
(2023) 03 NCLT CK 0047

In the National Company Law Tribunal

Case No : CP (IB) No.527/MB IV/2021

Sachana Exports Private Limited Vs Gstaad Hotels Pvt. Ltd ?

Date of Decision : 21-03-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(8), 7, 7(1), 7(2), 7(5), 7(5)(a)
Limitation Act, 1963 — Section 18
Companies Act, 1956 — Section 433
Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 — Rule 4, 4(3)

Citation : (2023) 03 NCLT CK 0047

Hon'ble Judges : Kishore Vemulapalli, Member (J); Prabhat Kumar, Member (T)

Bench : Division Bench

Advocate : Nimay Dave, Ajesh Kumar, Rohit Gupta

Final Decision : Disposed Of

Judgement

Prabhat Kumar Member (Technical)

1. This is a Company Petition being C.P. (IB) No. 527/NCLT/MB/C-IV/2021 filed by Sachana Exports Private Limited, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Gstaad Hotels Private Limited, Corporate Debtor and is filed on 15.05.2021.

1.1. The Financial Creditor is a company registered under Companies Act, 2013 having CIN no. U51900MH1980PTC022708 and present Application has been signed and verified by Mr. Sunil Ahuja stated to be person authorized to submit Application on its behalf, however, the copy of Board Resolution or any authorization is not annexed to the Application dated.

1.2. The Shares of the Corporate debtor are owned by three groups through their respective entities/individual i.e. (a) Raheja Group; (b) Ahuja Group; and (c) Royal Group. Each group has appointed its nominee as director on the board of the corporate debtor. The Corporate Debtor is in hospitality services and owns one Hotel in Bangalore and funds raised from its shareholder(s) as subscription

to equity shares and as loan were utilised to fund the construction of such hotel. The Corporate debtor had also borrowed from the banks/financial institutions and the money raised from the shareholder groups constituted the margin for such finance raised from outside. The corporate debtor is managed by Raheja Group.

2. The Financial Creditor has claimed debt of Rs. 7,60,57,321/- (Principal amounting to Rs. 1,80,00,000/- and interest thereon till date of filing of present Application @18% amounting to Rs. 5,80,57,321/-) and has submitted that this debt is in default since 19.04.2021.

3. It has been submitted by the Applicant that Loan of Rs. 1,80,00,000/- was given to the Corporate Debtor in the year 2012 and TDS on interest accrued thereon was deducted by the Financial Creditor and remitted to the Income Tax Department which is evidenced from the Form 26AS downloaded from TRACES by the Applicant. Further, the Corporate Debtor had sought confirmation of balance from the Applicant for the year 2017-18 which showed a balance of Rs. 1,80,00,000/- due and payable to the Applicant. Further, the audited Financial Balance sheet statement(s) for the year ended 31.03.2018 discloses unsecured loan taken (interest bearing) from the Applicant amounting to Rs. 1,80,00,000/-. This fact is further declared in the Audited Financial statement for the year ended 31.03.2020 under Related party disclosures at note 34.

3.1. The Financial Creditor has annexed the reply dated 01.04.2017 to the call notice dated 17.03.2017 issued by Corporate Debtor. This reply was sent through Legal Counsel on behalf of Marvel Fragrances Private Limited ("Marvel") and Mr. Sunil Ahuja, to the Corporate Debtor. The following facts emerges from the said reply –

3.1.1. A share subscription cum Shareholders agreement dated 5th May 2009 (hereinafter referred to as "SSSA") was entered into by and between Mr. Vijay B. Raheja being party of the first part; Mr. Deepak Raheja being party of the second part; Marvel being party of the third part (Ahuja Group); M/s. Royal Investments Ltd. being party of the fourth part; and the Corporate Debtor being the party of the fifth part. It was always agreed and confirmed by the shareholders that they would nominate the person/entity to whom the shares are to be allotted, accordingly, the Corporate Debtor allotted its shares to these groups' nominated entities.

