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**(2020) 06 NCLT CK 0029**

**In the National Company Law Appellate Tribunal, Pricipal Bench, New Delhi**

**Case No : (IB) No. 1295 (ND) Of 2019**

Jammu And Kashmir Bank Ltd

APPELLANT

Vs

Vinayak Rathi Steels Rolling Mills Pvt. Ltd

RESPONDENT

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**Date of Decision : 16-06-2020**

**Acts Referred:**

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 4, 4(3), 6  
Insolvency And Bankruptcy Code, 2016 — Section 5(7), 5(8), 7, 7(1), 7(2), 7(3), 7(5), 7(5)(a), 7(7), 8, 8(1), 8(2), 9, 14, 15, 17, 18, 20, 21, 31(1), 33  
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13(2), 17  
Companies Act, 1956 — Section 433(e)

**Citation : (2020) 06 NCLT CK 0029**

**Hon'ble Judges :** Abni Ranjan Kumar Sinha, J;Kapal Kumar Vohra, Member (Technical)

**Bench :** Division Bench

**Advocate :** Jatin Julka, Approva Malhotra, Syed Arsalan Abid, Prateek Khaitan, Vaibhav

**Final Decision :** Dismissed

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## **Judgement**

Abni Ranjan Kumar Sinha, J

1. The present application is being preferred by The Jammu & Kashmir Bank Ltd. (hereinafter referred to as "FC") against Vinayak Rathi Steels Rolling Mills Pvt. Ltd (hereinafter referred to as "CD") under Section 7 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code") read with Rule 6 of the IBC, 2016 to initiate Corporate Insolvency Resolution process in respect of CD.

2. The applicant/FC is a duly incorporated banking company incorporated under the then J&K Companies Act, No. XI of, 1977 (1920 AD) governed by the provisions of the Banking Regulation Act, 1949, having its Registered Office as

well as its Corporate Office at M.A. Road, Srinagar, Kashmir - 190001 with one of its branch office at 17-A, Ring Road, Lajpat Nagar-IV, New Delhi - 110024. The respondent/CD is a company incorporated under the Companies Act, 1956 having its registered office at Z-196, Loha Mandi, Naraina, New Delhi - 110028.

3. Brief Facts of the Application filed by Financial Creditor in short are as follows:

i. That the Financial Creditor is a banking company incorporated under the then J&K Companies Act, No. XI of, 1977 (1920 AD) governed by the provisions of the Banking Regulation Act, 1949, having its Registered Office as well as its Corporate Office at M.A. Road, Srinagar, Kashmir- 190001 with one of its branch office at 17-A, Ring Road, Lajpat Nagar-IV, New Delhi - 110024.

ii. That the Respondent, Vinayak Rathi Steels Rolling Mills Private Limited (hereinafter referred to as the "Corporate Debtor") is a company incorporate under the Companies Act, 1956 having its registered office at Z-196, Loha Mandi, Naraina, New Delhi - 110028. The Master Data from the website of the Ministry of Corporate Affairs in relation to the Corporate Debtor has been already placed on record.

iii. That in the year 2010, the Financial Creditor on the request of the Corporate Debtor, sanctioned a Term Loan Facility of Rs. 19 Crores, Cash Credit Facility of Rs. 12.50 Crores and Inland Letter of Credit/Foreign Letter of Credit/Bank Guarantee of Rs. 1.50 Crores for the purposes of part financing the project cost and other business/corporate requirements of the Corporate Debtor for developing, owning, designing, financing, constructing, commissioning, operating and maintaining a steel rolling mill (TMT Iron Bar) at Sikandrabad, UP (hereinafter referred to as the "Project"). The sanction was accorded after executing a Sanction letter dated 20.05.2010 and Loan Agreement dated 09.08.2010, which have been enclosed alongwith the application and are collectively marked as Annexure P-3 (Colly).

