

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)
Company Petition No. (IB)-50(PB)/2021

IN THE MATTER OF:

M/s Acute Daily Media Pvt. Ltd. & Ors.

... Financial Creditors

VERSUS

M/s Sharp Eye Advertising Pvt. Ltd.

...Corporate Debtor

AND IN THE MATTER OF I.A. 3602/2022:

(UNDER SECTION: 65 of IBC, 2016)

M/s Rockman Advertising and Marketing (India) Ltd.

K-15, Hauz Khas Enclave,

New Delhi -110016

...Applicant/Shareholder

VERSUS

1. M/s Acute Daily Media Pvt. Ltd.

Regd. Office at E-3/235, Arera Colony,
Bhopal, MP-462016

(alleged Financial Creditor)

2. Mr. Mayank Jain

E-3/235, Arera Colony,
Bhopal, MP-462016

(Director of R-1 at the the
time of filing of main Petition)

3. Mr. Hit Kishore Jain

E-3/235, Arera Colony,
Bhopal, MP-462016

(Director of R-1 at the the
time of filing of main Petition)

4. Ms. Deepanshi Jain

D/o Sh. Deep Kumar Jain,
R/o C-274, Shahpura,
Bhopal, MP

(Alleged Financial Creditor/
also Director of R-1 at the
time of filing of main Petition)

5. Ms. Rekha Jain (Prop. Of Hotel Amar Vilas)

D/o Sh. Fool Chand Jain,
R/o DK 1/71, Kolar Road,
Danish Kunj, Bhopal, MP

(Alleged Financial Creditor)

6. Ms. Ojaswi Jain

D/o Sh. Deep Kumar Jain,
R/o C-274, Shahpura,

Bhopal, MP

(Alleged Financial Creditor)

7. M/s Sharp Eye Advertising Pvt. Ltd.

(Through Resolution Professional)

Regd. Office at 38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Corporate Debtor)
under CIRP

8. Mr. Arpan Gupta

38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Director of R-7 at the
time of filing of main petition)

9. Ms. Pooja Agarwal

38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Director of R-7 at the
time of filing of main petition)

10. Mr. Mukesh Gupta

38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Promoter of R-7)

11. Smt. Padma Gupta

W/o Mr. Mukesh Gupta
38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Promoter of R-7)

12. Mr. Dinesh Gupta

38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Promoter of R-7)

13. Mr. Rakesh Gupta

38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Promoter of R-7)

14. Smt. Urmil Gupta

W/o Mr. Rakesh Gupta
38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Promoter of R-7)

15. Mr. Gaurav Gupta

S/o Mr. Rakesh Gupta
38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Promoter of R-7)

.....Respondents

AND IN THE MATTER OF Inv. Pett. - 36/2022:

(UNDER SECTION: 60(5) of IBC, 2016)

1. Mr. Rakesh Arora

S/o Sh. S. P. Arora
R/o C-4/4123, Vasant Kunj,
New Delhi-1 10070

...Applicant No.1

2. Mr. Shivam Raina

S/o Sh. Rajeev Raina,
R/o D-46, Anand Niketan,
New Delhi-1 10021

...Applicant No.2

VERSUS

1. M/s Acute Daily Media Pvt. Ltd.

E-3/235, Arera Colony
Bhopal, MP-462016

(alleged Financial Creditor)

2. Mr. Mayank Jain

E-3/235, Arera Colony,
Bhopal, MP-462016

(Director of R-1 at the time
of filing of main Petition)

3. Mr. Hit Kishore Jain

E-3/235, Arera Colony,
Bhopal, MP-462016

(Director of R-1 at the time
of filing of main Petition)

4. Ms. Deepanshi Jain

D/o Sh. Deep Kumar Jain,
R/o C-274, Shahpura,
Bhopal, MP

(Alleged Financial Creditor/
also Director of R-1 at the
time of filing of main Petition)

5. Ms. Rekha Jain

(Prop. Of Hotel Amar Vilas)

D/o Sh. Fool Chand Jain,
R/o DK 1/71, Kolar Road,
Danish Kunj, Bhopal, MP

(Alleged Financial Creditor)

6. Ms. Ojaswi Jain

D/o Sh. Deep Kumar Jain,
R/o C-274, Shahpura,
Bhopal, MP

(Alleged Financial Creditor)

7. M/s Sharp Eye Advertising Pvt. Ltd.

(Through Resolution Professional)
Regd. Office at 38, Rani Jhansi Road,

(Corporate Debtor)

Jhandewalan, New Delhi – 110055

under CIRP

8. Mr. Arpan Gupta

38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Director of R-7 at the time
of filing of main petition)

9. Ms. Pooja Agarwal

38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Director of R-7 at the time
of filing of main petition)

10. Mr. Mukesh Gupta

38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Promoter of R-7)

11. Smt. Padma Gupta

W/o Mr. Mukesh Gupta
38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Promoter of R-7)

12. Mr. Dinesh Gupta

38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Promoter of R-7)

13. Mr. Rakesh Gupta

38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Promoter of R-7)

14. Smt. Urmil Gupta

W/o Mr. Rakesh Gupta
38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Promoter of R-7)

15. Mr. Gaurav Gupta

S/o Mr. Rakesh Gupta
38, Rani Jhansi Road,
Jhandewalan, New Delhi – 110055

(Promoter of R-7)

16. M/s Rockman Advertising & Marketing (India) Ltd.

K-15, Hauz Khas Enclave,
New Delhi-110016

Applicant in
I.A.-3602/2022

...Respondents

AND IN THE MATTER OF I.A.-461/2024:

(UNDER SECTION: 60(5) of IBC, 2016)

M/s Rockman Advertising and Marketing (India) Ltd.

K-15, Hauz Khas Enclave,
New Delhi-110016

...Applicant/Shareholder

VERSUS

Vinay Kumar Singhal,

RP of Sharp Eye Advertising Pvt. Ltd.
38, Rani Jhansi Road, Jhandewalan,
New Delhi-110055

....(RP of Corporate Debtor under CIRP)

Order delivered on:12.06.2024

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Applicant	Adv. Sakal Bhushan, Adv. Vasu Bhushan & Adv. Nipun Bhushan in IA-3602/2022 & IA-461/2024.
For the Respondent	Sr. Adv. Vivek Kohli, Adv. Juvas Rewal, Adv. Pariyat, Adv. Nishtha Grover for R-1 to 6 in IA-3602/2022, Adv. Eshna Kumar, Adv. Shubham Jaiswal for Respondent Nos. 8 to 15 in IA-3602/2022
For the Intervener	Adv. Rohit Gandhi, Adv. Akshita Nigam, Adv. Nikita Sharma in Inv. Pet. 36/2022
For the RP	Adv. Abhishek Anand, Adv. Karan Kohli, Adv. Supriyo Banerjee, Advocates

ORDER

I.A. 3602/2022 and I.A. 461/2024 have been filed by the same Applicant (showing, inter alia, the inconsistencies in the documents) with a prayer for recall of Order dated 17.05.2022 passed by the Adjudicating Authority. The Inv. P. 36/2022 has been filed to support the I.A. 3602/2022 for the recall of Order dated 17.05.2022. These applications, being interconnected, are taken up for hearing together.