3.1.2. Pursuant to the above understanding, Mr. M.D. Ahuja made payment of Rs.1,25,00,000/- (Rupees One Crore Twenty-Five Lakhs Only) on behalf of Marvel, however, fully paid up shares to the extent of Rs.1,00,00,000/- (Rupees One Crore Only) were allotted to Mr. M.D. Ahuja and the balance amount of Rs.25,00,000/- (Rupees Twenty-Five Lakhs only) was shown as a loan in the books of the Corporate Debtor. Over a period of time, Marvel also made payment of Rs.20,50,00,000/-(Rupees Twenty Crores Fifty Lakhs Only), however, shares only to the extent of Rs.19,00,00,000/- (Rupees Nineteen Crores Only) were allotted to Marvel and the shares with respect to the balance amount of

Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs Only) have till date not been allotted.

3.1.3. The Ahuja Group agreed to lend monies to the Corporate Debtor when it was in dire need of funds to carry interest at the rate of 18% p.a. It was agreed that portion of the loan amount would be treated as capital contribution and the same would be adjusted against the balance amounts payable towards the shares to be allotted as per the SSSA, if any. It is stated that Ahuja Group brought in various amounts through its sister concerns based on this understanding.

3.1.4. Further, Applicant Company; M/s First Choice Property Pvt. Ltd. And M/s Ahuja Finance Pvt. Ltd. advanced a sum of Rs.1,80,00,000/-(Rupees One Crore Eighty Lakhs Only); Rs.2,85,00,000/- (Rupees Two Crore Eighty-Five Lakhs Only); and Rs.1,00,00,000/- (Rupees One Crore Only) respectively to the Corporate Debtor. These companies belonged to Ahuja Group and its relatives. Ahuja Group had instructed the Corporate Debtor through Mr. Deepak Raheja that since the Corporate Debtor was unable to repay the amount, the part thereof should be utilized towards allotment of shares under the SSSA and the balance amounts should be refunded with interest thereon, as agreed.

3.1.5. On 19th October 2016, the company Secretary of the Corporate Debtor issued a notice for holding fourth meeting of the Board of Directors of the Corporate Debtor for the financial year 2016-17 on 27th October 2016 at 11.30 a.m. The agenda also contained one item to discuss unpaid call money (allegedly) due to the Corporate Debtor by Marvel. However, Mr. Sunil Ahuja requested Mr. Raheja for alternate date as he was not available on the appointed date; also alleged that minutes of previous meeting are fabricated; sought audit or verifications of accounts; alleged that fund problem is on account of gross project mismanagement; and informed that instructions (as per agreed understanding) were given to appropriate the loans given by Group entities towards unpaid call money. However, Mr. Raheja refuted all allegations without giving any explanation and/or justification for the same. However, in none of these emails did Mr. Raheja dispute such instructions or understanding mentioned above.

3.1.6. On 8th February 2017, the company Secretary of the Corporate Debtor issued a notice along with agenda for holding fifth meeting of the Board of Directors of the Corporate Debtor for the financial year 2016-17 on 20th February 2017 at 11.30 a.m. and also supplied the minutes of the last meeting. Mr. Sunil Ahuja attended the Board of Director meeting held on 20th February 2017 and submitted a letter whereby the Corporate Debtor was asked to first issue the equity to the extent of the shortfall i.e. Rs. 1,50,00,000/- (Rupees One Crore Fifty Lakhs Only) to Marvel and Rs. 25,00,000/- (Rupees Twenty-Five Lakhs Only) to Mr. M D Ahuja. The Corporate Debtor was called upon to issue equity worth (i) Rs.1,62,50,000/- (Rupees One Crore Sixty Two Lakhs Fifty Thousand Only) in favour of Applicant and (ii) issue equity worth

Rs.1,00,00,000/- (Rupees One Crore Only) in favour of Ahuja Finance Pvt. Ltd. and thereafter refund the balance amount with interest due thereon.

3.1.7. The Corporate Debtor has incorrectly represented with Ahuja Group that the loans of about Rs.5,90,00,000/- (Rupees Five Crores Ninety Lakhs Only) from various sister concerns was infused in the Corporate Debtor to provide further capital contribution. The Corporate debtor has not paid any interest on these sums, though it had been deducted TDS thereon in its books of account. The Corporate Debtor's submission that it will have to increase its authorized capital to convert loan into equity shares is mere an attempt to resale from the understanding.