iv. That in terms of the aforementioned credit facilities, the Financial Creditor and Corporate Debtor executed security documents being Letter of Undertaking, Letter of Continuity, Letter of Waiver, Deed of Personal Guarantee and counter guarantee, Hypothecation agreement, Irrevocable Power of Attorney, Affidavit of the Corporate Debtor, Affidavit of the Director of the Corporate Debtor, Memorandum of Entry all dated 09.08.2010. The said documents have been enclosed alongwith the application and are collectively marked as Annexure P-4 (Colly).

v. That thereafter in the year 2013, the Corporate Debtor requested for an enhancement of the existing Cash Credit Facility from 12.5 Crore to 22.5 Crore and the same was enhanced by the Financial Creditor vide Sanction Letter dated 18.04.2013 and after executing a Loan Agreement dated 06.05.2013. The period of loan was decided to be one year which was subject to renewal after annual review. A copy of the Sanction letter dated 18.04.2013 & Loan Agreement dated 06.05.2013 have been enclosed alongside the application and are collectively

marked as Annexure P-5(Colly),

vi. That in terms of the aforementioned credit facilities the Financial Creditor and Corporate Debtor executed various security documents being Hypothecation of Book Debts, Hypothecation Deed, Letter of Undertaking, Letter of Waiver of Notice, Deed of Personal Guarantee, Memo of Deposit of Title Deeds, Affidavit of Rajiv Rathi, Affidavit of Ram Chander Rathi all dated 06.05.2013 and Letter of Continuity dated 14.05.2013. The said security documents have been enclosed alongside the Application and are collectively marked as Annexure P-6(Colly).

vii. That yet again in the year 2015, the Corporate Debtor requested for enhancement in the existing Cash Credit Facility from 22.5 Crore to 30 Crore, which was duly sanctioned by the Corporate Debtor vide Sanction letter dated 20.03.2015 after executing a Loan Agreement dated 06.05.2015. The said Sanction letter dated 20.03.2015 and Loan Agreement dated 06.05.2015 has been enclosed alongside the Application and are marked as Annexure P-7(Colly).

viii. That in terms of the aforesaid Cash Credit Facility, security documents were executed by the Corporate Debtor which include Letter of waiver of Notice, Letter of Continuity, Letter of Undertaking, Deed of Personal Guarantee, Hypothecation Deed, Hypothecation of Book Debts, Affidavit of Rajiv Rathi, Affidavit of Ram Chander Rathi and Extension of Charge all dated 06.05.2015. Copies of the said documents have been enclosed alongside the Application and are collectively marked as Annexure P-8(Colly).

ix. That in the year 2015, at the request of the Corporate Debtor, the Financial Creditor sanctioned an Ad-hoc facility of 3 Crore over and above the regular working capital/cash credit facility of 30 Crore for a period of 90 days against the extension of charge over existing securities vide Sanction letter dated 17.09.2015. Accordingly, security documents being Hypothecation Deed, Extension of Charge, Letter of waiver of Notice and Letter of Undertaking all dated 07.10.2015 were also executed. The sanction letter dated 17.09.2015 and the security documents all dated 07.10.2015 have been enclosed alongside the Application and are collectively marked as Annexure P-9(Colly).

x. That subsequently in the year 2016, the Corporate Debtor requested the Financial Creditor for enhancement of the existing working capital/Cash Credit Facility to the tune of Rs. 35 Crore from Rs. 30 Crore as well as furnishing of a fresh Bank Guarantee Facility of Rs. 2 Crore for the purpose of procurement of raw material as a sub-limit of the working capital facility of the Corporate Debtor. The same was again sanctioned vide Sanction letter dated 16.05.2016 after executing a Loan Agreement dated 17.05.2016. Copies of the Sanction Letter dated 16.05.2016 and Loan Agreement dated 17.05.2016 have been enclosed alongside the Application and are collectively marked as Annexure P-10(Colly).

xi. That in terms of the aforementioned sanction dated 16.05.2016, the Corporate Debtor executed security documents being Deed of Personal Guarantee, Deed of Counter Guarantee, Hypothecation Agreement, Letter of

