NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1480 of 2024

[Arising out of the Impugned Order dated 12.06.2024 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench-II in I.A. No. 3602 /2022 in C.P. No. 50(PB) of 2021]

In the matter of:

M/s Acute Daily Media Pvt. Ltd. & Ors.
E-3/235, Arera Colony,
Bhopal, MP- 462016 **... Appellant No.1**

MR. MAYANK JAIN
E-3/235, Arera Colony,
Bhopal, MP – 462016 **... Appellant No.2**

MR. HIT KISHOORE JAIN
E-3/235, Arera Colony,
Bhopal, MP – 462016 **... Appellant No.3**

MS. DEEPANSHI JAIN
C-274, Shahpura, Bhopal,
Bhopal, Madhya Pradesh **... Appellant No.4**

MS. REKHA JAIN
R/o C-274, Shahpura,
Bhopal, Madhya Pradesh **... Appellant No.5**

MS. OJASWI JAIN
R/o C-274, Shahpura,
Bhopal MP **... Appellant No.6**

Versus

M/s Rockman Advertising and Marketing (India) Ltd. & Ors.
K-15, Hauz Khas Enclave,
New Delhi – 110016. **...Respondent No. 1**

M/S SHARP EYE ADVERTISING PVT. LTD. (THROUGH RESOLUTION PROFESSIONAL)
Regd. Office at:

38, Rani Jhansi Road,
(Corporate Debtor)
Jhandewalan, New Delhi – 110055 **... Respondent No. 2**

MR. ARPAN GUPTA
38, RANI JHANSI ROAD,
(DIRECTOR OF CD)
AT THE JHANDEWALAN, NEW DELHI – 110055
TIME OF FILING OF MAIN PETITION) **... Respondent No. 3**

MS. POOJA AGARWAL
38, RANI JHANSI ROAD,
(DIRECTOR OF CD)
AT THE JHANDEWALAN, NEW DELHI – 110055
TIME OF FILING OF MAIN PETITION) **... Respondent No. 4**

MR. MUKESH GUPTA
38, RANI JHANSI ROAD,
JHANDEWALAN, NEW DELHI – 110055
(PROMOTER OF CD) **... Respondent No. 5**

SMT. PADMA GUPTA
W/O MR. MUKESH GUPTA
38, RANI JHANSI ROAD,
JHANDEWALAN, NEW DELHI – 110055
(PROMOTER OF CD) **... Respondent No. 6**

MR. DINESH GUPTA
38, RANI JHANSI ROAD,
JHANDEWALAN, NEW DELHI – 110055
(PROMOTER OF CD) **... Respondent No. 7**

MR. RAKESH GUPTA
38, RANI JHANSI ROAD,
JHANDEWALAN, NEW DELHI – 110055
(PROMOTER OF CD) **... Respondent No. 8**

SMT. URMIL GUPTA
W/O MR. RAKESH GUPTA
38, RANI JHANSI ROAD,
JHANDEWALAN, NEW DELHI – 110055
(PROMOTER OF R-7) **... Respondent No. 9**

MR. GAURAV GUPTA
S/O MR. RAKESH GUPTA
38, RANI JHANSI ROAD,
JHANDEWALAN, NEW DELHI – 110055
(Promoter of R-7) **... Respondent No. 10**

Present:

For Appellant : Mr. Krishnendu Datta, Sr. Advocate with Mr. Akhil Nene, Mr. Shivam Gautam, Advocates.

For Respondent : Mr. Sakal Bhushan, Mr. Vasu Bhushan, Advocates for R-1.
Ms. Eshna Kumar, Mr. Harpreet Singh Malhotra, Mr. Lakshmi Kant, Advocates for R-3 -10.

J U D G M E N T

(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellants arises out of the Order dated 12.06.2024 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench-II) in I.A. No. 3602/2022 in C.P. No. 50(PB) of 2021. By the impugned order, the Adjudicating Authority has allowed I.A. No. 3602 of 2022 under Section 65 of IBC terminating the Corporate Insolvency Resolution Proceedings (**'CIRP'** in short) initiated against the Corporate Debtor aggrieved by which order, the Appellants have come up in appeal.