3.1.8. On 8th March, 2017, the chairman of the Corporate Debtor informed Ahuja Group about holding of the sixth meeting of the Board of Directors of the Corporate Debtor for the financial year 2016-17 on 17th March 2017 at 11.30 a.m. to discuss, inter-alia, call of Rs.2.5/- per share to be made on the 25,00,000 equity shares issued to Ahuja Group. However, Ahuja Group categorically opposed any such move and reiterated the understanding stated in his letter dated 18th February 2017. Mr. Raheja addressed an email dated 9th March 2017 wherein he raised false and frivolous allegations against our clients and at the same time made feeble attempts to justify the alleged demand/ decision for calling upon our clients to make payment of the alleged call money. Our client states that in the said email, Mr. Raheja categorically admitted that the loan amount given by our client and its sister concerns was contribution towards share capital but was treated as loan.

3.1.9. The Ahuja Group, again vide letter dated 16th March 2017, asked the Corporate Debtor to issue the shares to the extent of Rs.2,62,50,000/- (Rupees Two Crores Sixty Two Lakhs Fifty Thousand Only) and refund the balance amount to Sachana Exports Pvt. Ltd. and also re-iterated its stand that no amount was payable by Marvel towards unpaid call money and the company was liable to refund the remaining amounts with interest due thereon. However, the Ahuja Group was informed that the Board of Director in its meeting held on 17th March 2017 have resolved to make a call of Rs.2.50/- per share on 25,00,000 partly paid-up equity shares of Rs.10/- each held by Marvel. In response to this, the Ahuja Group again called upon the Corporate Debtor vide letter dated 17th March 2017 to (i) issue balance shares worth Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs Only) and Rs.25,00,000/- (Rupees Twenty-Five Lakhs Only) to Marvel Fragrance Private Limited and Mr. M.D. Ahuja, respectively, (ii) issue shares worth Rs.1,62,50,000/- (Rupees One Crore Sixty Two Lakhs Fifty Thousand Only) in favour of Sachana Exports Pvt. Ltd. and shares worth Rs.1,00,00,000/- (Rupees One Crore Only) in favour of Ahuja Finance Pvt. Ltd. (iii) refund the balance amount due to it after making these appropriations with interest thereon at the rate of 18% p.a. It is stated that there was no further demand for the purported unpaid call money thereafter.

3.1.10. On 1st April 2018, a confirmation of accounts was addressed by the

Corporate Debtor to Sachna Exports Pvt. Ltd. and First Choice Properties (I) Pvt. Ltd. inter alia confirming that an amount of Rs.1,80,00,000/- (Rupees One Crores Eighty Lakhs Only) and Rs.2,85,00,000/- (Rupees Two Crores Eighty-Five Lakhs Only), respectively was due and payable by the company to them. Thereafter, several correspondences were exchanged between the parties, wherein time and again Ahuja Group requested Mr. Deepak Raheja to allot the shares to sister concern of Marvel by adjusting the loan amount advanced by them so that there was no call money due and payable by Marvel to the company. However, suddenly on 5th May 2020 an email was addressed by the company Secretary inter alia calling upon Marvel Group to make the payment of the alleged call money.

3.1.11. In the Annual Report for the year ended 31st March 2020, the Corporate Debtor has acknowledged that the following accounts are payable to the Marvel Group:

Sr.

No.

Name

Principal

Amount

Interest

1.

First Choice Properties (I) Pvt. Ltd.

2,85,00,000/-

2,30,75,457/-

2.

Sachana Exports Pvt. Ltd.

1,80,00,000/-

1,34,13,600/-

3.

Ahuja Finance Co. Pvt. Ltd.

1,00,00,000/-

80,55,617/-

TOTAL

5,65,00,000/-

4,45,44,674/-

3.1.12. The Ahuja Group has represented that the interest calculation arrived at by the company is incorrect and the correct interest due and payable by the Corporate Debtor is Rs.12,63,17,749/- (Rupees Twelve Crores Sixty-Three Lakhs Seventeen Thousand Seven Hundred and Forty Nine Only) to First Choice Properties (I) Pvt. Ltd. and a sum of Rs.6,42,99,183/-(Rupees Six Crores Forty Two Lakhs Ninety Nine Thousand One Hundred and Eighty Three Only) to Sachana Exports Pvt. Ltd.