Mortgagor confirming the extension of the Equitable Mortgage, Letter of Undertaking, Affidavit of Rajiv Rathi, Irrevocable Power of Attorney all dated 17.05.2016 as well as Letter of Continuity and Letter of waiver both dated 19.05.2016. Copies of the said documents have been enclosed alongside the Application and are collectively marked as Annexure P-11(Colly).

xii. That in the year 2016 itself, the Corporate Debtor yet again requested the Financial Creditor for issuance of an Ad-Hoc facility of 4 Crore over and above the existing Cash Credit Limit of Rs. 35 Crore. The Said Ad-Hoc Facility was sanctioned by the Financial Creditor vide Sanction letter dated 13.12.2016 after executing a Loan Agreement dated 21.12.2016. In terms of the aforementioned Sanction Letter dated 13.12.2016, the Corporate Debtor executed Security Documents being Demand Promissory Note of Rs. 39 Crore dated 23.12.2016, Demand Promissory Note of Rs. 4 Crore dated 23.12.2016, Deed of Personal Guarantee dated 21.12.2016, Letter of Mortgagor confirming the Equity Mortgage and its extension both dated 21.12.2016. The aforesaid Sanction letter, Loan Agreement and Security documents have been enclosed alongside the Application and are collectively marked as Annexure P-12(Colly).

xiii. That after availing the aforesaid Credit Facilities from the Financial Creditor, the accounts of the Corporate Debtor become irregular and despite repeated requests and demands, the Corporate Debtor failed and neglected to either to regularize its Credit Facilities or make payments of the outstanding amounts due and payable.

xiv. That the last payment was made by the Corporate Debtor in its Credit Facility Account on 15.07.2017, thereafter, the Corporate Debtor has continuously failed and neglected to pay the credit facilities availed by it from the Financial Creditor. As a consequence thereof, the account of the Corporate Debtor was declared NPA on 30.09.2017 as per the prudential norms issued by the Reserve Bank of India.

xv. That as a result of the non-payment of the outstanding dues by the Corporate Debtor, the Financial Creditor issued a Demand Notice dated 07.10.2017 calling upon the Corporate Debtor to pay the outstanding due amount being Rs. 41,39,39,136.52/-. The Financial Creditor further elucidated in the said Demand Notice that the Loan Account of the Corporate Debtor had been downgraded to NPA category owing to the three major factors being (1) Failure of serving Interest; (2) Failure to adjust the ad hoc facility of Rs. 400.00 lacs; and (3) Failure to adjust the Term Loan.

xvi. That no heed was paid by the Corporate Debtor to the Demand Notice dated 07.10.2017 for over 18 months and since the outstanding amount was still pending, the Financial Creditor was constrained to issue a Loan Recall Notice dated 14.03.2019 calling upon the Corporate Debtor to adjust its outstanding Credit Facilities within a period of 07 days from the date of the receipt of the Notice by paying the outstanding amount of Rs. 49,24,55,423.52.

xvii. That the Corporate Debtor, in response to the Loan Recall Notice dated

14.03.2019 sent Reply on 22.03.2019 wherein it was specifically admitted that at the request of the Corporate Debtor, the Financial Creditor had sanctioned the aforementioned sanctions for Cash Credit Facility, Term Loan Facility and Ad-Hoc Facility against securities being the personal guarantees of the directors of the Corporate Debtor and creation of equitable mortgage of two immovable properties (one situated at Mathura Road & the other at Village Kojhabad, Bulundsher). Furthermore, the Corporate Debtor in its Reply has stated that it has been making regular payments, however the record itself makes it evident that no payment had been made into either the Cash Credit Account or the Term Loan Account since 15.07.2017.

