

Initiation of CIRP in respect of Jaiprakash Associates Limited ("JAL")

Please refer to your letter No. CGO023Aug18 dated August 29, 2018 addressed to Shri Sudarshan Sen, Executive Director on the captioned matter.

2. In this context, it may be recalled that on the same resolution plan, we had previously received your request vide letter CG0003Dec17 dated December 7, 2017 for treating the plan as implemented, which was not accepted by us since the plan did not satisfy the requisite implementation conditions before December 13, 2017. Our response of December 27, 2017 to the above letter clearly mentioned that, "... the reasons cited by you for not initiating insolvency action against the said borrower are not acceptable". It was only in the context of certain directions made by the Hon'ble Supreme Court against JAL in another matter that we had advised you to hold initiation of CIRP against the borrower entity.

3. The Reserve Bank had subsequently filed an application before the Hon'ble Supreme Court with a prayer that the directions for initiation of CIRP in respect of the said company may be permitted to be issued. The Hon'ble Supreme Court, in its final order dated August 9, 2018 has inter alia directed that, "RBI is allowed, in terms of its application to this Court to direct the banks to initiate

corporate Insolvency resolution proceedings against JAL under the IBC".

4. In view of the above, the subsequent steps taken by the bank in pursuance of the same restructuring which was found not to have been implemented before the deadline, cannot be taken cognizance of. The statement that the 'company is meeting debt obligations as per the restructured terms with NIL arrears as on date to all the lenders' is misleading and invalid since the restructuring was itself rendered null and void. Further, multiple banks, including ICICI Bank, have since reported the borrower as being in default in the weekly reporting of borrowers in default, and the borrower continues to be in default in most of these banks.

5. Accordingly, your request for additional time for implementation of the resolution plan in respect of JAL cannot be acceded to.

6. We believe that as already advised vide our letter dated August 14, 2018, the bank would have taken suitable steps for filing the application for insolvency resolution in respect of the default committed by JAL within the required timeline.

Yours faithfully,

(Saurav Sinha)

Chief General Manager-in-Charge"

23. As noted above, in pursuance of the direction issued by the RBI letters dated 14.08.2018 and 30.08.2018, ICICI Bank filed Section 7 application before the NCLT, Allahabad Bench, Prayagraj on 07.09.2018.

Order of the Hon'ble Supreme Court in "Chitra Sharma & Ors. vs. Union of India & Ors."

24. Writ Petition (C) No.744 of 2017 was filed by "Chitra Sharma & Ors. vs. Union of India & Ors." by a set of homebuyers challenging the order passed by the NCLT, Allahabad admitting JIL into the insolvency resolution process. An interim order was passed on 04.09.2017 by the Hon'ble Supreme Court staying the order of the NCLT Allahabad which order was subsequently modified on 11.09.2017. In order dated 11.09.2017, following directions were issued to JAL:-

"d) JAL which is not a party to the insolvency proceedings, shall deposit a sum of Rs.2,000 crores (Rupees two thousand crores) before this Court on or before 27.10.2017. For the said purpose, if any assets or property of JAL have to be sold, after obtaining prior approval of this Court that should be done Any person who was a Director or Managing Director of JIL or JAL on the date of the institution of the insolvency proceedings against JIL as well as the present Directors/Managing Director shall also not leave the country without prior permission of this Court. The foregoing restraint shall not apply to nominee Directors of lending institutions (IDBI/ ICICI / SBI)"

25. The above order put a restraint on the JAL to alienate its assets which was required to be done on obtaining prior approval of the Hon'ble Supreme Court. After the order of the Hon'ble Supreme Court dated 11.09.2017, RBI vide letter dated 27.12.2017 has stayed its direction to initiate proceedings under the IBC against JAL. An application was filed by the RBI in the W.P. (C) 744 of 2017 on 18.01.2018 seeking leave of the Hon'ble Supreme Court to allow RBI to follow the recommendations of the IAC to initiate a CIRP against JAL under the IBC. The Hon'ble Supreme Court passed an order on 09.08.2018 in W.P. (C) No.744 of 2017 which is reported in (2018) 18 SCC 575. The Hon'ble Supreme Court noticed the recommendations of IAC with respect to JAL. The Hon'ble Supreme Court also noticed that JAL was classified under the SMA-II category by banks as early as on 03.10.2014 and as an NPA on 31.03.2015. The Hon'ble Supreme Court also observed that the application filed by the RBI clearly indicate the financial distress of JAL and JIL. In paragraphs 48.4, 49 and 50.5, following has been observed:-

“48.4... The RBI constituted an Internal Advisory Committee (IAC) consisting primarily of its independent directors. The IAC took up for consideration accounts which were classified either partly or wholly non-performing from amongst the top 500 exposures in the banking system as on 31 March 2017. As a first step, the IAC recommended all such non-performing asset accounts with fund and non-fund based outstanding exceeding Rs 5,000 crores. The IAC has initially taken up twelve accounts involving total exposure of Rs1,79,769 crores. JIL was one of the twelve accounts

in respect of which directions have been issued to banks for initiating insolvency resolution. Subsequently, the IAC recommended that in respect of those accounts where 60% or more had been classified as NPAs as on 30 June 2017, banks may be directed to implement a viable resolution plan within six months failing which the accounts may be directed for a reference under the IBC by 31 December 2017. JAL was one such entity. No viable resolution plan could be found as a result of which it is also required to be referred for CIRP.

49.... JAL was classified under the SMA-II category (demands overdue for more than 60 days) by banks as early as on 3 October 2014 and as an NPA since 31 March 2015. We agree with the submission of the RBI that any further delay in resolution would adversely impact a viable resolution being found for JAL and JIL. The facts which have emerged before the Court from the application filed by the RBI clearly indicate the financial distress of JAL and JIL.

...Accordingly, we accede to the request made on behalf of the RBI to allow it to follow the recommendations of the IAC to initiate a CIRP against JAL under the IBC.

50.5..... RBI is allowed, in terms of its application to this Court to direct the banks to initiate corporate insolvency resolution proceedings against JAL under the IBC.”

26. It was after the order of the Hon'ble Supreme Court dated 09.08.2018 direction was issued by the RBI dated 14.08.2018 to the ICICI Bank to initiate CIRP against the JAL as noted above. In reference to the direction dated 14.08.2018 issued by the RBI to the ICICI Bank, we may also notice challenge which was raised by the Appellant by filing a Writ Petition in Allahabad High Court being W.P. No.31329 of 2018- "*Jaiprakash Associates Limited vs. Reserve Bank of India & Ors.*" which was filed on 12.09.2018 subsequent to filing of Section 7 application. The above Writ Petition came to be dismissed by Allahabad High Court on 24.09.2018. It is relevant to notice that in the Writ Petition, Jaiprakash Associates Ltd. has also in addition to praying for quashing the direction dated 14.08.2018 has also prayed for writ quashing the order dated 10.09.2018 and all proceedings and orders passed in C.P. No.330 of 2018 i.e. Section 7 application filed by the ICICI Bank. It was contended before the Allahabad High Court that Jaiprakash Associates Ltd. is not a defaulter. An argument was also advanced before the Allahabad High Court that the judgment of '*Chitra Sharma*' of the Hon'ble Supreme Court does not in so many words direct or permits the RBI to issue any direction against the petitioner for adopting insolvency proceedings. Allahabad High Court after noticing the paragraphs 40, 41 and 42 of the judgment of the Hon'ble Supreme Court in *Chitra Sharma*'s case made following observations:-

"The aforesaid decision of the Supreme Court clearly indicates that the proposals of the petitioner were not accepted and that on the interlocutory application of

the RBI, it found that the petitioner is under financial distress and to safeguard the interest of the home buyers the request of the RBI to allow it to initiate CIRP against the petitioner under IBC is acceded to and the RBI is allowed to direct the Banks to initiate corporate insolvency resolution proceedings (CIRP) against the petitioner under IBC.