3.1.13. The Ahuja Group has also alleged that Mr. Deepak Raheja was paid back a sum of Rs.5,57,94,850/- out of total outstanding of Rs.10,10,85,598/-to his credit in F Y 2018-19., however, neither of Group company's loans have been repaid nor has the same been adjusted towards call money due from Marvel as was instructed and agreed between the parties.

3.1.14. The Ahuja Group has also alleged that the draft minutes of the 16th Annual General Meeting of the Corporate Debtor, received vide mail dated 12th February, 2021 has incorrectly recorded that it had objected to the company giving guarantee for the hotel owned by Mr. Deepak Raheja at Pune and had also requested for board approval regarding the same; and its objection regarding payment of interest on the loans given by Marvel Group and its sister concerns has been omitted therefrom.

3.1.15. On the other hand, Mr. Deepak Raheja, vide an email dated 15th February 2021, termed it arising from Ahuja Group's unwillingness to make payment of unpaid call money of Rs.3,50,00,000/- (Rupees Three Crores Fifty Lakhs Only) and further contribution as Unsecured Loans as agreed.

3.1.16. On 17th February 2021, the Ahuja Group demanded for forensic audit of the accounts of the company and had also requested for permission to visit the site with a team of engineers to verify the actual consumption of material and the bills paid by the company.

3.1.17. Vide email dated 16th March 2021, Ahuja Group sought to include in the agenda of fourth meeting of the Board of Directors of the company to be held on 19th March 2021 (i) return of loan advance by First Choice, Sachna Exports, Ahuja Finance and Mr. Awtani with interest, (ii) issuance of fully paid up share certificates of Rs.5,00,00,000/- (Rupees Five Crores Only) to Marvel Group after adjusting Rs.1,75,00,000/-(Rupees One Crore Seventy Five Lakhs Only) from Ahuja Finance and Rs.1,75,00,000/- (Rupees One Crore Seventy Five Lakhs Only) from First Choice.

3.1.18. It is also stated that even after adjustment of the unpaid call money is adjusted from the amount outstanding to the Group, a Rs.6,60,44,674/-(Rupees Six Crores Sixty Lakhs Forty-Four Thousand Six Hundred and Seventy-Four Only) would still be due and payable by the company as per its own books.

3.2. Vide Affidavit in rejoinder dated 03.05.2022, the Applicant has further

submitted that the present application is within limitation as Corporate Debtor has confirmed and/or acknowledged in its Audited Financial Statement for the year ended on 31.03.2018 that it has taken an unsecured interest-bearing loan and has also deducted tax at source on the interest amount due on such loan. Further, the annual report for the year ending 2018, 2019 and 2020 shows that unsecured loans are repayable on demand after 1 year from the balance sheet date. In fact, the Corporate Debtor was, inter alia, called upon by the Notice to adjust the loans provided by the First Choice Property Private Limited to extent of Rs. 1,75,00,000/- against the call money due from Marvel and to repay the balance amounts due to First Choice, the Financial Creditor and to the Ahuja Finance, along with interest at the rate of 18% p.a. The Corporate Debtor had committed default in repayment of the loan amount and interest thereon to the Financial Creditor on 19.04.2021 when it failed to pay the amount due to the Financial Creditor and this is further confirmed vide emails exchanged between 26.04.2021 and 28.04.2021, which default continued till the date of filing the Application and continues as on date. It is also submitted that an email dated 15.03.2021 from GM Accounts and Finance of the Corporate Debtor to Mr. Sunil Ahuja also conveys the fact that applicant had granted loan to the Corporate Debtor. The said mail conveyed that "After March 2017 we have not provided interest on promoters loan....."

3.3. The Applicant has also filed Affidavit in reply dated 20.05.2022 in reply to the Corporate Debtor's Affidavit dated 03.05.2022.

3.4. The Applicant has further submitted its Supplemental Affidavit dated 07.07.2022 in compliance to this Bench's order dated 09.06.2022 asking the Financial Creditor to furnish complete chain of Documents from date of requesting of loan of the Corporate debtor and thereafter. It is submitted that loan was repayable on demand at the end of 6 months from the date of full disbursement. No formal agreement was entered into as the promoters of the Applicant and the Corporate Debtor were known to each other. Applicant has enclosed the Bank Statement which shows that the sum of Rs. 1,80,00,000/- is debited on 28.08.2012 with narration "To CLG; Gstaad Hotels".