Copies of the Demand Notice dated 07.10.2017, Loan Recall Notice dated 14.03.2019 and Reply dated 22.03.2019 have been enclosed alongside the Application and are collectively marked as Annexure P-13(Colly).

xviii. That Financial Creditor maintained proper accounts of the Corporate Debtor and the statement of the account shows an outstanding/debit balance payable by the Corporate Debtor as on 30.04.2019 to be Rs. 50, 49,57,539.52/-. A copy of the Statement of Accounts depicting the outstanding balance as on 30.04.2019 has been enclosed alongside the Applicant and is marked as Annexure P-14.

S. No.

Credit Facility

Outstanding as on 30.04.2019

Rate of Interest

Debt fell due (Development Date)

1

Cash Credit Facility

Rs. 49,38,67,683.52/-

12.45%

01.07.2017

2

Term Loan

Rs. 1,10,89,856.00/-

13%

01.07.2017

3

Total

Rs.

--

50,49,57,539.52/-

4. That on receipt of summons, CD appeared and filed reply. The facts mentioned in the reply in short is that originally the CD was incorporated as Good Luck Sales Pvt. Ltd in 1979 but the same was subsequently changed in the year 2008. The company commenced commercial operations in December 2011 and is engaged in the business of manufacturing Thermo Mechanically Treated (TMT) products and the manufacturing plant is situated at Sikandrabad, Uttar Pradesh, with its head office located at New Delhi.

5. That the CD was sanctioned credit facilities from the J&K Bank and operated its account satisfactorily for many years and the loan was repaid by the CD in timely instalment over a period of time.

6. That the CD has made regular payment which are given below:-

Details of the payments made to the Bank

Financial Year

TL Repayment

TL Interest Payment

CC Interest Payment

FY 2016-17

299

33.89

447.5

FY 2015-16

380

69.37

399.02

FY 2014-15

380

125.6

295.99

FY 2013-14

380

187.05

221.95

FY 2012-13

380

246.17

1 15.40

Total

1819

662.08

1479.86

7. Further, that the CD had been dealing with the FC for the past 8 years. Further the CD had been facing tough time on account of tight liquidity position in the economy and due to sudden crash, the working capital of the company got further squeezed. That on account of unfavourable market conditions, instalment was not being paid in time and further the FC issued a notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 and claimed a due of Rs. 5400 Lakh.

8. That the CD in his written synopsis stated as follows:-

i. It was further the allegation of the Financial Creditor that the account of the Corporate Debtor was classified as Non-Performing Assets (NPA) w.e.f. 29.09.2017 and that the following amounts became due and payable by the Corporate Debtor as on 29.09.2017:

Name of the Facility

Amount Due

(i) Cash Credit

Rs. 40,48,99,423.52

(ii) Term Loan

Rs. 90,39,713.00

Total

Rs. 41,39,39,136.52.

ii. That a detailed reply to the said Notice was issued by the Corporate Debtor vide reply dated 14.12.2017. That the said reply was disposed of vide

communication dated 27.12.2017 issued by the Financial Creditor thereby rejecting all the contentions raised by the Corporate Debtor in the said reply.

iii. That it was alleged in the Notice dated 17.10.2017 issued by the Financial Creditor that the following properties were mortgaged/hypothecated in favour of the Financial Creditor:

a. Mortgage of land measuring 5.579 acres along with building situated in part of khasra No. 204 behind mini power UPSIDC village Jokhabad, Tehsil: Sikanderabad, District Bulandshahar(UP).

b. Hypothecation of plant & machinery and other misc. fixed assets of the Unit.

c. Mortgage of Land situated at plot No. 24/4, Block-A, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi measuring 1971 Sq. Meters along with 2 storied (Ground floor, 1st floor & shed)constructed thereon standing in the name of Mr. Ram Chander Rathi.

iv. Without prejudice to the above contentions, it is submitted that the Financial Creditor itself had alleged in the Notice dated 17.10.2017 that there are two immovable properties which were allegedly mortgaged in its favour by the Corporate Debtor.