I.A. – 3602/2022:- The captioned application has been filed under Section 65 of Insolvency and Bankruptcy Code, 2016 by M/s Rockman Advertising and Marketing (India) Ltd. (hereinafter referred to as the '**Applicant**') incorporated on 21.09.1987 vide Corporate Identification No. U74899DL1987PLC029272 viz, a Shareholder of M/s Acute Daily Media Pvt. Ltd. (hereinafter referred to as the '**Corporate Debtor**'). The Corporate Debtor is undergoing CIR Process in this Tribunal in C.P.(IB) No. 50/(PB)/2021. The Corporate Debtor is being represented through its Resolution Professional, namely, Mr. Vinay Kumar Singhal having IBBI Registration No. IBBI/IPA-002/IP-N00624/2018-2019/11880. The Prayer in the captioned Application reads thus:

- a) *“Call for record of CP (IB) No. 50(PB)/2021 decided on 17.05.2022 by this Hon'ble Tribunal;*
- b) *Pass an interim Order staying the CIRP proceedings- till the final disposal of this Application disclosing prima facie fraud: played upon the Hon'ble Tribunal, in order to avoid multiplicity of proceedings;*
- c) *Impose a penalty of Rs. One Crore on each of the Respondents in exercise of the powers vested in it under Section 65 IBC for initiating the CIRP of Corporate Debtor fraudulently, with malicious intent and for a purpose other than insolvency resolution of the Corporate Debtor;*

d) *Recall the Order dated 17.05.2022 (Annexure-1) obtained fraudulently by the Respondents from this Hon'ble Tribunal in CP (IB) No. 50(PB)/2021 as explained above;*

e) *Award exemplary and compensatory costs in favour of the Applicant whose decade long efforts since 2013 in the oppression and mismanagement petition were sought to be defeated by the Respondents by initiating the CIRP fraudulently;*

f) *Pass such other/ further orders, as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the instant case."*

2. The averments made by the Applicant in the present IA are summarized as under:

2.1 The Applicant is the 62.57% shareholder qua the Corporate Debtor (Respondent No. 7) the CIRP in respect of which was initiated by this Hon'ble Tribunal in CP. (IB) No. 50(PB)/2021, filed on 14.01.2021, fraudulently and with malicious intent by the four alleged Financial Creditors (Respondent Nos. 1, 4, 5 & 6) and the Directors qua respondent No. 1 (viz, Respondent Nos. 2, 3 & 4) in collusion with the Corporate Debtor (Respondent No. 7) and its Directors and Promoters (Respondent Nos. 8-15).

2.2 The Corporate Debtor (Respondent No. 7) and its promoters were previously subject to an Oppression and Mismanagement petition filed by the Applicant/Shareholder in 2013 (CP No. 143(ND)/2013) in which the Applicant sought redressal of its grievance regarding decrease in it's shareholding from 62.57% to 17.86% by illegal allotment of shares to two other companies by Respondent No. 7 without due consent, knowledge and concurrence of the Applicant.

2.3 To counter the Applicant's allegations, the Corporate Debtor (Respondent No. 7 herein) and its promoters had created a false narrative that the additional shares were issued to Prabhatam Investments (P) Ltd. (Respondent No. 11 therein) because the Corporate Debtor had taken a loan from the said Company under an alleged MOU dated 27.07.2007 that required conversion of loan into equity (by issue of shares) if and when the Corporate Debtor failed to repay the alleged loan to the Company.

2.4 This Tribunal in terms of its order dated 18.01.2018, directed the Respondents in the Oppression and Mismanagement Petition to produce the original MOU dated 27.07.2007, the original board resolution dated 28.06.2007, and all other original documents referred to in the pleadings. The alleged MOU dated 27.07.2007 was produced before the Tribunal, but the original board resolution dated 28.06.2007 and other original documents as directed by the Tribunal were never produced. This Tribunal had doubts regarding the ante-dating of the alleged MOU for defence purposes.

2.5 Furthermore, an Affidavit was filed by Ms. Pooja Aggarwal one of the Directors, stating that a fire at the Corporate Debtor's Registered Office on 31.12.2017 destroyed all original documents, except the alleged MOU. This false story was fabricated to conceal the true position regarding the fabrication and ante-dating of the alleged MOU. This Tribunal, after considering the contentions raised by the Petitioner, ruled in its order on 14.08.2018 that there appears to be a prima facie case for perjury, as the deponent attempted to overreach the court.

2.6 Before the alleged fire incident, an inspection of the Corporate Debtor's records was conducted by a representative of the Applicant on 27.11.2013 and 05.12.2013. The inspection report, countersigned by the Corporate Debtor, revealed that the alleged MOU dated 27.07.2017 was not found in the Corporate Debtor's records. This Tribunal noted this in its interim order dated 21.03.2018, stating that "allegations of fabrication of a photocopy have gained further strength."

2.7 In its order dated 20.07.2022 passed by this Tribunal in C.P. 143(ND)/2013, held that the Board Resolution dated 28.06.2007, 09.10.2009, and MoU dated 27.07.2007 were forged and fabricated documents. Relevant excerpt of the order passed by this Tribunal reads thus:

"39. In sequel to the above discussion, this Tribunal is of the firm view that the Board Resolution dated 28.06.2007, 09.10.2009 & MoU dated 27.07.2007 are nothing, but forged & fabricated documents... 40...accordingly, the act of the allotment of shares of the Respondent No. 1 Company to the Respondent Nos. 10 & 11 reducing the Petitioner Company's shareholding from 62.57% to 17.86% is hereby declared null & void-ab-initio..."

2.8 It has been further submitted that the Applicant was later declared as the majority (62.57%) shareholder, and the Respondents were attempting to preempt the Applicant's success in the Oppression and Mismanagement Petition by filing a Section 7 Petition collusively on 14.01.2021.

2.9 The Applicant came to know about the initiation of CIRP only when it received an email dated 26.05.2022 accompanied by an "Additional Affidavit" and an Admission order dated 17.05.2022. The Applicant learned about the moratorium and began collecting evidence before filing the present application.

2.10 The Applicant alleges fraudulent misrepresentation of "routine business entries" as "loan entries" and fabrication of loan agreements just for the sake of initiating CIRP against the Corporate Debtor. It is argued that no loan transactions or agreements were executed between the Corporate Debtor and the four Financial Creditors, and the loan agreements were fabricated.

2.11 It is alleged that the present CP (IB) No. 50(PB)/2021 u/s 7 of IBC had been filed jointly by four so-called Financial Creditors, namely, Acute Daily Media Pvt. Ltd., Ms. Deepanshi Jain, Ms. Rekha Jain and Ms. Ojaswi Jain (Respondent Nos. 1, 4, 5 & 6) against the Corporate Debtor (Respondent No. 7). It is alleged by the Financial Creditors that they had disbursed loans aggregating to Rs. 97,00,000/- to the Corporate Debtor under some loan agreements.