4. The Corporate Debtor has filed its Affidavit in reply dated 17.04.2022 stating that the Applicant, as part of Ahuja Group, is a shareholder of Corporate Debtor and all monies were paid by the Applicant and the Ahuja group into the Corporate Debtor by way of equity infusions or promoter's contribution as agreed between the Shareholders; No interest has been paid on the advance of Rs. 1,80,00,000/- and there is no agreement to substantiate that this money was received as a interest bearing loan; in fact, in terms of the agreement understanding between the shareholders of the Corporate Debtor, the said monies are required to be (i) adjusted against the unpaid calls on equity shares already allotted to the Ahuja group; and/or (ii) converted into fresh equity in the Corporate Debtor; the Applicant is a part of Ahuja group comprising of (i) the Applicant; (ii) Mr. M. D. Ahuja; (iii) Marvel Fragrances Private Limited ("Marvel");

(iv) First choice Properties Private Limited; (v) Ahuja Finance Company Private Limited; (vi) Mr. Anil Ahuja and Sunil Ahuja; by virtue of revision in FAR norms for Hotel development, the shareholders of the Corporate Debtor decided to construct additional four floors in the Hotel; Mr. Sunil Ahuja was present at the meetings of the directors and Shareholders of the Corporate debtor held on 18.09.2017 and 12.10.2017; In December 2017, Marvel was allotted fresh shares on payment of part subscription; Yes Bank, while sanctioning credit facilities to fund additional construction, stipulated additional contribution by way of capital or other funding from the existing shareholders; while the shareholders other than Ahuja Group shareholders inducted required capital contribution, the Ahuja Group failed to bring in its full share of capital contribution and the shares allotted to them remained partly paid; Ahuja Group is holder 2.5 Cr. Equity shares which are unpaid to the extent of 3.5 Cr. till June 2021; total shortfall due from Ahuja group in terms of understanding amongst shareholders of the Corporate Debtor was Rs. 4.6 Cr as on 13.06.2021 after giving credit of Rs. 1.8 Cr. received from the Applicant and also money received from other companies of Ahuja Group.

4.1. The Hotel project became operational into 2013, however, there were cost overruns which were funded from the additional credit facilities taken from Yes Bank upon shareholders commitment to the Bank that they would also infuse additional equity into the Corporate Debtor. However, shareholders other than Deepak Raheja group refused to infuse any further equity shares by conversion of other loans or otherwise, even though, Mr. M.D. Ahuja, on behalf of Ahuja group, had assured full support for meeting the obligations of the Ahuja group to provide further funds in a meeting with CEO and MD of the Bank. Since, the Corporate Debtor was asked by the Bankers to increase its capital, it decided to call in the unpaid share money to meet its financial requirements and accordingly issued a call notice dated 17.03.2017 to Marvel requiring them to pay unpaid amount.

4.2. It is further submitted that vide email dated 05.10.2012 Mr. Sunil Ahuja stated that "As per our family settlement a total amount of 32 Cr. Being 20% equity in Gstaad, we are responsible as follows – MD Ahuja 1.6Cr. (Balance is Rs. 35 Lacs); Sunil Ahuja 15.2 Cr. (has paid 10.25 Cr. From Marvel {50% of 20.50} + 2.85 Cr First Choice + 1.80 Cr. Sachana total 14.90 Cr. Balance 30 lacs); and Anil Ahuja 15.20 Cr (has paid 10.25 Cr. From Marvel {50% of 20.50} + 1 Cr from Ahuja Finance Balance 3.95 Cr)" and further communicated that "Please note that I am not interested in increasing my holding but if Anil does not cooperate then I am willing to fulfill our quota of 20% equity". This email communication confirms the contention of Corporate Debtor. One of the Ahuja group Company i.e. Ahuja Finance Company Private Limited had filed a company petition no. 1122 of 2015 before Hon'ble Bombay High Court u/s 433 of Companies Act, 1956 seeking winding up. The Facts in that petition are similar to the facts in this case. This Petition was withdrawn by the Applicant Company, accordingly this petition is barred by issue Estoppel and/or Res Judicata and/or

constructive Res Judicata

4.3. It is further submitted that in the absence of a written agreement as to either interest or date of repayment, there can be no default as envisaged in the Code. In the present case there is serious controversy as to the existence of Financial debt much less default. The Applicants case is also barred by Limitation as cause of action, if any, arose in 2012 and this Application ought to have been filed in 2015.