In view of the above conclusion drawn by the Supreme Court, the directions issued the Letter of Consortium of Lenders dated 7.12.2017 has no sanctity and pales into insignificance.

The aforesaid decision of the Supreme Court in clear and unequivocal terms allows the RBI to initiate corporate insolvency resolution process against the petitioner. No Forum not even this Court in exercise of its inherent power can sit over the above decision or direction of the Apex court. Accordingly, the directions issued by the RBI vide letter dated 14th August 2018 in purported exercise of powers under Section 35 AA of the Banking Regulation Act is neither without jurisdiction nor otherwise illegal.”

27. The direction of the RBI dated 14.08.2018 was thus, also upheld by the Allahabad High Court in the aforesaid judgment. It was further held that the ICICI Bank independent of the above direction was not precluded from initiating CIRP against JAL. The Writ Petition was dismissed with liberty to petitioner to participate in the proceedings under the IBC. Special Leave Petition (C) No. 26907 of 2018 against the judgment of the Allahabad High Court dated 24.09.2018 was also disposed of on 12.10.2018 given liberty to the petitioner to raise all pleas before the NCLT.

QUESTION NO. (I)

28. Directions issued by the Reserve Bank of India dated 14.08.2018 are referable to the provision of Section 35AA of the Banking Regulation Act 1949. By Notification dated 05.05.2017, as extracted above, the Central Government authorises the RBI to issue directions to any banking company to initiate insolvency resolution process in respect of a default under the provisions of the Insolvency and Bankruptcy Code, 2016. *Explanation* to Section 35AA provided:-

“Explanation--For the purposes of this section, "default" has the same meaning assigned to it in clause (12) of section 3 of the Insolvency and Bankruptcy Code, 2016.”

29. Thus, the statutory provision of Section 35AA read with above *explanation* clearly contemplated exercise of statutory powers on default within the meaning of Section 3(12) of the IBC. Thus, it is a default within the meaning of IBC which is the foundation for issuing any direction by the RBI to a banking company to initiate proceedings under the IBC. We have already noticed the letter dated 28.08.2017 of the RBI, Jaiprakash Associates Limited was mentioned in Annexure-1 of the letter as an account where more than 60 per cent of the total outstanding of which had been NPA since 30.06.2016. Annexure 1 of the letter is as follows:-

“List of Accounts

ICICI BANK LTD.

1	JAIPRAKASH ASSOCIATES LIMITED *#
2	MONNET POWER COMPANY LIMITED* #
3	ESSAR POWER (JHARKHAND) LIMITED

**More than 60 percent of total outstanding has been NPA since June 30, 2016*

SDR timelines exceeded.”

30. Paragraphs 3 and 4 of the said letter also read as follows:-

“3. Based on the IAC recommendations, it has been decided that of the above accounts, those which are materially NPA as on June 30, 2017, ie., where more than 60 per cent of the total outstanding is classified as NPA on CRILC, will be given time till December 13, 2017 for resolution outside IBC. In the event that a viable resolution plan is not finalised and implemented before the said date, insolvency proceedings under the provisions of the IBC may be initiated before December 31, 2017, unless already initiated.

4. Accordingly, enclosed are two separate lists of accounts, one, where the ICICI Bank Limited is the lead bank (Annex 1), and, two, where the ICICI Bank Limited is a member of the Joint Lenders Forum (JLF) (Annex 2) The JLF process should already have been initiated in respect of these accounts. We advise that the ICICI Bank Limited. along with other lenders that are part of the JLF/consortium, make every effort to complete the resolution process and implement a viable resolution plan for these accounts before December 13, 2017, failing which, the JLF/consortium may initiate

insolvency proceedings in respect of the account/s under the provisions of the IBC, before December 31, 2017, unless already initiated The resolution plan, wherever feasible, may involve restructuring under any of the existing guidelines or sale of the stressed debt to an interested buyer/investor, including any other viable and legal restructuring plan.”

31. We have also noticed the judgment of the Hon’ble Supreme Court in “*Chitra Sharma & Ors. vs. Union of India & Ors.*” dated 09.08.2018 in which proceedings, RBI has filed an application praying for permission from the Hon’ble Supreme Court to initiate CIRP process against JAL as per recommendation of the IAC. The Hon’ble Supreme Court has allowed the said application permitting the RBI to initiate CIRP against the JAL as per recommendations of the IAC. Paragraph 50.5 of the judgment of the Hon’ble Supreme Court is as follows:-

“50.5. RBI is allowed, in terms of its application to this Court to direct the banks to initiate corporate insolvency resolution proceedings against JAL under the IBC;”

32. It was after the judgment of the Hon’ble Supreme Court dated 09.08.2018, the RBI issued letter dated 14.08.2018 directing the ICICI Bank to initiate CIRP process against the Jaiprakash Associates Ltd. within 15 days. The letter dated 14.08.2018 was brought before the Adjudicating Authority by the Corporate Debtor itself in its reply and which letter has been noticed and considered by the Adjudicating Authority in the impugned order. As noted above, the RBI being regulator in Banking Regulation Act,

1949 and in exercise of its statutory powers under Section 35AA has issued direction which direction presupposes default within the meaning of Section 3(12) of the IBC as per the provisions of Section 35AA *explanation*. Direction to initiate is relevant material to determine the default on the part of the Corporate Debtor while determining an application under Section 7. Counsel for the Appellant contended that neither the Hon'ble Supreme Court in Chitra Sharma's case (*supra*) nor the RBI were to determine the default on the part of the Corporate Debtor which needs to be decided and adjudicated only in proceedings under Section 7 by the Adjudicating Authority. There can be no two opinions on the above submission. It is the Adjudicating Authority who has to determine the question of debt and default in Section 7 application which can be foundation or basis for passing an order of admission of Section 7 application. However, the question is as to whether the said directions issued by the RBI are relevant on the question of default by the Corporate Debtor.

33. Looking to the statutory scheme under Section 35AA and directions issued by the RBI, we are of the view that the direction issued by the RBI which are based on foundation of default within the meaning of Section 3(12) are also relevant material while determining the question of default by the Corporate Debtor in proceeding under Section 7. In this context, we may refer to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. Rule 4(1) provides as follows:-

“4. Application by financial creditor.—(1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.”

34. Application by Financial Creditor has to be filed in Form-1. Part V of Form-1 refers to financial debt documents, records and evidence of default. Thus, Financial Creditor is fully entitled to file documents, records and evidence of default. When direction has been issued by the RBI which is a regulator of banking companies directing for initiation of the CIRP against the Corporate Debtor, the said direction cannot be disregarded or ignored while determining application under Section 7 filed by the Financial Creditor against the Corporate Debtor. We, thus, are of the view that the direction issued under Section 33AA of the Banking Regulations Act by the RBI are relevant for determining default by Corporate Debtor within the meaning of Section 3(12).