S. No.	Name of FC	Amount of loan	Date of disbursement	Date of default	Amount due and payable
1.	Acute Daily Media Private Limited	50,00,000/-	21.07.2016 (Under alleged loan agreement dt. 21.07.2016)	31.01.2020	72,33,710/-
2.	Deepanshi Jain	30,00,000/-	03.12.2019 – 30.12.2019 (Under alleged loan agreement dt. 03.12.2019)	28.02.2020	30,73,972/-
3.	Rekha Jain	7,00,000/-	24.05.2019 (Under alleged loan agreement dt. 27.05.2019)	26.02.2020	7,63,000/-
4.	Ojaswi Jain	10,00,000/-	31.12.2019 (Under alleged loan agreement dt. 31.12.2019)	28.02.2020	10,20,000/-
	Total	97,00,000/-			1,20,90,682/-

2.12 What was projected as the loans taken by the Corporate Debtor from the alleged Financial Creditors (Respondent Nos. 1, 4, 5 & 6) were in fact not genuine loan transactions and also that the loan agreements annexed as A-4, 10, 15 and 20 were also fabricated just to initiate the CIRP in a fraudulent

manner.

2.13 It is submitted that the loan agreement dated 21.07.2016 at Pg. 51-123 of the Application is drafted on the letterhead of M/s Acute Daily Media Pvt. Ltd. and mentions its Registered Office to be at E-3/235, 10 No. Market, Arera Colony, Bhopal – 462016. However, the Registered Office of Respondent No. 1 as on 21.07.2016 was at D.K-1 Danish Kunj, Kolar Road, Tehsil Huzur, Bhopal and it was changed to E-3/235, Arera Colony, Bhopal, MP 462016 with effect from 30.04.2019 as reflected in Form No. INC-22 filed by it with the ROC. It is also submitted that documents allegedly executed in 2016 cannot carry the address of the Registered Office of Respondent No. 1/Alleged FC which came into existence much later only in 2019.

2.14 The alleged loan agreement dated 21.07.2016 refers to the remedy under IBC, 2016 in para 6(j) while the same remedy was not even notified as on 21.07.2016. Section 4 to 32 of IBC, 2016 had been notified vide S.O. 3394(E) dated 30.11.2016 w.e.f. 01.12.2016. An agreement allegedly executed in July, 2016 cannot refer to remedy under IBC which was not even notified at that point of time. The inference from the said aspect is that it was so done to fraudulently misrepresent the routine business entry as loan for initiation of CIRP against the CD for oblique motives of defeating the Applicant/Shareholder's likely success in the Oppression and Mismanagement Petition and not for the Corporate Debtor's resolution.

2.15 All four alleged loan agreements dated 21.07.2016, 03.12.2019, 27.05.2019 and 31.12.2019 are verbatim copies of each other. The inference

so derived from this is that all agreements have been fabricated together at one place, that is, Delhi.

2.16 No stamp duty has been paid on the alleged loan agreements and this further leads to the inference that no genuine loan transactions had ever taken place.

2.17 The alleged board meetings of the CD dated 20.07.2016, 02.12.2019, 26.05.2019 and 30.12.2019 in which board resolutions for obtaining loans from alleged Financial Creditors and the alleged board meeting of CD dated 14.07.2019 in which board resolution for obtaining extension of loan from Respondent No. 1 are alleged to have been passed find no mention in the CD's relevant Annual Returns for FYs 2016-17 and 2019-20. The dates of alleged board meetings for passing the above-mentioned alleged resolutions find no mention in the Annual Returns.

2.18 The Balance Sheets of CD for FYs 2016-17 and 2019-20 when the alleged loans are said to have been disbursed to it do not mention the names of the four alleged FCs while these Balance Sheets do mention names of some other creditors. Further, the Audit Report of the CD for FY 2016-17 prepared by the Statutory Auditor clearly mentions at point 9 to Annexure – A thereof that the Company had not raised any money in the form of loans during that year, whereas it was projected before this Tribunal in the Insolvency proceeding that the CD had taken a loan of Rs. 50 lakhs from the Respondent No. 1 in that year. Similarly, the Audit Report for FY 2019-20 prepared by the Statutory Auditor clearly mentions at point 8 of Annexure A thereof that the

Company had not raised any money in the form of loans during the year, whereas it was projected that the CD had taken loans of Rs. 30 lakhs, 7 lakhs and 10 lakhs from the Respondent Nos. 4, 5 & 6. This further indicates that Respondent Nos. 1 to 15 (CD, its Promoters and alleged FCs) had collusively projected the routine business entries as loans.

2.19 The Statutory Audit Report of the CD for FY 2020-21 clearly mentions at point 1(h) of Notes to Balance Sheet that there was no borrowing cost to the Company. This also fortifies that the Respondent No. 7/ CD had not taken any amount of interest from anybody. The alleged amount even if taken by the CD from the Respondent Nos. 1, 4, 5 & 6 does not even qualify to be “financial debt” as defined under Section 5(8) of IBC in the absence of interest or any other time value of money.

2.20 The Respondent Nos. 4, 5 and 6 alleged Financial Creditors admittedly are not members/shareholders of the CD, and therefore the CD admittedly being a Private Company (not a Public Company) is not eligible under Section 76 of the Companies Act, 2013 to accept any deposit/loan from them being non-members of the CD. Thus the CD being ineligible under law has not taken any loan/deposit from the said Respondents/alleged FCs as per the Balance Sheet and Audit Report filed by the Statutory Auditor of the CD for FY 2019-20 during which year the said Respondents are alleged to have given loans to the CD. This fact further exposes the fraud played upon the Tribunal by the Respondents Nos. 4, 5 & 6/alleged FCs when it was misled by them in collusion with CD and its Directors/Promoters (Respondents 7 to 15) into believing the normal business entries as loan entries for securing the

admission order dated 17.05.2022.

2.21 At the time of granting the alleged loan to the CD in 2016, the Respondent No. 1/ alleged FC had a fully paid-up share capital of merely Rs.10 lakhs with no reserves and securities premium. A copy of Annual Return of the Respondent No. 1/alleged FC for FY 2016-17 showing fully paid-up capital of merely Rs. 10 lakhs has already been attached as Annexure-9. Therefore, the maximum loan amount that it could have granted to all its debtors including the CD could be up to Rs. 6 lakhs (*sixty per cent.* of 10 lakhs). However, Respondent No. 1/alleged FC has alleged to have granted a loan amounting to Rs. 50 lac. Admittedly, no special resolution passed in a general meeting authorizing the said Loan exceeding the limits specified in Section 186(2)(a) had ever been passed in the year 2016, as nothing *of* that sort has been placed on record by the Respondent No. 1 /alleged FC in the insolvency petition filed before the Hon'ble Tribunal. This clearly shows that no such loan transaction ever took place between the Respondent No. 1/alleged FC and the CD, and this Tribunal was misled by the Respondent No. 1/alleged FC in collusion with CD and its Directors/Promoters (Respondents 7 to 15) into believing the normal business entries as loan entries for securing the admission order dated 17.05.2022