4.4. The Corporate Debtor has filed an I.A. NO 1179/2022 seeking permission to place on record the Audited Financial Statements of the Applicant for year from March 2013 to March 2021 to demonstrate the true nature of transaction as recorded in the books of Applicant. We are of the view that this prayer can be allowed in view of decision of Superior Courts and the evidence(s) being in nature of documents, which pertain to the Applicant. On perusal of Financial Statement for the year ended 31.03.2015 filed through this IA, it is noticed that the Applicant had not accounted for any income in its profit and loss account for the relevant year and the year preceding to it. Further, note no. 15 forming part of the said Financial Statement states that "Interest in not provided on advance given to Gstaad Hotels Private Limited of Rs. 1,82,50,000/- as there is dispute to nature of transaction though Gstaad Hotels Private Limited have been providing interest @18% though not paid. However, co will account the same as and when received." Further, note no. 16 forming part of the Financial Statement for the year ended 31.03.2016 states that "The advance given to Gstaad Hotels Private Limited of Rs. 1,82,50,000/- is under dispute and since the company is neither paying interest nor returning the principal, no provision is made of any nature". The same note is continuing year on year and is appearing in the financial statements for the year ended 31.03.2021

4.5. The Corporate Debtor has filed its written submission dated 30.01.2023 stating that notice dated 19.04.2021 asking the Corporate Debtor to pay the loan amount was not issued by the Applicant but was issued by the Legal Counsel on behalf of Mr. Sunil Ahuja i.e. Director of Marvel Fragrance Private Limited. The Corporate Debtor has relied on the judgment of Laxmi Pat Surana v. Union Bank of India & Anr 2021 SCC Online SC 267 wherein it was held that the provisions of Limitation Act are applicable to proceedings under the Code; Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the Corporate Debtor, acknowledges their liability to pay the debt. Such acknowledgement, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to the acknowledgement of the debt; S. M. Ghogbhai v. Schedulers LLogistics India Private Limited CA (AT) (Ins) No. 281 of 2022 wherein the Appellate Tribunal ordered on Limitation vis-à-vis IBC that under Article 137, time from which period begins to run is "when the right to apply accrues"; Vidharbha Industries Power Limited v. Axis Bank Limited (2022) 8 SCC 352 wherein the Hon'ble Supreme Court has held that the usage of word 'may' in section 7(5)(a) of the

IBC and its meaning; overall financial health and viability of the Corporate Debtor ought to be looked into; discretionary power cannot be exercised arbitrarily or capriciously;

4.6. The Corporate Debtor has also relied on the case of Sudhir T Deshpande v. Dhanada Corporation Limited in CP (IB) 4671/MB/2018 wherein it was held that when there is no proof disbursement, question of default on the part of the Corporate Debtor does not arise. Disbursement is a sine qua non for any debt to fall within the ambit of the definition of financial debt; Jagbasera Infratech Private Limited v. Rawal Variety Construction Limited in CA(AT) (Ins) No. 150 of 2019 where the Appellate Tribunal has held that amount invested towards completion of a project cannot be termed as a financial debt as defined u/s 5(8) of the Code;

Findings/Observations:

5. We have heard both the counsel(s) and perused material on record.

5.1. Admittedly, an amount of Rs. 1,80,00,000/- is shown as payable to the Applicant in the books of Financial Creditors and interest accrued thereon upto 31.03.2016 is also stated under "Interest accrued but not due" and this amount has not been appropriated towards the call money payable by applicant's group company Marvel towards its partly paid up shares of the Corporate Debtor. On the other hand, the Applicant's financial statement for the year 31.03.2015 stated that there is some dispute as to nature of transactions and from the financial year 2015-16, its financial statements are stating that there is some dispute. Accordingly, its admitted fact by the Applicant that there is a dispute as regards the nature of money stated to have been received by the Corporate Debtor by the Applicant and other Ahuja Group Company.