QUESTION NOS. (II) & (III)

35. Counsel for the Appellant has relied on Resolution Plan approved in the JLF meeting held on 22.06.2017 and MRA dated 31.10.2017 to support his submission that the entire debt having been restructured all debts prior to the aforesaid debt cannot be basis for any application under Section 7. It

is further submitted that the Corporate Debtor has been making payment to the lenders as per MRA dated 31.10.2017 which payment have been accepted by the lenders. It is not open for the lenders to contend that the default has been committed by the Corporate Debtor. Counsel for the Appellant referring to clause 2.2 of the MRA has further contended that as per the said clause, the lenders have waived all existing events of default which MRA having been entered on 31.10.2017, no application under Section 7 was maintainable on the basis of any default prior to 31.10.2017. It is contended that the default period for Section 7 application was 30.04.2016 to 15.05.2016 and the application was not maintainable and default between the periods 30.04.2016 to 15.05.2016 could not be basis for any Section 7 application.

36. The Appellant's case in the Appeal is that the performance of the Corporate Debtor started deteriorating from financial year 2014-15 due to various reasons beyond the control of management and there has been pressure on liquidity which resulted in delay in meeting the obligation towards lenders and others and with a view to overcome the liquidity problem, a joint lender forum was constituted on 18.12.2014 as per the RBI Circular dated 26.02.2014. A Draft Comprehensive Re-organisation and Re-structuring Plan (CRRP) was approved by the JLF which was subject to final approval by the Independent Evaluation Committee (IEC) which was appointed by the RBI. The Appellant's submission is that the IEC approved the draft CRRP which recommendations were considered and finally approved by the JLF in their meeting held on 22.06.2017. In the Appeal, a

broad feature of finally approved CRRP has been captured. It is useful to extract paragraphs 13 and 14 of the Appeal:-

“13. It is submitted that the finally approved CRRP broadly envisaged bifurcation of the entire debt of the Corporate Debtor into 2 parts - "sustainable debt" and "other debt". While "sustainable debt" is to remain the liability of the Corporate Debtor, the "other debt" had been addressed through sale/transfer of assets of the Corporate Debtor. The CRRP put the entire outstanding debt into three buckets and made provision for settlement/ continuance of each category of debt as under-

*i. **Bucket 1 Debt of Rs.11,689 Crores** -which is part of the "Other debt", is to be discharged against sale of identified Cement Plants of the Company & JCCL to UltraTech Cement Limited for which a definite agreement has been executed between the parties.*

*ii. **Bucket 2a Debt of Rs.6367 Crores** -which is "sustainable debt", will continue as debt of the Corporate Debtor.*

*iii. **Bucket 2b Debt of Rs.13,590 Crores - which is part of "Other debt"** to be transferred to a Special Purpose Vehicle (SPV) along with identified land of the Corporate Debtor of the equivalent value.*

14. The finally approved CRRP, as aforesaid, has been implemented as per details given below:

i. **Implementation of Bucket 1:** Sale of identified Cement Plants to UltraTech Cement Limited has been completed through a Scheme of Arrangement which was sanctioned by the Ld. Adjudicating Authority, vide order dated 02.03.2017 (as corrected on 09.03.2017), passed in CP No. 49 of 2016. The Bucket 1 debts stand fully repaid long back out of sale consideration of identified cement plants to UltraTech Cement Limited. Hence there is no question of any default in respect of this part of the debt.

ii. **Implementation of Bucket 2a:** Bucket 2a debt continues to remain the debt of the Corporate Debtor on restructured terms mentioned in the Master Restructuring Agreement dated 31.10.2017. The MRA has been executed by 32 Lenders including the Respondent No. 1 and the Corporate Debtor. It is further submitted that the Remaining 8 Lenders have agreed either to continue on the existing terms or have entered into individual arrangement like. Debt Assets Swap/re-schedulement of repayment terms. The terms of the MRA are being duly complied with and the Corporate Debtor is regularly meeting its obligation towards payment of interest without a single day's default, repayment of principal and maintaining the Fixed Assets Coverage Ratio (FACR) etc. as contemplated under the MRA. The personal Guarantee of Mr. Manoj Gaur, Executive Chairman of the Corporate Debtor and the Deed of

Hypothecation over assets as stipulated in the MRA were also executed.

*iii. **Implementation of Bucket 2b:** Out of the debt of Rs. 13,590 crores placed in this Bucket, the debt aggregating Rs. 2543.55 Crores stands settled through direct Debt Assets Swap. For the remaining debt of Rs.11,833.55 Crores (including Interest), a Scheme of Arrangement has been framed in consultation and with the approval of banks/Fls. Under this Scheme, the above debts are to be transferred with equivalent security to an SPV for which the Scheme of Arrangement has also been dismissed by the Ld. Adjudicating Authority for which the Appellant is in the process of filing requisite Appeal as per law. The Scheme was effective from 01.07.2017 and upon sanction of the Scheme, the entire loan and the land parcels of equivalent value will stand transferred to the SPV.”*

37. The Corporate Debtor has also filed reply to Section 7 application before the Adjudicating Authority in which reply also the Corporate Debtor took the same stand in paragraph 28 of the reply filed before the Adjudicating Authority. In paragraphs 28 and 29, following was pleaded:-

“28. The finally approved CRRP broadly envisages bifurcation of the entire debt of the Corporate Debtor into 2 parts - "sustainable debt" and "other debt". While "sustainable debt" is to remain the liability of the Corporate Debtor, the "other debt" has been addressed through sale/transfer of assets of the Corporate

Debtor. The CRRP has put the entire outstanding debt into three buckets and made provision for settlement/continuance of each category of debt as under -

(i) Bucket 1 Debt of Rs.11.689 Crores - which is part of the "Other debt", is to be discharged against sale of identified Cement Plants of the Company & JCCL to UltraTech Cement Limited.

(ii) Bucket 2a Debt of Rs.6367 Crores - which is "sustainable debt", will continue as debt of the Corporate Debtor.

(iii) Bucket 2b Debt of Rs.13,590 Crores - which is part of "Other debt" is to be transferred to a Special Purpose Vehicle (SPV) along with identified land of the Corporate Debtor of the equivalent value.

29. The finally approved CRRP, as aforesaid, has been implemented as per details given below:

(i) **Implementation of Bucket 1:** Sale of identified Cement Plants to UltraTech Cement Limited has been completed through a Scheme of Arrangement which was sanctioned by NCLT, Allahabad, vide order dated 02.03.2017 (as corrected on 09.03.2017), passed in CP No. 49 of 2016. The Bucket 1 debts stand fully repaid long back out of sale consideration of identified cement plants to UltraTech Cement Limited Hence there is no question of any default in respect of this part of the debt.

Copies of the said orders dated 02.03.2017 and 09.03.2017 are already annexed as ANNEXURE - 12 (COLLY).