2.22 As per the accounting standards, a Balance Sheet must record all incomes which have accrued during the year. Admittedly, Respondent No. 1/alleged FC has not mentioned any accrued interest income in its Balance Sheets. Had there been a loan arrangement between the Respondent No. 1 /alleged FC and the Respondent No. 7/CD, then Respondent No. 1/ alleged

FC would definitely have reflected the accrued interest income in its Balance Sheets. The fact that no accrued interest income is reflected clearly shows that no loan transaction ever took place between them. The Respondent No. 1/alleged FC has included an interest amount of Rs. 22,33,710/- in calculation in the Insolvency Petition u/s 7 IBC just for the sake of achieving the minimum threshold limit of Rs. 1 crore for rendering the Petition maintainable under IBC. By excluding this alleged interest, the alleged aggregate amount due would be Rs. 98,56,972/- only (Rs.1,20,90,682 minus Rs.22,33,710) which is below the threshold of Rs. 1 crore fixed w.e.f. 24.03.2020 and which was applicable on 14.01.2021 when the insolvency petition under Section 7 IBC was filed by the Respondent Nos. 1, 4, 5 & 6 (alleged FCs) against Respondent No. 7/CD.

2.23 The Balance Sheets of Respondent No. 1, Acute Daily Media Pvt. Ltd. Alleged Financial Creditor for the FYs 2016-17 to 2019-20 show alleged deposits amounting to Rs. 50 lac towards the CD while suddenly the Balance Sheet for FY 2020-21 show the same figure to be Rs. 97 lakhs, which is equivalent to the alleged combined principal amount claimed to be disbursed as loan separately by the four alleged four FCs/Respondent Nos. 1, 4, 5, & 6 (Rs. 50 lac + Rs. 30 lac + Rs. 7 lac + 10 lac respectively). All the four alleged FCs being separate and distinct juristic and natural persons, showing of the alleged combined principal loan amount of Rs. 97 lac in Balance Sheet of Respondent No. 1/alleged FC/Company is a clear indication of a pre-planned collusion between the four *alleged* four FCs/ Respondent Nos. 1, 4, 5, & 6.

3. In response to the above averments made by the Applicant, the Respondent Nos. 1 to 6 have stated the following:

3.1 The CIRP vide the said petition commenced on 17.05.2022. The Respondents Nos. 1 to 6 were not a party to the Oppression and Mismanagement petition bearing C.P. No. 143 (ND)/2013 and were not aware about its existence. Further, the Oppression and Mismanagement petition was admitted on 20.07.2022 while the CIRP against the CD was admitted on 17.05.2022 and subsequently, a moratorium under Section – 14 was already in place.

3.2 The Applicant/Shareholder is trying to reargue the Section 7 petition on merits and challenge the merits of the decision taken by NCLT may lie in appeal but cannot be a ground to sustain an application under Section 65.

3.3 There is no allegation or pleading that the monies advanced by R1-R6 to the Corporate Debtor were: (i) not paid by R1-R6; or (ii) not received by the Corporate Debtor; or (iii) have been repaid by the Corporate Debtor. Thus, the payment, the receipt and the fact of the repayment remaining due are well admitted and accepted.

3.4 The impugned order under challenge in the present petition was passed on 17.05.2022 and as evident from the records, the Applicant herein never challenged the same before the appropriate authority even though they were fully aware of the proceedings.

3.5 The Applicant has transferred the entire shareholding of the Corporate

Debtor comprising 5,25,000 shares in favor of one Mr. Rakesh Arora and Mr. Shivam Raina for valuable consideration and hence does not have *locus standi* to file this present application.

3.6 The details of disbursement of the financial debt by R1 to the CD has been tabulated below:

Date of the Agreement	Particulars	Disbursement	Remarks
21.07.2016	Loan amount: Rs.50,00,000/- to the CD. Rate of interest: 12% per annum Tenure: three years, i.e., up to 21.07.2019. [R/8 at P- 128-135 of the Reply by R1-6]	On 21.07.2016 Rs. 50,00,000/- was disbursed by R 1 to the CD vide NEFT and RTGS from its Bank Account at Oriental Bank of Commerce at Arera Colony, Bhopal.	The Loan Agreement and the Loan Extension Agreements are backed by: - 1. Board Resolutions dated 20.07.2016 of the CD and R1. [R/9 (Colly.) at P- 136-137 of the Reply by R1-6] 2. Board Resolutions dated 20.07.2019 of the CD and R1. [R/12 (Colly.) at P- 141-142 of the Reply by R1-6]
01.08.2019	At the request of the CD, the Loan Extension Agreement was executed between the CD and R 1. [R/11 (Colly) at P-139-140 of Reply by R1-6] <u>Loan Extension Agreement: -</u> Clause 1: the unpaid interest of Rs. 18,00,000/- was added into the original principal amount of 50,00,000/-. New principal: 68,00,000/-	Bhopal. [R/10 at P-138 of the Reply by R1-6]	Balance Sheet: 1. The audited balance sheet of the CD for FY 2016-17 and 2019-20 (" BS of the CD ") reflects non-current and current liabilities which include long term and short term borrowings on a consolidated basis. [A-10 Colly at P- 140 to 156 of the IA] 2. The report of the RP dated 26.09.2022 at Point No. 9 categorically states that the loan amounts disbursed by R 1, 4, 5 and 6 to the CD is reflected as ' unsecured

	<p>Rate of interest: 12% per annum. Maturity date: 31.01.2020. [R/13 at P- 143-144 of the Reply by R1-6]</p>	<p>loans’ on the tally account software handed over by the CD to the RP. [Page-9 of the Affidavit dated 26.09.2022 of the RP]</p> <p>3. The BS of the CD states that the CD – “has not raised <i>any money by way of initial public offer or further public offer (including debt instrument) and term loans during the year</i>”[Point 9 at P-147 and Point 8 at P-156 of the IA]</p> <p>This fact has been relied on vehemently in the IA. However, the transaction between R1 and CD is a loan agreement which is not covered by any security. It is not an IPO, term loan or a further public offer. The amount disbursed by R1 to the CD is an unsecured loan.</p> <p>4. The Balance Sheet of R1 for the FY 2016-17, 2017-18, 2018-19, 2019-20, 2020-21 (“BS of the R1”) showcases the loan amount granted by R1 to the CD under the heading of long-term loans & advances. [A-12 Colly at P-189, 192, 195, 198 and 202 of the IA]</p> <p>Address of R1: The IA alleges that the loan agreement dated 21.07.2016 mentions the registered office of R1 was changed in the year 2019 (as per the INC 22 filed by R1 with the MCA).</p> <p>The Reply filed by R1-6 categorically states that the address mentioned agreement was the office address of R1 since 2016. Any typographical error in the loan agreement does not negate the existence of valid debt, its disbursement and the subsequent default in repayment by the CD. The rent agreement dated 01.04.2016 showcasing the use of the said address by R1 clearly substantiates the same. [R/ 31 (colly) at P- 199-211 of the Reply by R1-6]</p>
		<p>Remedy under the Code:</p> <ol style="list-style-type: none"> 1. The Code was introduced before the Lok Sabha on 21.12.2015 and was passed on 05.05.2016. 2. The Code was passed by the Rajya Sabha on 12.05.2016. 3. The Code received the Hon’ble President’s assent on 28.05.2016 and hence, was notified and in the public domain. <p>Hence, the Loan Agreement dated 21.07.2016 which mentions the remedies under the Code was executed after the Presidential assent to the Code but before the notification bringing the Code into effect. The mere mention of the availability of the remedy under the Code in the Loan Agreement would not negate or impinge on the validity of the Loan Agreement itself.</p>