v. It is submitted that one of the Directors of the Corporate Debtor had approached the Financial Creditor with respect to the property situated at Plot No. 24/4, Block-A, Mohan Co-operative Industrial Estate, Mathura Road, New Delhi and informed the Financial Creditor that the said property was leased out vide registered Lease Deed dated 18.09.2017 in favour of Concorde Motors India Limited for a monthly rent of Rs. 8,00,000/- (Rupees Eight Lakh Only). It is further submitted that the Corporate Debtor had duly apprised the Financial Creditor about the proposal of leasing out the said property situated at Mohan Cooperative Industrial Estate, Mathura Road. New Delhi and that the Corporate Debtor would deposit the rent realized from said property with the Financial Creditor which can be adjusted towards the alleged outstanding dues of the Corporate Debtor.

vi. Subsequently, the Financial Creditor had got the said Mohan Co-operative Estate Property vacated from the tenant namely Concord Motors Pvt. Ltd. However, without informing the Corporate Debtor, the Financial Creditor again leased out the said premises on rent to Concord Motors Pvt. Ltd. and started realizing rent on a monthly basis. It is submitted that the present action of the Financial Creditor of initiating the present proceedings against the Corporate Debtor is entirely mala fide inasmuch as admittedly the value of the Mohan Co-operative Estate property is more than Rs. 50,00,00,000/-(Rupees Fifty Crore Only) and the Financial Creditor has no intention to sell the said property. This is despite the fact that the Corporate Debtor had repeatedly offered to the Financial Creditor that the said Mohan Co-operative Estate Property be auctioned and the entire sale proceed be adjusted towards outstanding dues of the Financial

Creditor. However, with mala fide intention, the Financial Creditor gave the said property on rent. It is a matter of common knowledge that a rented property cannot realise its true market value on sale. Hence, on one hand the Financial Creditor is not willing to sell the said Mohan Co-operative Estate property to realise its outstanding dues and on the other hand the only intention of the Financial Creditor is to kill the industry of the Corporate Debtor. In view of the above facts, it is submitted that there was no default which can be attributed to the Corporate Debtor on the basis of which the present proceedings have been initiated by the Financial Creditors. Hence, the present proceedings are liable to be dismissed with heavy cost.

vii. As already mentioned hereinabove that the Financial Creditor has been realizing the complete rent of the said property, the Financial Creditor has realized an amount of Rs. 1,92,00,000/- (Rupees One Crore Ninety-Two Lacs only) approx. till date. It is further submitted that the Financial Creditor has not disclosed the said fact of realization of rent thereby suppressing material facts necessary for the proper adjudication of the present petition. Hence, the present Petition is liable to be dismissed in as much as the Financial Creditor has suppressed material facts from this Hon'ble Tribunal.

viii. It is further submitted that with a view to regularize the account and with a view to restructure the account of the Corporate Debtor, the Corporate Debtor submitted a detailed restructuring proposal with the Financial Creditor vide a restructuring proposal dated 07.02.2018.

ix. That it is relevant to point out that the Corporate Debtor is a running concern which is employing more than 300 workers whose families are totally dependent on the running of the said factory. However, the Financial Creditor is bent upon to close down the factory and auction the same thereby ruining the business of the Corporate Debtor herein. It is submitted that in case the factory of the Corporate Debtor is closed, it would have a cascading effect in as much as the families of more than 300 workers would not only suffer but the workers would become totally jobless and would lose their employment.

x. That pursuant to the said coercive action initiated by the Financial Creditor, the Corporate Debtor was constrained to file a Securitization Application under Section 17 of the Securitization Act, 2002 being SA No. 88 of 2018 before the learned Debt Recovery Tribunal, New Delhi. The said S.A. is pending disposal before the Ld. Debt Recovery Tribunal, New Delhi.

xi. That it is the submission of the Corporate Debtor that the circle rate for the property situated at Mohan Co-operative Industrial Estate is to the tune of the Rs. 2,55,360/- per sq. meter. Admittedly, the area of the property in question is 1971 sq. mtr. Hence, even if the property is auctioned at the circle rate, as declared by DDA, the base minimum value of the property would be Rs. 50,35,14,560/- (Rupees fifty crores thirty-five lacs fourteen thousand five hundred and sixty only).