*(ii) **Implementation of Bucket 2a:** Bucket 2a debt continues to remain the debt of the Corporate Debtor on restructured terms mentioned in the Master Restructuring Agreement dated 31.10.2017. The MRA has been executed by 32 Lenders including the Applicant and the Corporate Debtor. Remaining 8 Lenders have agreed either to continue on the existing terms or have entered into individual arrangement like Debt Assets Swap/re-schedulement of repayment terms. The terms of the MRA are being duly complied with and the Corporate Debtor is regularly meeting its obligation towards payment of interest without a single day's default, repayment of principal and maintaining the Fixed Assets Coverage Ratio (FACR) etc. as contemplated under the MRA. The personal Guarantee of Mr. Manoj Gaur, Executive Chairman of the Corporate Debtor and the Deed of Hypothecation over assets as stipulated in the MRA have also been executed.*

A copy of the Master Restructuring Agreement dated 31.10.2017 is annexed hereto marked as ANNEXURE -16.

For sake of convenience, the Corporate Debtor is annexing a summarized Chart showing the details of restructured debt of ICICI Bank Limited under different categories, security provided, revised rate of interest, repayment schedule, payments made towards

principal and interest becoming due etc., which is marked as ANNEXURE - 17.

From the perusal of the MRA and the summarized Chart it can be seen that the restructured debt is repayable in quarterly instalments commencing from 31.03.2018 only. This Chart further shows that the repayments of principal amount of loans and interest becoming due and payable have been paid and there is nothing which is in arrears. Hence, the question of default in respect of this part of the loan also does not arise.

*(iii) **Implementation of Bucket 2b:** Out of the debt of Rs.13,590 Crores placed in this Bucket, the debt aggregating Rs. 2543.55 Crores stands settled through direct Debt Assets Swap. For the remaining debt of Rs.11,833.55 Crores (including Interest), a Scheme of Arrangement has been framed in consultation and with the approval of banks/FIs. Under this Scheme, the above debts is to be transferred with equivalent security to an SPV for which the Scheme of Arrangement is pending for final sanction before this Hon'ble Tribunal. The Scheme is effective from 01.07.2017 and upon sanction of the Scheme the entire loan and the land parcels of equivalent value will stand transferred to the SPV.*

It is noteworthy that as per terms of the sanction letter dated 19.05.2017 issued by the ICICI Bank Limited, interest on this part of the debt has ceased with effect from 01.10.2016 and no part of the debt is repayable as the entire amount is to be transferred to

SPV in terms of the approved Scheme. Hence, in respect of this part of the loan also there is no question of any default.

It is submitted that the reports/approvals of all the authorities have been received, all statutory formalities have been completed satisfactorily and there are no objectors to the Scheme. Since the Company Petition No. 19/ALD/2018, being second motion for sanction of the Scheme of Arrangement is ordered to be listed with the instant Application the Corporate Debtor will refer to the records of the said Petition at the time of hearing to show that the delay in sanction of the Scheme is not due to any negligence or lack of due diligence on the part of the Corporate debtor.

In any case, the delay in formal sanction of the Scheme does not nullify the fact that the Bucket 2b debt stands implemented since the Scheme of Arrangement is effective from 01.07.2017 irrespective of the date of formal sanction of the Scheme by NCLT.

A copy of the Scheme of Arrangement referred to above and filed by the Corporate Debtor in NCLT, Allahabad Bench, for sanction is already annexed as ANNEXURE - 13.”

38. From the above pleadings of the Appellant made before the Adjudicating Authority as well as in this Appeal, it is fully proved that the debt of Rs.11,833.55 Crores which was bifurcated in Bucket 2B was to be transferred with equivalent security to an SPV.

39. Now we come to MRA dated 31.10.2017 to find out as to MRA captured which facilities. Counsel for the ICICI Bank has referred to certain clauses of MRA to contend that the ‘real estate debt’ which was to be hived and transferred to an SPV was not in the ambit of MRA. Clause 1.1.94 defines ‘Real Estate Debt’ which clause is as follows:-

“1.1.94. "Real Estate Debt" means the amounts of an aggregate amount of approximately Rs. 14,000,00,00,000/- (Rupees Fourteen Thousand Crore only) forming part of the Existing Loans, and which does not and shall not fall within the ambit of this Agreement.”

40. Now we need to notice as to what were the facilities which were covered by the MRA. Schedule II of the MRA referred to the facilities. Schedule II of the MRA contained ‘particulars of lenders and existing financial assistance’. The ICICI Bank is mentioned at Serial No.13 of the Schedule II. Serial No.13 is listed only two facilities of RTL 8.00 Cr. and RTL 15.00 Billion which is as follows:-

Sr.No .	Name of the Lenders	Amount of the loan / financial assistance (in Rupees crore)	Restructured Amount under this Agreement (In Rupees crore)	Loan No.	Facility Agreement / IM Date	Particulars of Existing Financial Documents	Particulars of Existing Security Documents	Particulars of movable and immovable properties
13.	ICICI Bank Limited	(i) RTL 8.00 billion (ii) RTL 15.00	(i) J005161001 (ii) 00000008	(i) 390.30 (ii) 357.67	(i) Commo n Facility Agreement dated	(i) CAL 90/W12 MU M/2120 3 dated Septemb	(i) MSTA dated September 24, 2011	Properties secured by the MSTA and the relevant Deeds of

		billion	57		December 28, 2009 (ii) Facility Agreement	er 30, 2009 (ii) CAL 34/PFG MU	(ii) Deed of accession dated December 20, 2013	Accession thereto
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41. Thus, the MRA confined to only two facilities which were listed in Item No.13. Details of the facility agreement is also mentioned in Serial No.13.

42. Now we come to Section 7 filed by the ICICI Bank to find out as to for which facility Section 7 application filed by the ICICI Bank. Part IV of Section 7 application has given 'particulars of financial debt'. Part IV of the application is as follows:-

"Part-IV PARTICULARS OF FINANCIAL DEBT"		
1.	TOTAL AMOUNT OF DEBT GRANTED	<p><i>The Financial Creditor has, inter alia, granted the following financial debt to the Corporate Debtor:</i></p> <p><i>(i) Rupee term loan to the tune of INR 400,00,00,000 (Rupees Four Hundred Crore Only) ("Facility 1") under the Common Facility Agreement dated December 28, 2009 read with Amendment Agreement dated May 2, 2012, Amendment Agreement dated June 9, 2012 and Amendment Agreement dated August 28, 2012 (collectively "Facility Agreement 1");</i></p> <p><i>(ii) Rupee term loan to the tune of INR 500,00,00,000 (Rupees Five Hundred Crore Only) ("Facility 2") under Facility Agreement dated</i></p>