3.7 The details of loans advanced by Respondent Nos. 4, 5 and 6 to the CD have been tabulated below:

Date of the Agreement	Particulars	Disbursement	Remarks
27.05.2019	Parties: CD & R5 Principal: Rs. 7,00,000/- Rate of interest: 12% per annum. Tenure: 9 months, i.e., up to 26.02.2020.	On 24.05.2019 Rs. 7,00,000/- was disbursed by R5 to the CD vide NEFT from Oriental Bank of Commerce at Service Branch, Bhopal [R/17	A Board Resolution dated 26.05.2019 was passed by the CD authorizing availing of a loan of Rs. 7,00,000/- from R5 for its working capital requirements and general corporate purposes. [R/16 at P 158 of the Reply by R1-6]
		at P 159 of the Reply by R1-6]	
03.12.2019	Parties: CD & R4 Principal: Rs. 30,00,000/- Rate of interest: 12% per annum Tenure: 2 months, i.e., up to 28.02.2020.	Rs. 30,00,000/- was disbursed by R 4 to the CD vide NEFT from the State Bank of India, Mahavir Nagar Branch, Bhopal and Central Bank of India, T.T Nagar Branch, Bhopal. [R/22 (Colly) at P 174-178 of the Reply by R1-6]	Board Resolution dated 02.12.2019 was passed in the meeting of Board of Directors of the CD authorizing availing loan of Rs. 30,00,000/- from R 4 for its working capital requirements and general corporate purposes. [R/21 at P 173 of the Reply by R1-6]
31.12.2019	Parties: CD & R6 Principal: Rs. 10,00,000/- Rate of interest: 12% per annum Tenure: 2 months, i.e., up to 28.02.2020 [R/25 at P 184-190 of the Reply by R1-6]	Rs. 10,00,000/- was disbursed by R 6 to the CD through Cheque No. 261034 drawn on the Bank Account of R 6 at State Bank of India, Mandakini Branch, Bhopal. [R/27 at P 192 of the Reply by R1-6]	Board Resolution dated 30.12.2019 was passed in the meeting of Board of Directors of the CD authorizing the availment of the loan of Rs. 10,00,000/- from R6 for its working capital requirements and general corporate purposes. [R/26 at P 191 of the Reply by R1-6]

3.8 In light of the aforesaid tables, Respondent Nos. 1, 4, 5 and 6 have duly disbursed as sum aggregating to Rs. 97,00,000/- as loan to the CD and the total interest accruing to the principal amount was Rs. 23,90,682/-. Further, the Respondents have sent various legal notices-cum-recall letters to the CD before finally moving a Section 7 Application on 11.01.2021.

3.9 No evidence has been moved by way of Reply to show any repayment of the outstanding dues owed by the CD.

3.10 In light of the aforesaid, for any alleged non-compliances on the part of the CD such as the CD not being eligible to accept any loan from R1 to R6 or that the Balance Sheet of the CD reflecting 'no borrowing costs', Respondent nos. 1 to 6 cannot be held liable nor can the liability owed and due to R1 to R6 be washed away on any grounds seeking sustainable indoor (mis)management. Furthermore, any alleged non-compliance under the Companies Act, 2013 does not alter the underlying transaction between R1, 4, 5 and 6 and the CD.

4. In the Reply filed by R-8 to R-15 it is stated that shares of the CD held by the Applicant have been transferred in favor of Mr. Rakesh Arora and Mr. Shivam Raina for valuable consideration and the new beneficial owners have moved an intervention petition in the said IA.

4.1 A withdrawal application bearing IA No. 4988/2022 dated 11.10.2022 was filed by M/s Rockman Advertising and Marketing (India) Limited, the Applicant herein, containing the Board Resolution authorising Mr. Chandra Shekhar Aggarwal (an Additional Director of the Applicant) to withdraw the present IA. The IA No. 4988/2022 states that the present IA is being sought to be withdrawn on the basis of an oral settlement between the Applicant and the CD.

4.2 The very conduct of the Applicant by not disclosing the fact that the Applicant is no longer a shareholder of the CD and the oral settlement was

entered into between the CD and the Applicant basis which IA No. 4988/2022 was filed for withdrawing the present IA smacks of malafide. This conduct demonstrates that the Applicant in collusion with the CD is trying to defeat a successful resolution of the CD. Further, the Resolution Plan has already been approved and I.A. 936/2023 seeking an approval of the same is already pending before this Tribunal.

4.3 Vide order dated 20.09.2023, the withdrawal application bearing IA No. 4988/2022 was unauthorisedly withdrawn by the counsel for the Applicant in IA 3602/2022, i.e., Adv Shakal Bhusan who was not the counsel on record for IA No. 4988/2022. Reference in this regard is placed on the order dated 14.12.2022 which demonstrates that Sr. Adv. Rachana Srivastava and Adv Sameer Kulshreshtha were representing the Applicant in IA No. 4988/2022. Thus, the Applicant has not approached this Tribunal with clean hands and is merely attempting to impede the successful resolution of the CD.

4.4 That the present IA is not legally sustainable in light of the observations of the Hon'ble NCLAT passed in Order dated 03.10.2023 in **Amour Infrastructure LLP (Formerly known as Amour Infrastructure Pvt. Ltd.) Vs. Digital Integrated Technologies Pvt. Ltd. [CA (AT)(Ins) 884 of 2022]** wherein it has been held that for proving the ingredients of section 65 of the Code, the same has to be backed by adequate pleadings and findings. It is worthy to note that there are no pleadings at all on how the Section 7 petition is either malicious or fraudulent and is coupled with the intent to initiate the CIRP proceedings for some purpose other than the resolution of the Corporate Debtor.

4.5 In the present IA, the vague assertions, hyper technical objections and assumptions made by the Applicant does not change the nature of transaction between the R1, 4, 5 and 6 and the CD, i.e., disbursal of financial debt by the financial creditors to the CD and default on part of the CD in repayment of the said financial debt. Further, the Applicant has not brought any evidence on record demonstrating that the CD is allegedly a solvent company that does not warrant any resolution under the Code.

4.6 It is further submitted that the present IA fails to fulfill any of the ingredients of section 65 of the Code. Furthermore, the provisions of section 65 of the Code cannot be resorted to as a mechanism to re-agitate the established debt and default under section 7 of the Code or serve as an appeal under section 61 of the Code against a CIRP admission order. Thus, the IA in the garb of falsified allegations under section 65 of the Code is an attempt by the Applicant to challenge the CIRP admission order dated 17.05.2022 which has already attained finality and any appeal in respect of the said order is time barred as per the Code. The Applicant is merely attempting to indirectly challenge the Order dated 17.05.2022 which otherwise as per the applicable law of limitation is impermissible and wholly untenable.