xii. It is submitted in this regard that it is a matter of common knowledge that the market value of the property is always more than the circle rate. Hence, the value of the property in question is more than Rs. 50,00,00,000/-. Hence, even if calculated conservatively, the property of the Corporate Debtor and its guarantors should fetch not less than Rs. 52,00,00,000/- to Rs. 55,00,00,000/- crores in terms of the market value.

xiii. It is submitted that on account of the fact that the Corporate Debtor has approached the Financial Creditor on a number of occasions with a request that it may sell the said Mohan Cooperative Industrial Area property. However, no steps have been taken by the Financial Creditor to sell the said Mohan Cooperative Industrial Area property to realize its dues. In fact, if the Financial Credit -would have sold the said Mohan Cooperative Industrial Area property, the alleged outstanding dues would not have become due and payable against the Corporate Debtor since the entire outstanding dues would have been cleared by the sale of the said Mohan Co-operative Industrial Area property..

9. We have heard the Ld. Counsel for the FC. None appeared on behalf of Corporate Debtor.

10. Ld. Counsel for the FC in course of his arguments has raised all the facts mentioned in the application as well as the written synopsis filed on behalf of the FC. He further submitted that in view of Section 7 of IBC, the Applicant is required to establish that:-

I. Whether the Applicant comes under the definition of Financial Creditor under Section 5(7) of the IBC?

II. Whether there is existing Financial Debt as defined in Section 5(8)?

III. Whether any default had been occurred in the payment of the Financial Debt? If yes, then when it became due and payable?

11. He further submitted that by filing reply, the CD has admitted the fact that he had been granted cash credit facility and also admit that there is default in payment of debt. He further submitted that of course the CD claimed in his reply that he has mortgaged several immovable properties in favour of FC and the sale proceed of those properties will satisfy the loan amount of the FC and in its reply, the contention of the FC is that the FC is unable to sell the mortgaged properties at the valued price to pay off its debt and as a result of which the present case is filed. He also placed reliance upon the Following decisions:-

1. Innoventive Industries Ltd. v. ICICI Bank and Anr., (2018) 1 SCC 407

2. Swiss Ribbons Pvt. Ltd. and Ors. vs. Union of India (UOI) and Ors. (25.01.2019 - SC),

3. Naveen Luthra and Ors. vs. Bell Finvest (India) Ltd. and Ors. Company Appeal (AT) (Insolvency) No. 336 of 2017

4. V.R. Hemantraj vs. Stanbic Bank Ghana Ltd. and Ors. -Company Appeal (AT) (Insolvency) No. 213 of 2018

12. He further submitted that "Mere pendency of the case before the DRT for adjudicating of such disputed amount cannot be a ground to reject the application u/s. 7 of the I&B Code, if the Adjudicating Authority is satisfied that there is a 'debt' and 'default' and the application is complete" and in this regard he has placed reliance on the judgment of the Hon'ble NCLAT in "Harkirat S. Bedi vs. Oriental Bank of Commerce - Company Appeal (AT) (Insolvency) No. 499 of 2019"