5.2. It is also undisputed that the Corporate Debtor is in nature of joint venture of three groups, where each group has its nominee director on the board. It is a fact that lender(s) seek promoter's margin while funding a venture and allows such margin to be introduced in the form of Equity as well as Unsecured loans from the Promoters.

5.3. It is the case of the Corporate Debtor that Ahuja Group was required to bring its share of investment in the Corporate Debtor to fund expansion and cost-over-runs as promised by Mr. M D Ahuja even in meeting held with Bankers; while Raheja Group brought in requisite contributions to the Corporate Debtor, the other groups have failed to do so; the Ahuja Group had to infuse 32.00 crores as its promised share of contribution through itself or its group companies whether as equity or as loans. The Corporate debtor has placed on reliance on one email communication dated 05.10.2012, wherein the Ahuja Group has confirmed the agreed amount of investment to substantiate its plea that the loan was in nature Promoter's contribution and as agreed amount was not received by the Corporate Debtor, the same is not due and payable till shortfall in the agreed amount of investment is not made good. This email communication clearly

acknowledges that the amount paid by the applicant was towards their group's equity contribution and their group was further liable to infuse 4.55 Cr. in the Corporate Debtor.

5.4. On the other hand, the Applicant has submitted that it was not required to infuse any further sum and the Corporate Debtor had to return the money to the applicant as well as other Group Companies even after appropriation of call money due on shares allotted to Marvel. However, this assertion of the Applicant is in contradiction of email communication of Mr. Sunil Ahuja where he had confirmed that his group was to infuse 32 Cr. towards 20% equity of the Corporate Debtor and he would infuse the share of his brother Mr. Anil Ahuja also in case he doesn't infuse any further amount towards his share of investment forming part of Ahuja Group investments.

5.5. A default is said to occur when a debt or part thereof, when due for repayment, is not paid by the borrower. On the facts of the present case, the question whether the amount received as loan from the applicant was due for repayment and if yes, when it can be said to be due, requires determination for the purpose of deciding of present application.

5.5.1. On perusal of the facts stated in the legal counsel's letter on behalf of Corporate Debtor, it is not in dispute that Ahuja Group had been insisting upon to issue shares worth Rs.1,62,50,000/- (Rupees One Crore Sixty Two Lakhs Fifty Thousand Only) in favor of Sachana Exports Pvt. Ltd. and shares worth Rs.1,00,00,000/- (Rupees One Crore Only) in favour of Ahuja Finance Pvt. Ltd. till 17th March 2017. Further, email communication dated 05.10.2012 from Mr. Sunil Ahuja of Ahuja Group clearly appropriate the sum paid by the Applicant towards his group's share of contribution of Rs. 32 Cr. for 20% equity of the Corporate Debtor. These facts confirm the submission of the Corporate Debtor that money was contributed towards promoter's margin.

5.5.2. Further, the Applicant's statement in its financial statement for the year ended 31.03.2015 that there is dispute as to nature of transaction and thereafter continuing with a statement that there is dispute; and its auditor's stand on non-provision of interest or expected short realization on account of dispute even though the Corporate Debtor had provided interest on such sums till 31.03.2017 in its books of accounts and deducted tax at source on such interest, which is not in accordance with the accrual principal of accounting mandated by the Companies Act, 2013/1956; leads us to conclude that the amount paid by the Applicant was towards Ahuja Group's equity contribution as stated in the email dated 05.10.2012. Even if for the sake of argument it is considered that the accounting entry treat this amount as loan in books of both the parties, there is no document to suggest that there was any stipulation of interest on such loans or repayment date in terms of the understanding amongst the shareholders of the Corporate Debtor, which indicates that there was dispute in relation to the time of repayment of such amount, including interest itself.

5.5.3. We have also gone through the contents of notice sent by the Ahuja Group's legal counsel in its notice containing alleged acts of oppression and mismanagement on the part of Raheja Group, these allegations further confirm the existence of a dispute amongst the promoter's group.

5.5.4. In the light of this, we feel that the recall of amounts, once contributed as promoter's margin by the groups, is an attempt towards recovery rather than to seek resolution of the corporate debtor. In the case of M/s Invent Asset Securitisation and Reconstruction Pvt. Ltd Vs. M/s Girnar Fibres Ltd. (2022) ibclaw.in 26 SC, it has been reiterated that "Time and again, it has been expressed and explained by this Court that the provisions of the Code are essentially intended to bring the corporate debtor to its feet and are not of money recovery proceedings as such. The intent of the appellant had only been to invoke the provisions of the Code so as to enforce recovery against the corporate debtor".