2. Coming to the brief factual background of the present case, basis the Section 7 proceedings filed by Acute Daily Media Pvt. Ltd. and other financial creditors, CIRP was initiated on 17.05.2022 against Corporate Debtor-Sharp Eye Advertising Pvt. Ltd. The Appellants had purportedly advanced loans to the Corporate Debtor, repayment of which had been defaulted by the Corporate Debtor. After the above CIRP proceedings had concluded and resolution plan approval application was filed before the Adjudicating

Authority, the Respondent No.1-Rockman Advertising moved an application vide I.A. No. 3602 of 2022 under Section 65 of the IBC seeking termination of the CIRP and for action against the Appellants for having filed the Section 7 application collusively and fraudulently with the promoters of the Corporate Debtor with a malicious intent other than insolvency of the Corporate Debtor. Respondent No.1 had also filed an Oppression and Mismanagement Petition (**'OMP'** in short) against the Corporate Debtor and the promoters which was allowed on 20.07.2022 and the act of reduction of the shareholding of Respondent No.1-Rockman Advertising in the Corporate Debtor was declared null and void. The Section 65 application filed by the Rockman Advertising was allowed by the Adjudicating Authority terminating the CIRP of the Corporate Debtor and show cause notice issued to the Appellants for imposition of penalty. Aggrieved by this impugned order, the Appellants have preferred this appeal.

3. Making submissions on behalf of the Appellants, Shri Krishnendu Datta, Ld. Senior Counsel for the Appellant challenging the impugned order stated that the Adjudicating Authority by admitting the Section 65 application indirectly recalled the CIRP admission order dated 17.05.2022 which is not permissible in the eyes of law. It was contended that the CIRP admission order of 17.05.2022 not having been challenged by the Appellant, the same had already attained finality. Since appeal against this order stood time barred, with a view to indirectly challenge the CIRP initiation order, the Respondent took recourse to file Section 65 application vide IA No. 3602 of 2022. Recall of the CIRP order of 17.05.2022 was violative of the settled principles of law under IBC.

4. It was emphatically asserted that the Adjudicating Authority in allowing the IA No. 3602 of 2022 had failed to appreciate that the records of the Corporate Debtor clearly reveal that loan was taken by the Corporate Debtor from the Appellants. There is clear evidence of disbursal of financial debt by the Appellants-Financial Creditors to the Corporate Debtor. There is ample proof that the Corporate Debtor had been given several notices for having defaulted in making repayment of the financial debt before finally filing the section 7 application. It was also contended that debt and default having been unequivocally established and the same having been adjudicated upon by the Adjudicating Authority, this order cannot be indirectly challenged by the Respondent after the period of limitation had expired.

5. It was also emphasized that at the time of passing the admission of Section 7 order there was no order passed by the Adjudicating Authority in respect of the OMP filed by the Respondent. It was pointed out that the Appellants were not even a party to the OMP filed by the Respondent and hence were unaware of the facts and circumstances pertaining to the OMP petition. It was therefore denied that the Appellants had filed the Section 7 petition to pre-empt the likely success of the Respondents in the OMP filed by them. There is no bar to admission of Section 7 application during the pendency of OMP proceedings.

6. It was submitted that Section 65 application cannot sustain merely on the basis of assertion of fraud and malice without any cogent evidence. It was added that the allegation made by the Respondent that the purpose behind filing of the Section 7 by the Financial Creditors was propelled by malicious intent to defeat the rights of the Respondent which were likely to be restored

to them under the OMP was based on surmises and conjectures. Reliance was placed on the judgment of this Tribunal in ***Amour Infrastructure LLP vs. Digital Integrated Technologies Pvt. Ltd.*** in ***CA (AT) (Ins) No. 884 of 2022*** wherein it has been held that for proving the ingredients of Section 65 of IBC, the same has to be backed by adequate pleadings and findings. Instead of placing cogent evidence, the Respondents have merely relied on hyper-technical objections and assumptions which do not alter or change the nature of transactions between the Financial Creditors and the Corporate Debtor which clearly signified debt and default

7. It was further contended that the Respondent No.1-Rockman Advertising had transferred its entire share-holding in the Corporate Debtor in favour of Mr. Rakesh Arora and Mr. Shivam Raina for valuable consideration. However, the Respondent never brought this fact to the knowledge of the Adjudicating Authority while filing I.A. No. 3602/2022. When the Respondent had already transferred its entire share-holding, it was alleged that the Respondent not being a share-holder of the Corporate Debtor it had no locus to file I.A. No. 3602/2022.