		<p>March 31, 2011 read with Addendum Agreement dated March 31, 2011 (collectively "Facility Agreement 2");</p> <p>(iii) Rupee term loan to the tune of INR 1300,00,00,000 (Rupee One Thousand Three Hundred Crore Only) ("Facility 3") under Rupee Loan Facility Agreement dated March 31, 2011 read with the General Conditions GC-C-08 dated March 31, 2011 read with Addendum Agreement dated March 31, 2011 (collectively "Facility Agreement 3");</p> <p>(iv) Rupee term loan to the tune of INR 1200,00,00,000 (Rupees One Thousand Two Hundred Crore Only) ("Facility 4") under the Facility Agreement dated September 30, 2011 ("Facility Agreement 4");</p> <p>(v) Rupee term loan to the tune of INR 1200,00,00,000 (Rupees One Thousand Two Hundred Crore Only) ("Facility 5") as part of corrective action plan under Corporate Rupee Loan Facility Agreement dated May 25, 2015 read with the General Conditions GC-C-08 dated May 25, 2015 read with Addendum Agreement dated May 25, 2015 (collectively "Facility Agreement 5");</p> <p>(vi) Rupee term loan to the tune of INR 150,00,00,000 (Rupees One Hundred and Fifty Crore Only) ("Facility 6") to Jaypee Sports International Limited ("JSIL"), which was subsequently amalgamated into the Corporate Debtor pursuant to the Order of the Hon'ble High Court of Judicature at Allahabad dated</p>
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		<p>September 14, 2015 approving the Scheme of Amalgamation between the Corporate Debtor and JSIL and their respective shareholders and creditors ("JSIL Scheme of Arrangement"). Facility 6 was granted under the Rupee Term Loan Facility Agreement dated June 30, 2012 read with the General Conditions dated June 30, 2012 (collectively "Facility Agreement 6"). Pursuant to the aforesaid Order sanctioning the JSIL Scheme of Arrangement, the debts of JSIL were transferred to the Corporate Debtor. The copy of the Order of Hon'ble High Court of Judicature at Allahabad dated September 14, 2015 is annexed hereto and marked as Annexure-3.</p> <p>(Facility 1, Facility 2, Facility 3, Facility 4, Facility 5 and Facility 6 are collectively, referred to as the "Facilities".)</p> <p>(Facility Agreement 1, Facility Agreement 2, Facility Agreement 3, Facility Agreement 4, Facility Agreement 5 and Facility Agreement 6 are collectively referred to as the "Loan Agreements").</p> <p>The total principal amount of debt disbursed under the aforementioned Facilities was INR 4750,00,00,000 (Rupees Four Thousand Seven Hundred and Fifty Crore Only).</p> <p>Copies of the Loan Agreements along with the relevant credit arrangement letters in relation to the Facilities have been annexed hereto and marked as Annexure-4 (Colly).</p>
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		<p><i>The Financial Creditor has filed this Application for initiating Corporate Insolvency Resolution Process against the Corporate Debtor based on the defaults committed by the Corporate Debtor in respect of the Facilities granted to it pursuant to the Loan Agreements.</i></p> <p><i>The Financial Creditor has also granted other Rupee term loan facilities as well as working capital facilities in the form of both fund- based and non-fund based facilities (including letters of credit and bank guarantees issued on behalf of the Corporate Debtor) (collectively "Other Facilities"). The Financial Creditor craves leave to produce the financial contracts in respect of the Other Facilities, if required by this Hon'ble Tribunal. This Application under Section 7 of the Insolvency and Bankruptcy Code, 2016, as amended (the "Code") is being filed without prejudice to the rights of the Financial Creditor to submit its claims before the Interim Resolution Professional or the Resolution Professional, as the case may be, under the provisions of the Code with respect to the Other Facilities or otherwise.</i></p> <p><i>The dates and details of all disbursements in relation to each of the Facilities have been annexed hereto and marked as Annexure-5.</i></p>
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURED	<p><i>The aggregate amount in default under the Loan Agreements as on August 31, 2018 is INR 1269,10,26,803.06 (Rupees One Thousand Two Hundred and Sixty Nine Crores Ten Lakhs</i></p>

		<p><i>Twenty Six Thousand Eight Hundred and Three and Paise Six Only). This includes the defaulted amounts of principal, interest and overdue interest.</i></p> <p><i>The computation relating to the defaulted amount and days of default under each of the Loan Agreements have been annexed hereto and marked as Annexure-6.</i></p>
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43. Annexure 6 gave the details of all six facilities with amount of the loan account number has been mentioned in Annexure 6 to Section 7 application which Annexure 6 is as follows:-

“Total amount of default and days of default

Sl. No		Principal overdue	Interest Overdue			
1	Rupee Term Loan of Rs. 400 Crores Loan account number: J005161002		363,946,960.23	148,739,147.00	15-05-2016	839
2	Rupee Term Loan of Rs. 500 Crores Loan number: account J005163001		462,447,559.32	282,771,778.90	30-04-2016	854
3	Rupee Term Loan of Rs. 1200 Crores Loan account number: J005165001	1,572,964,731.24	1,616,684,830.48	647,679,560.02	30-04-2016	854
4	Rupee Term Loan of Rs. 1200 Crores (under corrective action plan) Loan account number: 0000002297	857,142,856.00	3,554,092,369.00	592,831,778.00	30-04-2016	854

5	Rupee Term Loan of Rs. 1300 Crores Loan account number: J005164001		1,627,692,567.8 1	863,958,686.2 3	30-04- 2016	85 4
6	Rupee Term Loan of Rs. 150 Crores Loan account number: 0000003165*		41,436,058.00	58,637,920.83	30-04- 2016	85 4

**loan account number before amalgamation of JSIL in JAL was J117202001
Only amount defaulted till August 31, 2018 is presented in the above table."*

44. Now when we look into the facilities which are listed in Item No.13 of Schedule II of the MRA and those which are listed in Annexure 6 to Section 7 application, it is clear that the two facilities which are listed at Item No.13 of the Schedule II of the MRA are different from the facilities which are listed at Annexure-6 of the Section 7 application and details of which has been given in Part IV as noticed above. From the above, it is clear that the MRA does not relate to six facilities for which Section 7 application was filed by the Financial Creditor.

45. When we look into the reply which was filed by the Corporate Debtor to Section 7 application, the above position is also reflected in the reply of the Corporate Debtor. In Part IV of the reply under the heading para-wise reply of the application, the Corporate Debtor has again reiterated the bifurcation of the debt in three buckets. Pleadings in paras (iv), (v), (vi) and (vii) in the reply of the Corporate Debtor is as follows:-

"(iv) As already stated earlier, under the finally approved CRRP, the entire debt has been placed in three buckets Bucket 1, 2a and 2b as under-

Bucket 1 Debt of Rs.11,689 Crores -which is part of the "Other debt", is to be discharged against sale of identified Cement Plants of the Company & JCCL to UltraTech Cement Limited.

Bucket 2a Debt of Rs.6367 Crores which is "sustainable debt", will continue as debt of the Corporate Debtor.

Bucket 2b Debt of Rs.13,590 Crores -which is part of "Other debt", is to be transferred to a Special Purpose Vehicle (SPV) along with identified land of the Corporate Debtor of the equivalent value.

(v) Bucket 1 debt stands fully repaid long back out of sale consideration of identified cement plants to UltraTech Cement Limited under a Scheme of Arrangement sanctioned by this Hon'ble Tribunal vide order dated 02.03.2017 passed in CP 49/2016. Hence there is no question of any default in respect of this part of the debt.

(vi) Bucket 2a debt continues to remain the debt of the Corporate debtor on restructured terms mentioned in the Master Implementation Agreement dated 31.10.2017. A chart showing the details of restructured debt of ICICI Bank Limited as above, under different categories, revised rate of interest, repayment schedule, payments made towards principal and interest becoming due etc., is already annexed as ANNEXURE- 17. From this chart it is evident that the restructured debt is repayable in quarterly instalments commencing from 31.03.2018

only. This chart further show that the repayments of principal amount of loans and interest becoming due and payable have been paid and there is nothing which is in arrears. Hence, the question of default in respect of this part of the loan also does not arise.