5.6. In the case of Innoventive Industries Limited vs. ICICI Bank and Another (2018) 1 SCC 407, the scope of proceedings under Section 7 of the IB Code was articulated in paras –

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 3rd financial creditor

and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”

5.7. In the case of Indus Biotech Pvt. Ltd. Vs. Kotak India Venture (Offshore) Fund & Ors. (2021) ibclaw.in 52 SC, the Hon’ble Apex Court further explained scope of default in the context of section 7 of Code in the following words –

“21. In such circumstance if the Adjudicating Authority finds from the material available on record that the situation is not yet ripe to call it a default, that too if it is satisfied that it is profit making company and certain other factors which need consideration, appropriate orders in that regard would be made; the consequence of which could be the dismissal of the petition under Section 7 of IB Code on taking note of the stance of the corporate debtor. As otherwise if in every case where there is debt, if default is also assumed and the process becomes automatic, a company which is ably running its administration and discharging its debts in planned manner may also be pushed to the Corporate Insolvency Resolution Process and get entangled in a proceeding with no point of return. Therefore, the Adjudicating Authority certainly would make an objective assessment of the whole situation before coming to a conclusion as to whether the petition under Section 7 of IB Code is to be admitted in the factual background. Dr. Singhvi, however contended, that when it is shown the debt is due and the same has not been paid the Adjudicating Authority should record default and admit the petition. He contends that even in such situation the interest of the corporate debtor is not jeopardised inasmuch as the admission orders made by the Adjudicating Authority is appealable to the NCLAT and thereafter to the Supreme Court where the correctness of the order in any case would be tested. We note, it cannot be in dispute that so would be the case even if the Adjudicating Authority takes a view that the petition is not ripe to be entertained or does not constitute all the ingredients, more particularly default, to admit the petition, since even such order would remain appealable to the NCLAT and the Supreme Court where the correctness in that regard also will be examined”.

5.8. On perusal of the Financial Statements for the year ended on 31.03.2020, it is observed that the Corporate Debtor has been declaring cash profit. It is noted that the Corporate Debtor has settled with one of its large financial creditor i.e. IDBI Trusteeship Services Limited (CP (IB) 1292 of 2021, in consequence to such settlement, an application u/s 7 of the Code was withdrawn by such financial creditor.

5.9. It is also noted that there is some dispute raised by one of related party of Raheja Group on the entitlement of equity share capital of the Corporate Debtor and this is pending before Hon’ble High Court of Bombay. This related party of the Raheja Group i.e. Mr. Sandeep G Raheja has filed an Interlocutory Application No. 987 of 2022 before us seeking intervention in the present Company Petition and tagging of Application filed u/s 7 of the Code numbered as CP (IB) No. 1292 of 2021 and CP (IB) No. 981 of 2021. Further, CP (IB) No. 981 of 2021 has been

filed by First Choice Properties (India) Private Limited, which is group company of Ahuja Group, seeking initiation of CIRP against Corporate Debtor. The facts in this Company Petition are similar as this company also belongs to Ahuja Group Company and Mr. Sunil Ahuja has acknowledged vide email dated 05.10.2012 that the money paid by First Choice Properties (India) Private Limited was towards his group's promised contribution of Rs. 32 Cr.

5.10. Further, no intervention can be allowed in proceedings u/s 7 of the Code as in case of Admission of such Application, the intervening party has complete opportunity to present its case before the IRP/RP.

6. In view of the aforesaid discussion and after perusal of the material on record, this Bench is of considered view that the Petition under section 7 filed by the Financial Creditor to initiate the CIRP against the Corporate Debtor is not maintainable.

ORDER

1. This Application being C.P. (IB) No. 527/NCLT/MB/C-IV/2021 filed under Section 7 of I&B Code, 2016, filed by Sachana Exports Private Limited, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Gstaad Hotels Private Limited, Corporate Debtor is dismissed.

2. Accordingly, I. A No. 987 of 2022 is dismissed as not maintainable and I. A 1179 of 2022 is allowed for the reasons stated hereinbefore.