5. In response to the averments made by the Applicant, the Resolution Professional (Respondent No. – 7) of Sharp Eye Advertising Private Limited (Corporate Debtor) has also filed its Reply stating the following:

S. NO	ALLEGATIONS	REMARKS
1.	Brief outline of the past fraudulent conduct of the Corporate Debtor (Respondent No.7) and its promoters before this Hon'ble Adjudicating Authority	This Hon'ble Adjudicating Authority vide order dated 20.07.2022 in C.P. No. 143 of 2013 held in favour of the Applicant. Therefore, in view of the above, it is the subject matter and jurisdiction of this Hon'ble Adjudicating Authority only.
2.	Insolvency Petition has been fraudulently filed and with malicious intent to defeat the Applicant shareholder's success in the oppression and Mismanagement Petition	This allegation is the subject matter which is to be decided by this Hon'ble Adjudicating Authority, hence, the Answering Respondent/ Resolution Professional cannot verify the said allegation raised by the Applicant.

		Tehsil Huzur Bhopal to E-3/235 Arera Colony, Bhopal - 462016 on 30.04.2019.
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5.	Mentioning of the remedy of IBC in the alleged loan agreement dated 21.07.2016	It is submitted that IBC Code came into effect on 28.05.2016 when the assent of President was obtained on 28.05.2016. It was passed by Rajya Sabha on 05.05.2016. It is further submitted that Section 7 of the Code came into force on 01.12.2016. However, the loan agreement was executed between the Corporate Debtor and Respondent No. 1 / Acute Daily Media Private Limited on 21.07.2016 wherein the Code was already in place, however, it did not come into force in July 2016.
6.	All loan agreements verbatim copy of each other	The loan agreement entered into between all Financial creditors and corporate Debtor are same except the amount of the loans and dates. However, it is also transpired from the address mentioned in the present petition that all Financial creditors are related to each other. In view of above, it is the jurisdiction of this Hon'ble Adjudicating Authority to decide this issue.

7.	No stamp duty was paid on the loan agreements	<p>The loan agreements have been entered into between the Respondents and the Corporate Debtor on their respective letter heads.</p> <p>However, the Answering Respondent/ Resolution Professional sought the clarification from the Respondents, however, the Answering Respondent/ Resolution Professional has not received any supplied any information from them.</p>
8.	Date of alleged Board meetings not recorded in the Annual return of CD	The dates of the Board meeting such as 20.07.2016, 02.12.2019, 26.05.2019 and 30.12.2019 to avail the loan from Financial Creditor, are different from the date of Board meeting as shown in the Form MGT-7 (Annual Return) as filed by the Corporate Debtor.
9.	No specific loan to CD shown in the Balance sheets and audit reports of CD	The borrowings have been shown in the financial statements of CD for the financial year 2016-17 and FY 2019-20 as long term borrowings and short term borrowing on consolidated basis. Party wise data was not shown in the audited balance sheet. However, the books of accounts which are being maintained on the tally accounting software which had been handed over to the Answering

		<p>Respondent/ Resolution Professional, shows that the same under the head of Unsecured Loans.</p> <p>Further, as alleged in the para 13(g) of the IA that <i>“Further, the audit report of the CD for FY 2016-17 prepared by statutory auditor clearly mentions at point 9 to annexure A thereof that the company had not raised any money in the form of loans during the year”</i>.</p> <p>However, RP has gone through the point no 9 to the annexure A of audit report which is</p>
		<p>reproduced below:</p> <p><i>“The Company did not raise any money by way of initial public offer or further public offer (including debt instrument) and term loans during the year.”</i></p> <p>It is pertinent mention here that a similar allegation has been made for the FY 2019-20 and a similar remark / opinion / stipulation has been made by the statutory auditor in their audit report for the FY 2019-20.</p>
10.	Audit report of CD clearly shows no borrowing costs	<p>The statutory auditor report of the CD for the FY 2020-21 at point no 1(h) of the notes to the accounts, has a mention that <i>“The company does not have any borrowing cost”</i></p>

11.	CD not eligible to accept any loan from Respondent Nos. 4 to 6	Para 4 of the Annexure A to the Independent Auditor's Report, the Statutory Auditor report for the FY 2019-20 that the CD has not accepted any deposits from the public covered u/s 73 to 76 of the Companies Act, 2013. However, there was no mention about any loan taken in the statutory auditor report.
12.	Respondent No.1 / Financial Creditor not eligible to advance any loan to the CD	In compliance of Section 186 of the Companies Act, 2013, Respondent No.1 / Financial Creditor being corporate entity, has neither placed any documents pertaining to any resolution authorizing to extend the loan beyond its paid up capital and free reserves nor the Resolution Professional has observed

		the same documents having filed with ROC by the Respondent No.1 / Financial Creditor. However, it is to be mentioned that Respondent Nos. 4 to 6, being individual are not covered under the Companies Act, 2013.
13.	Alleged interest of 12% not accrued in the books of accounts of Respondent No.1 / Financial Creditor.	Having gone through the Financial statements of Respondent No.1 / Financial Creditor from 2016-17 to 2020-21, it is observed that no accrued interest income has been shown / reflected / booked.
14.	Conduct of Respondents	On the perusal of audited financial statements of the R-1 / financial creditor, amount receivable from sharp eye advertising private limited has been shown under Main head Long term Loan & advance sub-head deposits had been increased from Rs.50.00 lakhs (in FY 2016-17) to Rs. 97.00 lakhs (in FY 2020-21). However, The other Respondents can only
		defend such allegations.

6. **Inv. Petition - 36/2022:-**

The Intervention Petition 36/2022 has been filed by Mr. Rakesh Arora and Mr. Shivam Raina with a prayer to intervene in IA-3602/2022 reiterating the allegations made in IA-3602/2022. The Applicants state that during the pendency of the present proceedings, the entire shareholding of the Applicant in I.A. 3602/2022 i.e., M/s Rockman Advertising & Marketing (India) Ltd. has been sold to the Mr. Rakesh Arora and Mr. Shivam Raina i.e., the Applicants in Inv. Petition 36/2022 for valuable consideration.

In the course of the present proceedings, the present Applicants in their pleadings have adopted the pleadings of the Applicants in IA No. 3602/2022, which are being discussed in the subsequent paragraphs. No separate discussions on the issue raised in the Intervention Petition is, therefore, required.

7. **I.A. 461/2024:-**

7.1 In the course of the present proceedings in our daily order dated 03.01.2024, the RP was directed to file an affidavit clearly indicating therein the short term and long term loans reflected in the Balance Sheet of the Corporate Debtor for the years ending 2016-17 & 2019-20 including the short term and long term loans received by the Corporate Debtor and also from the Financial Creditors who initiated the CIRP and also to attach the relevant statement from the ledger of the Corporate Debtor indicating acknowledgment of the loan amounts.