(vii) Bucket 2b debt is to be transferred with equivalent security to an SPV for which the Scheme of Arrangement is pending for final sanction before this Hon'ble Tribunal. The Scheme is effective from 01.07.2017 and upon sanction of the Scheme the entire loan and the land parcels of equivalent value will stand transferred to the SPV. As per terms of the sanction letter dated 19.05.2017, interest on this part of the debt has ceased with effect from 01.10.2016 and no part of the debt is repayable as the entire amount is to be transferred to SPV in terms of the approved Scheme. Hence, in respect of this part of the loan also there is no question of any default.”

46. The Adjudicating Authority in the impugned order has noticed the above position and in paragraph 15 of the order has made following observations:-

“15. It is admitted position of Applicant as well as the Respondent that the present application has been filed with respect to loan/debt remaining outstanding in Bucket 2B. Therefore, in this order, we have considered all the arguments put forward in respect of payment of loan/debt in Bucket 2B and to examine whether there is any default or otherwise in its repayment by the Corporate Debtor. In respect of the debt of Bucket 2b,

the Corporate Debtor in its Reply has submitted that out of the debt of Rs. 13,590 crores placed in this Bucket, the debt aggregating to Rs. 2543.55 crores stand settled through direct Debt Assets Swap. For the remaining debt of Rs. 11,833.55 crores (including interest), a Scheme of Arrangement has been framed in consultation and with the approval of Banks/FIs. Under this Scheme, as per the Corporate Debtor, this debt is to be transferred with equivalent security to SPV for which the Scheme of Arrangement has been filed to this Tribunal and in this respect, a Company Petition No. 19/ALD/2018, being second motion for final sanction of the Scheme of Arrangement is pending before this Tribunal. It is also stressed in the Reply that delay in sanction of the Scheme is not due to any negligence or lack of due diligence on the part of the Corporate Debtor. As mentioned in the Reply, this Scheme is effective from 01.07.2017 and in view of the Corporate Debtor, upon sanction of this Scheme, the entire loan and the land parcel of equivalent value will stand transferred to SPV. By referring to these facts, it is emphasised that even if there is delay in formal sanction of the Scheme, it does not nullify the fact that the settlement of Bucket 2B debt stands implemented since the Scheme of Arrangement is effective from 01.07.2017 irrespective of the date of formal sanction of the Scheme by NCLT.”

47. From the facts as noticed above and the pleadings of the Corporate Debtor itself, it is found that as per Restructuring Plan approved in the JLF meeting dated 22.06.2017, the debt of Rs.11,833.55 Crores was to be transferred to SPV which was debt covered under Bucket 2B. It is further

clear that the MRA did not cover the six facilities for which ICICI Bank filed the application under Section 7, hence, the debt under the MRA which relate to Bucket 2A which was being serviced by the Corporate Debtor is not relevant for the facilities for which Section 7 application was filed by the Financial Creditor. We, thus, answer Question Nos. (II) and (III) in following manner:-

(II) Under the Restructuring Plan approved in JLF meeting held on 22.06.2017 for debt of Rs.11833.55 Crore (including interest) a scheme of arrangement was framed to transfer the above debt along with land parcel of equivalent value to an SPV, namely Jaypee Infrastructure Development Ltd., which debt was referable to Bucket 2B, and the Section 7 application filed by the ICICI Bank related to debt of Bucket 2B only.

(III) Master Restructuring Agreement entered on 31.10.2017 between JAL and lenders did not cover the facilities, default of which was claimed by the ICICI Bank in application under Section 7 filed against the Corporate Debtor on 06.09.2018.

QUESTION NOS. (IV) & (V)

48. As noticed above, for debt of Rs.11833.55 Crore (including interest), a scheme of arrangement was prepared to transfer the debt to SPV w.e.f. 01.07.2017. Scheme of arrangement was approved by the lenders and 1st motion petition was approved by the NCLT on 08.12.2017 and Second motion petition was also filed on 23.01.2018. The submission which has

been advanced by the Appellant is that in view of the fact that debt of Bucket 2B was to be transferred to SPV for which scheme of arrangement was approved by the lenders also and 1st motion petition was filed and admitted by the NCLT, no default can occur with respect to debt which was to be transferred to SPV under the scheme of arrangement. The scheme of arrangement which was filed before the NCLT by the Corporate Debtor after approval by lenders contemplated implementation of the scheme w.e.f. 01.07.2017. Scheme of arrangement also contemplated that in event the scheme is not implemented till 31.05.2018, it shall become void and in-operative. The question for consideration is as to whether debt which was bifurcated in Bucket 2B and was owed to the lenders by the corporate debtor was proposed to be transferred to SPV through scheme of arrangement. The scheme of arrangement has never fructified. We need to notice certain clauses of Scheme of Arrangement.

49. We may first notice Part-II of the Scheme containing the heading 'Definitions'. 'Appointed Date' is defined in 2.01 which is as follow:-

*"**Appointed Date**" means the date from which the provisions of this Scheme shall become operational i.e. open of business on 01.07.2017 or such other date as fixed or approved by the Hon'ble National Company Law Tribunal;"*

50. The scheme thus, was proposed to become operational w.e.f. 01.07.2017. Clause 7.10 which is under the heading 'General Terms and

Conditions' contemplated that in event the scheme failing to take effect by 31.05.2018, the scheme shall become null and void. Clause 7.10 is as follows:-

“7.10. In the event of the Scheme failing to take effect by 31.05.2018 or by such later date as may be mutually agreed by the Board of Directors of the Transferor and the Transferee Companies, or if either of them withdraw from the Scheme in accordance with the provisions made hereinabove, the Scheme shall become null and void and in that event, no rights and liabilities, whatsoever, shall accrue to or be incurred inter-se by the parties or their shareholders or creditors or employees or any other person. In such case, each Company shall bear its own costs or as may be mutually agreed. No further approval of the shareholders or the creditors shall be necessary for giving effect to the provisions contained in this clause.”

51. The Scheme petition also came to be rejected by the Adjudicating Authority by the order of the same date dated 03.06.2024 which is under challenge in this Tribunal as noted above.

52. The argument of Corporate Debtor on the strength of scheme of arrangement was considered and not accepted. In paragraph 82 of the order, following was observed:-

“82. Another plea of the Corporate Debtor is that default on repayment of debt that occurred earlier in 2014-15, has ceased to exist after CRRP under DRP

has been approved and an Scheme of Arrangement for Bucket 2B loan has been finalised. This Scheme has been made for the resolution of the debt in Bucket 2B keeping in view the direction of the RBI in its letter dated 22.08.2017, as per which the JLF including ICICI as a lead Bank was required to finalise a resolution plan for JAL and it has also been provided that in the event that a viable resolution plan is not finalised and implemented before 13.12.2017, insolvency proceedings under the provisions of the IBC may be initiated before 31.12.2017. There is no dispute that the Scheme for the resolution of the Bucket 2B loan could not be implemented till 13.12.2017 as the same could not be approved by the NCLT. This Scheme is still pending for approval, hence resolution plan for Bucket 2B is still not implemented. On considering the Scheme of Arrangement in CP(CAA) No. 19/2018 and a CA No. 213/2018 connected with this petition, an order dated 03.06.2024 has been passed finding that after a gap of six year and now the land of the Corporate Debtor to be transferred as security has been under litigation as its allotment has been cancelled by YEIDA and therefore, viability of the Scheme has become doubtful as it is now being opposed by the Applicant Bank also after becoming Party Intervener in CA No. 213/2019, who earlier had given consent for it. Therefore, in absence of any Scheme being implemented for resolution of loans in Bucket 2B, default of this loan covered in the present Application is still continuing leave aside the default being in existence on 07.09.2018 when Application u/s 7 was filed. As far as not filing of the Application

by 31.12.2018 is concerned, the same has already been explained to have happened because of letter of RBI dated 27.12.2017 staying its direction to initiate proceedings under IBC against JAL in the light of the interim order in the Chitra Sharma Case. However, after passing of order in this case on 09.08.2018, a direction by RBI was issued vide letter dated 14.08.2018 in compliance of which the present Petition/Application u/s 7 has been filed on 07.09.2018.”