13. On the other hand, although the several opportunities were given to the CD to argue the matter but none appeared on behalf of the CD, therefore, the matter was posted for judgment. However, the CD filed his written synopsis, therefore, we have gone through the submissions made on behalf of the CD, which have already been mentioned by us in the aforementioned Paragraph. The CD in his written synopsis mentioned this fact that the FC had got the said Mohan Co-operative Estate Property vacated from the tenant namely Concord Motors Pvt. Ltd. It is also mentioned that the CD had repeatedly offered to the Financial Creditor that the said Mohan Co-operative Estate Property be auctioned and the entire sale proceed be adjusted towards outstanding dues of the Financial Creditor. But the FC with mala fide intention, gave the said property on rent. It is also mentioned since the FC took the possession of the said property, therefore, there is no default. It is further submitted that the FC has been realizing the complete rent of the said property, the Financial Creditor has realized an amount of Rs. 1,92,00,000/- (Rupees One Crore Ninety-Two Lacs only) approx. till date and the FC has not disclosed the said fact of realization of rent. It is further submitted that with a view to regularize the account and with a view to restructure the account of the CD, the CD submitted a detailed restructuring proposal with the FC vide a restructuring proposal dated 07.02.2018 but the same was not considered. It is further submitted that the circle rate for the property situated at Mohan Co-operative Industrial Estate is to the tune of the Rs. 2,55,360/- per sq. Meter and admittedly, the area of the property in question is 1971 sq. mtr. Hence, even if the property is auctioned at the circle rate, as declared by DDA, the base minimum value of the property would be Rs. 50,35,14,560/- (Rupees fifty crores thirty-five lacs fourteen thousand five hundred and sixty only), therefore, there is no default on the part of the CD. However, the CD in his written submissions also admit that he had been given cash credit facility by the FC and he availed that facility.

14. Now, in the light of the submissions made on behalf of the FC and in the light of the facts mentioned in the written submissions of the CD, we have gone through the averments made in the application, reply and documents enclosed with application and reply as well as written synopsis filed on behalf of both the parties and we find that it is an admitted fact that the applicant had sanctioned a cash credit facility/term loan/BG/LC vide sanction letter dated 25.05.2010, which

is evident from annexure P3 (Colly) at page no. 39 of the paper book and on the basis of that a loan agreement was executed between the FC and CD, which is evident from page 45 onwards of the paper book. We further find that from time to time, the loan facility had been enhanced on the request of the CD and that has not been denied by the CD by filing the reply. The only ground taken by the CD is that the FC has taken possession of the property situated at plot No. 24/4, Block-A, Mohan Co-operative Industrial Estate, Mathura Road, New Delhi and if that property is auctioned then the sale proceed of that property would be sufficient to liquidate the debt of the FC.

15. Therefore, in the background of these facts, we would like to consider this aspect that whether taking possession of any immovable property amounts to realisation of the debt or not? And we would also like to consider this submission of the CD that in view of the facts that the FC has taken the possession of the said property and leased out the same and realizing the rent, which would be sufficient to liquidate the debt, this also amounts to realization of the debt or not?

16. At this juncture, we have gone through the written submissions filed on behalf of the CD and we find that in support of his contentions, the CD has not placed reliance on any decision, which would substantiate the CD's submission on the liquidation of the debt. On the other hand, Ld. Counsel for the FC placed reliance upon the judgments, which we have referred in the aforementioned paragraphs, therefore, at this juncture, we would like to refer Section 7 of the IBC and the same is quoted below:-

"7. Initiation of corporate insolvency resolution process by financial creditor-

(1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation.--For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under subsection (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish--

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section(2), ascertain the existence of a default from the

records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section

(5) within such time, it shall record its reasons in writing for the same.

(5) Where the Adjudicating Authority is satisfied that--

(a) a default has occurred and the application under subsection (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution, professional, it may, by order, admit such application; or

(b) default has not occurred or the application under subsection (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate--

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be."

17. At this juncture, we would also like to refer the decisions upon which the FC has placed reliance:-

A. In *Swiss Ribbons Pvt. Ltd. and Ors. vs. Union of India (UOI) and Ors.* (25.01.2019 - SC),

The Hon'ble Supreme Court has clearly held that:

"Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor. It is for this reason that a financial creditor has to prove "default" as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors under Section 7 and by operational creditors Under Sections 8 and 9 of the Code becomes clear".

Further, the Apex court has laid down the grounds for "determination of default".