7.2 The Resolution Professional filed an affidavit in compliance to our aforementioned order and also shared a copy of the same with the other parties including the present Applicant. After receiving a copy of the said Affidavit and the ledger accounts, the present Applicant filed another IA i.e., IA-461/2024 making pointed allegations with reference to the apparent discrepancies in the ledger accounts filed by the RP. The allegations in IA-461/2024 are summarized below:

(i) The ledger of the Corporate Debtor along with the Bank Statements of the Financial Creditors filed by the Resolution Professional, along with his first affidavit do not indicate the acknowledgement of “Loan Amount”. It is nowhere found in the description that the Corporate Debtor has received the said money from Acute Daily Media Pvt. Ltd. as Loan Amount. The description of the “Loan Amount” is missing in the Deepashi Jain’s ledger and as well as in her Bank Statements and furthermore her Bank Statement reflects transfer of Rs. 05 Lakhs to Corporate Debtor under the head “TO TRANSFER- INB Business- ”. The amount against the name of Ms. Rekha Jain and Ms. Ojaswi Jain also do not reflect any such reference to “Loan Amount”.

(ii) The Balance Sheet does not specifically mention the names of the 04 entities, who have claimed to have advanced loans to the Corporate Debtor and are treated as Financial Creditors.

(iii) It is thus stated that the respondent-CD had fraudulently misrepresented the “routine business entries” as “loan entries” for securing an order of admission to insolvency Section 7 of IBC 2016.

(iv) It is pointed out that the 02 additional pages in the 2nd affidavit of the RP dated 23.01.2024 relating to “relevant pages of annexure to note 4 to Balance Sheet of CD for FY 2016-17 and note 7 Balance Sheet for the FY 2019-20” are not genuine as the names and signature of the Directors were forged.

It is further alleged that these 02 pages were entered for the very first time allegedly as “annexures to Notes” of the Audited Balance Sheets also go against the Statutory Auditors own Note.

Furthermore, these 02 additional pages were not the part of the audited Balance Sheet of the Financial Creditor for FY 2016-17 & FY 2019-20 as has been filed by the Corporate Debtor which the ROC and uploaded on the portal of MCA.

(v) It is also submitted that these amounts are not to be treated as “Financial Debt” as defined in Section 5(8) of the Code, as they lack the “borrowing cost” and thus cannot be held to be a disbursal against the consideration of Time Value of Time. In this connection, reliance is placed on decision of the Hon’ble Supreme Court in “Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Ltd. Etc.”

(vi) To sum up, it is alleged that the inconsistencies in the 02 affidavits dated 20.01.2024 and 23.01.2024 indicate clearly that there was a fraudulent intent on part of the Financial Creditors and the Corporate Debtor to defraud the Applicant/Shareholder and the Income Tax Department etc. It was not aimed at resolving any insolvency.

8. We have heard the Ld. Counsels and gone through the records. Before analyzing the allegations made by the Applicant, the essential ingredients of

Section 65 need to be put in perspective. For the sake of clarity, the provision of the Section 65 is extracted below:

“65. Fraudulent or malicious initiation of proceedings. -

(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.

(3) If any person initiates the pre-packaged insolvency resolution process—

(a) fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or

(b) with the intent to defraud any person,

the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.”

9. For the sake of discussion, a reference is also made to the following extracts from the relevant decisions of the Hon’ble NCLAT:

(i) **Pawan Kumar Ex-Director and Shareholder Vogue Clothiers Pvt. Ltd.**

Vs. Utsav Securities Pvt. Ltd. [(2021) ibclaw.in 368 NCLAT] vide

Judgement dated 03.08.2021 has observed:

“32. Section 65 provides that where any person furnishes any information under Section 7, which is false in material particulars, knowing it to be false or omits any material facts, knowing it to be material such person shall be punished with fine.”

(Emphasis Supplied)

(ii) **Shri Amit Katyal Vs. Mrs Meera Ahuja [(2020) ibclaw.in 326 NCLAT]**,

vide judgment dated 09.11.2020 has observed as follows:

“46. It is necessary to keep in mind that Sec 65 of the Code is not meant to negate the process U/S 7 or 9 of the Code. Penal action U/S Sec 65 can be taken only when the provision of the Code has been invoked fraudulently, with malicious intent.”

48. No penalty can be saddled either under Section 65(1) or (2) of the Code without recording an opinion that a prima facie case is establtsed to suggest that a person ‘fraudulently’ or with malicious intent for the purpose other than the resolution of Insolvency or Liquidation or with an intent to defraud any person has filed the Application.”

(Emphasis Supplied)

(iii) **Ashmeet Singh Bhatia v. Pragati Impex India Pvt. Ltd. and Anr.**

[(2024) ibclaw.in 63 NCLAT] vide judgment dated 02.02.2024 observed as under:

“16. The power under Section 65 of the Code can be exercised by the Adjudicating Authority only after satisfying that grounds as mentioned exist, if the Adjudicating Authority come to the conclusion that insolvency proceedings have been initiated fraudulently or with malicious intent for any other purpose other than for the resolution of insolvency of the Corporate Debtor, it can impose penalty as provided in the provision. While exercising jurisdiction under Section 65, the Adjudicating Authority is also fully entitled to close CIRP process and pass all consequential order. The mere fact that Section 7 Application has been admitted does not denude the jurisdiction of the Adjudicating Authority to examine the application under Section 65 of the Code.”

(Emphasis Supplied)

(iv) **Unigreen Global Pvt. Ltd. v. Punjab National Bank and Ors.**

[Company Appeal(AT)(Ins.) 81 of 2017] decided on 01.12.2017 and held as under:

“37. From the aforesaid provision, it is clear that for imposition of penalty under Section 65, the Adjudicating Authority on the basis of record is required to form prima facie opinion that the person (Financial Creditor / Corporate Applicant / Operational Applicant) has filed the petition for initiation of proceeding “fraudulently” or “with malicious intent” for the purpose other than the resolution of the insolvency or liquidation or that voluntary liquidation proceedings has been filed with the intent to defraud any person.

38. No such penalty under sub-section (1) or (2) of Section 65 can be imposed by the Adjudicating Authority without recording opinion for coming to the conclusion that a prima facie case is made out to suggest that the person “fraudulently” or “with malicious intent” for the purpose, other than the resolution insolvency or liquidation or with the intent to defraud any person has filed the application.”

(Emphasis Supplied)

(v) **Hytone Merchants Private Limited VS Satabadi Investment Consultants Private Limited [(2021) ibclaw.in 287 NCLAT]** decided on 30.06.2021, extracts inter alia the following paragraph from the decision of the Hon’ble Supreme Court in *Swiss Ribbons (P) Ltd v. Union of India*, [(2019) 4 SCC 17];

“59. What is also of relevance is that in order to protect the corporate debtor from being dragged into the corporate insolvency resolution process mala fide, the Code prescribes penalties. (Para 35)

37. Based on the law laid down by Hon’ble Supreme Court in the abovementioned case, it is clear that even if the Application filed under Section 7 meets all the requirements, then also the Adjudicating Authority has exercise discretion carefully to prevent and protect the Corporate Debtor from being dragged into the Corporate Insolvency Resolution Process mala fide.