53. Whether there shall be no default on the ground that scheme of arrangement remains pending for consideration before NCLT? Proceedings under Section 7 are proceedings of special nature contemplated in IBC for resolution of the Corporate Debtor which is in default. Counsel for the ICICI Bank has relied on the judgment of the Hon’ble Supreme Court in (2021) 4 SCC 435- **“Navinchandra Steels Pvt. Ltd. vs. SREI Equipment Finance Ltd.”** where Hon’ble Supreme Court has held that the IBC is a special statute dealing with revival of companies which must prevail. In paragraphs 16 and 25 of the aforesaid judgment, following was laid down:-

“16. Having heard the learned counsel for all the parties, it is important to restate a few fundamentals. Given the object of the IBC as delineated in paras 25 to 28 of Swiss Ribbons (P) Ltd. v. Union of India [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] [“Swiss Ribbons”], it is clear that the IBC is a special statute dealing with revival of companies that are in the red, winding up only being resorted to in case all attempts of revival fail. Vis-à-vis the Companies Act,

which is a general statute dealing with companies, including companies that are in the red, the IBC is not only a special statute which must prevail in the event of conflict, but has a non obstante clause contained in Section 238, which makes it even clearer that in case of conflict, the provisions of the IBC will prevail.

25. *A conspectus of the aforesaid authorities would show that a petition either under Section 7 or Section 9 IBC is an independent proceeding which is unaffected by winding-up proceedings that may be filed qua the same company. Given the object sought to be achieved by the IBC, it is clear that only where a company in winding up is near corporate death that no transfer of the winding-up proceeding would then take place to NCLT to be tried as a proceeding under the IBC. Short of an irresistible conclusion that corporate death is inevitable, every effort should be made to resuscitate the corporate debtor in the larger public interest, which includes not only the workmen of the corporate debtor, but also its creditors and the goods it produces in the larger interest of the economy of the country. It is, thus, not possible to accede to the argument on behalf of the appellant that given Section 446 of the Companies Act, 1956/Section 279 of the Companies Act, 2013, once a winding-up petition is admitted, the winding-up petition should trump any subsequent attempt at revival of the company through a Section 7 or Section 9 petition filed under the IBC. While it is true that Sections 391 to 393 of the Companies Act, 1956 may, in a given factual circumstance, be availed of to pull the company out of the red, Section 230(1) of the*

Companies Act, 2013 is instructive and provides as follows:

“230. Power to compromise or make arrangements with creditors and members.—(1)

Where a compromise or arrangement is proposed—

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them,

the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation.—For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.”

What is clear by this Section is that a compromise or arrangement can also be entered into in an IBC proceeding if liquidation is ordered. However, what is of importance is that under the Companies Act, it is only winding up that can be ordered, whereas under the IBC, the primary emphasis is on revival of the

corporate debtor through infusion of a new management.”

54. Thus, the fact that a scheme to make arrangement with creditors filed by the corporate debtor before the NCLT remains pending cannot have effect of arresting the default or to cause any impediment in proceedings under Section 7 application which has to be given precedent. The mere fact that the proceeding for approval of scheme of arrangement which was initially approved by the lenders remains pending from 2018 to 2024, there being no default on the part of the Corporate Debtor qua the debt which was owed by it cannot be accepted. As per the scheme of arrangement, the scheme was to come into effect from 01.07.2017. Scheme never came into operation nor the debt which was bifurcated in Bucket 2B came to be transferred to the SPV. The debt continued with the Corporate Debtor and default for the aforesaid debt was clearly made out.

55. Counsel for the Respondent has also placed reliance on the judgment of this Tribunal in Company Appeal (AT) (Insolvency) No.690 of 2023- **“State Bank of India vs. Abhijeet Ferrotech Limited”** where application under Section 7 filed by the State Bank of India was rejected. Relying on proceedings which were initiated in the DRT by the Bank and pending in the High Court in Appeal filed by the Corporate Debtor before the Calcutta High Court, Adjudicating Authority held that the proceeding under Section 7 is barred in view of the order passed by the DRT Calcutta. The Appeal filed by the SBI challenging the order of the Adjudicating Authority was allowed.

This Tribunal held that the order of the DRT which was still inconclusive cannot be a ground to hold Section 7 application as barred. This Tribunal has also noticed the judgment of the Hon'ble Supreme Court in the above case has relied on the judgment of the Hon'ble Supreme Court in **“A. Navinchandra Steels Pvt. Ltd. vs. SREI Equipment Finance Ltd. – (2021) 4 SCC 435”** (supra).

56. We, thus, are satisfied that the pendency of proceedings before the NCLT for approval of the scheme of arrangement does in no manner either shall suspend the default which was committed by the Corporate Debtor or preclude the Financial Creditor to proceed with Section 7 application.

57. In view of the above discussions and conclusions, we answer Question Nos. (IV) and (V) in following manner:-

- (IV) The Scheme of Arrangement which was filed before the NCLT for approval having not been approved, there is default on part of the Corporate Debtor regarding not servicing the debt of Bucket 2B.
- (V) The fact that 1st motion petition was approved by the NCLT on 08.12.2017 and Second motion petition was filed on 23.01.2018 which remain pending cannot be a ground to hold that there shall be no default on part of the Corporate Debtor with regard to debt under Bucket 2B and Section 7 application filed by the ICICI Bank on 06.09.2018 did not deserve to be rejected on the above ground.

QUESTION NOS. (VI) & (VII)

58. Both the above questions being inter-related are being taken together. Whether there was sufficient materials brought by the Financial Creditor to prove the debt and default on the part of the Corporate Debtor or the Corporate Debtor has brought such pleadings and materials which proved that there was no default on the part of the Corporate Debtor are two questions to be answered.