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

The Hon'ble Apex Court farther outlined that "Apart from the record maintained by such utility, Form 1 appended to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016" make it clear that the following are other sources which evidence a financial debt:

- i. Particulars of security held, if any, the date of its creation, its estimated value as per the creditor;
- ii. Certificate of registration of charge issued by the registrar of companies (if the corporate debtor is a company);
- iii. Order of a court, tribunal or arbitral panel adjudicating on the default;
- iv. Record of default with the information utility;
- v. Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925;
- vi. The latest and complete copy of the financial contract reflecting all amendments and waivers to date;
- vii. A record of default as available with any credit information company;
- viii. Copies of entries in a bankers book in accordance with the Bankers Books Evidence Act, 1891.

B. In *Innoventive Industries Limited Vs. ICICI Bank* reported in 2018 (1) SCC 407 Hon'ble Supreme Court held:-

"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution, professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under

Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing -i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise".

18. When we shall consider the submissions of the CD in the light of the aforesaid provision and decisions then we are of the considered view that the Hon'ble Apex Court in the matter of Swiss Ribbons Pvt. Ltd. and Ors. vs. Union of India (UOI) and Ors. (25.01.2019 - SC) has laid down the grounds for "determination of default". The judgment reads that "the trigger for a financial creditor's application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(e) of the Companies Act, 1956

has been repealed by the Code and a change in approach has been brought about. Legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default". The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation" and when we shall consider the provisions of the aforementioned decisions, then we find that here in this case in hand it is admitted by the CD that a cash credit facility was provided to him by the FC and to some extent, it is also admitted by the CD that there is default in repayment of the debt. The only contention of the CD is that since the FC had taken over the possession of the premises situated at plot No. 24/4, Block-A, Mohan Co-operative Industrial Estate, Mathura Road, New Delhi measuring 1971 Sq. Meters along with 2 storied (Ground floor, 1st floor & shed) and FC is also realizing rent and further contention is that if the said property is auctioned then the sale proceed would be sufficient to liquidate the debt. Hence, there is no default.

19. As we have already mentioned this fact that the loan has not been repaid by the CD which is due and payable and Hon'ble Supreme Court In *Innoventive Industries Limited Vs. ICICI Bank* reported in 2018 (1) SCC 407 which we have referred above, held that there is difference between Section 9 of IBC, 2016 and Section 7 IBC, 2016. The moment it is established that there is a default in payment of Financial debt by the Corporate Debtor, which is due and payable and the application is complete and no disciplinary proceedings is pending against the proposed RP then the Adjudicating Authority has no option but to admit the application. So far dispute is concerned like Section 9 of the IBC, 2016, there is no scope to raise the disputes. Therefore, the averments made in the reply and Written submission of the Corporate Debtor that Financial Creditor has already taken the possession of the immovable property which sale proceed would be sufficient to satisfy the debt is not liable to be accepted.

20. In the light of the aforesaid discussions, when we shall consider the case in hand, then we find that the application is complete and the loan has been disbursed and the same has not been repaid by the Corporate Debtor, therefore there is default in payment of debt, there is no disciplinary proceedings pending against the RP. Therefore, we have no option but to admit the application under Section 7(5)(a) of the IBC, 2016.

21. Accordingly, this petition is ADMITTED. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying:-

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

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

(c) any action to foreclose, recover or enforce any security interest created by

the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

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

Further:

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator. (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

22. The Financial Creditor has proposed the name of Mr. Neeraj Bhatia R/o P-27m 1st Floor, Malviya Nagar, New Delhi-110017 having Email: nbtracel@yahoo.com and Registration No. : IBBI/IPA-001/IP-P00824/2017-18/11400, duly empanelled with the IBBI as the IRP. Therefore, he is appointed as IRP in this matter and directed to take such steps as are mandated under the Code, more specifically under Sections 15, 17, 18, 20 and 21 and shall file his report before the Adjudicating Authority.

23. The Financial Creditor is directed to deposit a sum of Rs. 2 lakhs to meet the immediate expenses of IRP. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Financial Creditor to be recovered as CIR costs.

24. Copy of the order be sent to both the parties as well as to the IRP.

25. To come up on for further consideration.