38. Therefore, the Code prescribes penalties under Section 65 and 75. Furthermore, Section 65 explicitly says that if any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for resolution of Insolvency or liquidation, as the case may, the Adjudicating Authority may impose a penalty.”

(Emphasis Supplied)

10. Thus, even after the Section 7 application has been admitted, this Adjudicating Authority has the jurisdiction to consider the application alleging initiation of insolvency proceedings fraudulently or with malicious intent for any purpose other than the resolution of the insolvency of the Corporate Debtor. In the present case, the Applicant has stated that the original Section 7 application was filed to defeat the outcome of Oppression and Mismanagement case filed against the Corporate Debtor by the Applicant/Shareholder in 2013 (CP No. 143(ND)/2013) in which the present Applicant sought redressal of its grievance that the Promoters of M/s Sharp Eye Advertising Pvt. Ltd. decreased the shareholding of 62.57% to 17.86% by illegal allotment of shares to two other companies without due consent. It is noted that the said Petition was ruled in the favor of the Applicant. The Applicant has also pointed out various transactions reflected in the Audited Books of Accounts of the Corporate Debtor, which are purportedly contrary to the assertions made in the impugned proceedings under Section 7 of IBC, 2016 in the case of the Corporate Debtor.

11. These facts obviously were never brought before the Adjudicating Authority during the proceedings which culminated in the order dated

17.05.2022 initiating the CIRP in the case of the Corporate Debtor. Thus, we find enough justification to adjudicate the allegation leveled by the Applicant in the present application on merits.

12. In the case in hand, the Applicant has pointed out to certain financial transactions in the Audited Books of Accounts of the Corporate Debtor and related documents uploaded on the MCA website at the time of the disbursement of the alleged loans to the Corporate Debtor i.e., FY 2016-17. On the basis of the discrepancies in the aforementioned documents, it is alleged that normal financial transactions have been given the colour of a loan transaction subsequently to justify the filing of application under Section 7 against the Corporate Debtor ultimately resulting in the initiation of CIRP by the order of the Adjudicating Authority dated 17.05.2022. This Bench has proceeded to verify the correctness of these allegations with reference to the Audited Books of Accounts and related documents of the Corporate Debtor, which have been placed before this Bench by the RP of the Corporate Debtor. In this context, the alleged false material particulars as pointed out by the applicant are listed below:

- (i) The dates of the alleged Board Meetings such as 20.07.2016, 02.12.2019, 26.05.2019 and 30.12.2019 to avail the loan from Financial Creditor, are different from the date of Board Meetings shown in the Form MGT-7 (Annual Return) as filed by the Corporate Debtor.
- (ii) Though the remedy of IBC was mentioned in the alleged Loan Agreement dated 21.07.2016, the relevant Section 7 of the Code came into force only on 01.12.2016.

(iii) These alleged transactions are in violation of Section 186(2) of the Companies Act, 2013 as the Respondent No. 1/ Financial Creditor, being a corporate entity has neither placed any documents pertaining to any resolution authorizing to extend the loan beyond its paid up capital and free reserves nor the relevant documents have been filed before the ROC by the Respondent No. 1.

(iv) The Statutory Audit Report of the Corporate Debtor for the FY 2020-21 clearly points out at point no. 1(h) of the Notes to the Accounts, that “**The company does not have any borrowing cost**”. It is stated in the Annexure-A to the Independent Auditors’ Report, the Statutory Auditor Report for the FY 2019-20 that the CD has not accepted any deposit from the public covered u/s 73 to 76 of the Companies Act, 2013. Further, there was no mention about any loan taken in the statutory auditor report.

(v) The RP has confirmed that he has moved from D.K-1, Danish Kunj, Kolar Road, Tehsil Huzur, Bhopal to E-3/235 Arera Colony, Bhopal-462016 only on 30.4.2019 through the later address is mentioned in the Loan Agreements dated 21.07.2016.

13. In this context, we observe that:

“It is highly improbable that the first impugned loan transactions were made in the normal course of the business of the Respondent/Corporate Debtor and there is a valid ground to conclude that some of these evidences have been created much after the receipt of the amounts by the Corporate Debtor, which are subsequently given the color of the loan amounts.”

14. Furthermore, there is corroborative evidence to support the allegation of fraud in the Audited Books of Accounts itself.

14.1 The Audited Financial Statements of R-1/Financial Creditor shows that the amount receivable from Sharp Eye Advertising Private Limited has been shown under Main head Long Term Loan & advance sub-head Deposits which had been increased from Rs. 50.00 lakhs (in FY 2016-17) to Rs. 97.00 Lakhs (in FY 2020-21).

14.2 Furthermore, no accrued interest is shown in the Books of Accounts of R1/ Financial Creditor from Financial Year 2016-17 to 2020-21, which is contrary to the claim of the respondents of an accrued interest at the rate of 12% on the alleged loans.

15. In I.A. 461/2024, which was filed subsequently, the Applicants have made specific allegations with reference to the Audited Balance Sheets, documents uploaded on the MCA Website and documents of the Corporate Debtor in public domain. In the course of the present proceedings, the Respondents have not been able to rebut the aforementioned specific allegations except for taking the plea that the Applicant has been re-arguing the issues considered during the proceedings under Section 7 against the Corporate Debtor. This defence does not appear tenable as the facts recorded in the aforementioned documents are part of the statutory compliances made by the Corporate Debtor before the initiation of the CIRP proceedings.

16. To sum up, we are of the considered view that the aforementioned insolvency proceedings in C.P.(IB)-50(PB)/2021 resulting in our order dated

17.05.2022 were initiated fraudulently and with malicious intent for a purpose other than the resolution of the insolvency of the Corporate Debtor.

17. As a sequel, we recall the order dated 17.05.2022 initiating CIRP of the Corporate Debtor, obtained fraudulently from the Tribunal in C.P.(IB)-50(PB)/2021. The RP is directed to hand over the control and custody of the corporate debtor and its assets to the erstwhile management. The Financial creditors/Applicants in the C.P.(IB)-50(PB)/2021 are directed to pay the CIRP costs incurred so far within 7 days of this order.

18. Regarding action under Section 65(1) of IBC 2016, we deem it appropriate to issue a Show Cause Notice, under Rule 59 of the National Company Law Tribunal Rules, 2016 to the Financial Creditors - M/s. Acute Daily Media and Ors. through its Directors as to why penalty as stipulated under Section 65(1) of IBC, 2016 should not be imposed on it. The notice is made returnable on 09.09.2024. Learned Registrar NCLT would serve Show Cause Notice under Section 65(1) of IBC, 2016 read with Rule 59 of the National Company Law Tribunal Rules, 2016 upon M/s Acute Daily Media and other financial creditors calling upon them to explain and submit in writing as to why the penalty as stipulated under Section 65(1) of IBC, 2016 should not be imposed on them.

19. List on 09.09.2024.

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)