59. As noticed above, Section 7 application was filed by the Corporate Debtor for six facilities as mentioned in Section 7 application. Annexure-6 to Section 7 application gave the details of default of facilities and the outstanding amount due on the Corporate Debtor. The Financial Creditor in his Section 7 application in Part V Item-6 on the subject “a record of default as available with any credit information company’ has sought for leave to rely upon such reports, as and when available. Item-6 of Part V is as follows:-

6.	<p>A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY</p> <p><i>The details of records available with the credit information companies are listed below:</i></p> <p><i>The status classification reports of the Corporate Debtor maintained by TransUnion CIBIL could not be made available on account of technical issues. The Financial Creditor craves leave to refer to and rely upon such reports, as and when available. Correspondence with Trans Union CIBIL are annexed hereto and marked as <u>Annexure-36</u></i></p>
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60. Appellant has obtained necessary credit information and filed before the Adjudicating Authority which credit information was obtained and filed which has been noted by the Adjudicating Authority in the impugned order. It is also brought on the record that an order was passed by the NCLT directing for filing the record from the information utility for the year 2020 in the pending petition as well as in the petition to be filed in the NCLT under Section 7 filed. In pursuance of the order passed by the NCLT, NeSL records were also obtained by the Financial Creditor on 08.06.2020 and were filed before the Adjudicating Authority. In paragraph 63 of the judgement, Adjudicating Authority has returned a finding that an amount of Rs.1,269 Crores is defaulted out of debt of Rs.11,833.55 Crores put in Bucket 2B. The Adjudicating Authority has held that the scheme of arrangement could not be implemented and the debt under Bucket 2B remains under default. Adjudicating Authority has also noticed the order of the Hon'ble Supreme Court dated 09.08.2018 in Writ Petition- *Chitra Sharma vs. Union of India* (supra) as well as the direction of the RBI dated 14.08.2018. In paragraph 65 of the judgment, following has been observed by the Adjudicating Authority:-

“65. As the Scheme of Arrangement could not be implemented, the debt under Bucket 2B remained under default and the Hon'ble Supreme Court in its order dated 09.08.2018 acceded to the request made on behalf of the RBI to allow it to follow the recommendations of the IAC to initiate a CIRP against JAL under the IBC and also ordered to allow

the RBI in terms of its application filed in the Supreme Court to direct the banks to initiate corporate insolvency resolution proceedings against JAL under the IBC and consequent to that order, RBI issued a letter dated 14.08.2018 directing the ICICI Bank to initiate proceeding against JAL, the Applicant Bank i.e. ICICI Bank filed the present Petition/Application details of which have already been discussed in earlier part of this order.”

61. After considering all materials on the record including the information received from the Information Utility and credit information report, findings has been returned in paragraphs 79 and 86 which is as follows:-

“79. After considering all the arguments put before us as well as perusing the records before us to decide the issue whether the default existed or otherwise at the time of filing Application u/s 7 on 07.09.2017, we find that as far as occurrence of default in payment of the loan is concerned, the Corporate Debtor has itself admitted in para 16 and 17 of the Reply that due to the liquidity crunch, the Corporate Debtor wasn't able to repay its liabilities owed to the Financial Creditor. Furthermore, the Corporate Debtor in Para 9 (v) of the reply has categorically admitted as regards the restructuring of the loan under consideration in this Application due to the same becoming NPA in 2015 stating that “... (v) Out of the total debt of Rs. 13,590 crores, the debt aggregating Rs. 2543.55 stands settled through Debt Assets Swap and for the balance debt of Rs. 11833.55 scheme of arrangement has been framed...”

86. After considering the entire facts of the case so far discussed and taking into account the decision of the Apex Court in the above mentioned cases, we find that in the present case, default has occurred and ICICI Bank's Section 7 Petition is complete providing all the details of debts and default as required in Part IV of the Application and attaching all the necessary supporting documents including ROD from NeSL along with CIBIL Report and CIRLC Report from RBI portal as required in Part V of the Application and there is no disciplinary proceeding against the proposed IRP. Considering that all the above elements are fulfilled as required under IBC, we find that this Application deserves to be admitted u/s 7 for starting CIRP against the Corporate Debtor.”

62. The submission of the Appellant is that since the scheme of arrangement under Section 230-232 of the Companies Act, 2013 was filed with the consent of the lenders which remains pending and was rejected by NCLT only on 03.06.2024, hence, there is no default on the part of the Corporate Debtor and the Scheme matter being kept pending, there will be no adverse consequences on the Corporate Debtor. We are not persuaded to accept the above submission. Facilities for which Section 7 application was filed were facilities to the Corporate Debtor. The fact that under the CRRP they were bifurcated in Bucket 2B and were to be transferred to SPV does not wipe off the debt. The debt, thus, continued on the Corporate Debtor in which default was committed which shall not be treated to be arrested or

suspended by pendency of scheme of arrangement before the NCLT. Adjudicating Authority has also returned a finding that even if charging of interest from 01.10.2016 to 31.10.2018 is not taken into account, default is much more than the threshold limit.

63. Counsel for the Appellant has referred to paragraph 2.2 of the MRA which provided that all earlier events of default stand waived, hence, application could not have been filed for default between the period from 30.04.2016 to 15.05.2016. Clause 2.2 of the MRA is as follows:-

“2.2. Waiver of Existing Events of Defaults

Subject to Section 8.3 (Consequences of Revocation), each of the Lenders hereby waives any Existing Events of Default relating to such Lender and any and all rights, remedies and powers that may have arisen in connection therewith. For avoidance of doubt, it is hereby clarified that the Lenders do not hereby waive their right to recover their respective Facilities, in accordance with the terms of this Agreement. In the event any Lender had already commenced any action against the Borrower and/or its guarantors, unless such action is brought to a close through consent terms or otherwise pursuant to the Restructuring Documents such action shall not abate but shall continue against the Borrower and/or the Personal Guarantor as the case may be.”

64. We have already held that MRA dated 31.10.2017 did not cover the facilities for which Section 7 application was filed. Clause 2.2 of the MRA

has no applicability and the default for which Section 7 application was filed cannot be treated to be waived by the lenders.

65. There is one more aspect which also cannot be ignored. The Corporate Debtor after Section 7 application was reserved on 17.05.2024 has filed OTS proposal dated 29.05.2024 giving an OTS and also paid Rs.200 Crores as upfront. Even during pendency of this Appeal, a revised OTS proposal was submitted by the Corporate Debtor to the lenders dated 23.06.2024. The revised OTS proposal was also considered by the lenders in their meeting held on 01.07.2024 and communication was sent by the lenders to the Corporate Debtor that OTS proposal cannot be accepted which has also been noticed in the proceedings of this Appeal. The OTS having been submitted by the Corporate Debtor offering upfront amount and the total amount, it does not lie in the mouth of the Corporate Debtor to contend that no default has been committed by the Corporate Debtor. In the OTS proposal submitted on 23.06.2024 to the ICICI Bank, lenders have offered to give upfront payment of Rs.500 Crores (200+300) and total amount of Rs.16,016 Crores. The copy of the OTS proposal dated 23.06.2024 submitted on behalf of the Corporate Debtor has been filed as Annexure R-18 to the Reply of the Respondent No.1. The OTS proposal submitted both before the Adjudicating Authority as well as before this Tribunal on behalf of the Corporate Debtor contains the clear acknowledgment of debt and default. Hence, we are of the view that the findings returned by the Adjudicating Authority on the debt and default are based on materials on record and are affirmed by us.

QUESTION NO. (VIII)

66. In view of the above reasons and answers given to the questions, we are of the view that no ground has been made out in this Appeal to interfere with the impugned order dated 03.06.2024.

67. In result, all the Appeals are dismissed. IA No.5550-5554 of 2024 filed by the State Bank of India seeking intervention is allowed. All other IAs stand disposed of.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

NEW DELHI

06th November, 2024

Anjali/ himanshu