8. Refuting the contentions of the Appellants, Shri Sakal Bhushan, Ld. Counsel for Respondent No.1 submitted that the share-holding of Respondent No.1 had been brought down from 62.57% to 17.86% by illegal allotment of their shares to two other companies by the Corporate Debtor and its promoters. This had led to the filing of OMP by the Rockman Advertising-Respondent No.1 against the Corporate Debtor. The Corporate Debtor and the promoters in their defence in the OMP petition had set up a false narrative by fabricating an antedated MoU. However, the Adjudicating Authority after

taking notice that the MoU was not backed by original documents/Board resolutions allowed the OMP and declared the Respondent No.1 to be 62.57% share-holder of the Corporate Debtor vide its order dated 20.07.2022. It was also pointed out that even while adjudicating on the OMP, the Adjudicating Authority had noticed the conduct of the Corporate Debtor of relying on forged and fabricated documents including the MoU and related board resolutions.

9. Elaborating further, it was submitted that the promoters of the Corporate Debtor on realising that they were on a weak footing in the OMP and that the present Respondent No.1 was likely to succeed, they contrived the Section 7 petition with a view to pre-empt the Respondent No.1 from gaining control of the Corporate Debtor. Towards this end, they fabricated antedated loan agreements with Appellants-Financial Creditors and showed default in repayment of the loan by the Corporate Debtor. It was contended that the Section 7 petition was pre-meditated and self-induced with fraudulent intentions. It is contended that no loan transactions had actually taken place. What has been sought to be projected as loans by the Appellants were infact not genuine loan transactions but were routine business transactions. It was pleaded that there was no genuine debt. The Section 7 application was filed by the Financial Creditors to fraudulently initiate CIRP of the Corporate Debtor. The promoters misled the Adjudicating Authority into initiating CIRP of the Corporate Debtor so as to extinguish their entire shareholding including that of Respondent No.1. The malafide intent of the Appellants is also borne out by the fact that when the OMP was being heard, the Appellants deliberately suppressed from the notice of both the Adjudicating Authority as well as the Respondent No.1 of the insolvency

petition having been filed against the Corporate Debtor. It was vehemently contended that the Section 7 application was the outcome of fraud and collusion between the Corporate Debtor, Financial Creditors and Promoters. The Appellants have failed to bring on record cogent evidence to show that Section 7 application was filed with an objective other than the resolution of the Corporate Debtor.

10. It was pressed hard that it is a misplaced contention on the part of the Appellants that the Adjudicating Authority in a Section 7 application should have confined their findings only to the aspect of debt and default. It was asserted that it was open for the Adjudicating Authority to traverse into other material facts to find out whether any fraud or malafide is involved in the filing of a Section 7 petition if the facts and circumstances so warrants. Where any person furnishes any information under Section 7, which is false in material particulars, or knowing it to be false or omits any material fact knowing it to be material is liable to be fined, the applicability of Section 65 cannot be questioned. In such circumstances, the Adjudicating Authority is obligated to exercise caution to prevent any party from taking undue benefit of the provisions of IBC in pushing the Corporate Debtor into CIRP unnecessarily. The Adjudicating Authority had therefore rightly taken note of the several discrepancies which had come to light from the ledger statements, related Audited Balance Sheets of the Corporate Debtor and Statutory Auditor's Reports; infirmities found in the dates of Board resolutions; infraction of the Companies Act etc. which when cumulatively put in perspective show that the Section 7 application was fraudulent in nature.

11. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully. The short question before us is whether in the facts of the present case, there is sufficient evidence before the Adjudicating Authority to establish that the Section 7 application was filed collusively and with mala-fide intention by the Appellants which was good enough to attract Section 65 of the IBC and consequential recall of the initiation of CIRP of the Corporate Debtor.

12. It is the case of the Appellants that it is trite law that under the IBC once a debt becomes due or payable, in law and in fact, and there is incidence of non-payment of the said debt in full or part thereof, CIRP may be triggered by the Financial Creditor as long as the amount in default is above the threshold limit. The Adjudicating Authority is not required to go into any other aspect once it is satisfied that there is debt and default. It is their contention that in the present factual matrix the twin conditions of debt and default is squarely met. The Adjudicating Authority while passing the earlier order admitting the Corporate Debtor into CIRP on 17.05.2022 had been fully satisfied on the issue of debt and default. The said order had attainted finality and the extendable period of limitation had already been crossed. Hence the same cannot be reopened indirectly by the Respondent now by raising frivolous assertions as contained in IA-3602/2022 which has been erroneously allowed by the Adjudicating Authority without realizing that it is a belated attempt by the Respondent No.1 seeking recall of the CIRP order of 17.05.2022. By recalling the Section 7 admission order, the Adjudicating Authority has acted in derogation of settled principles of law.

13. To buttress their contention that debt and default stood well established, it was pointed out that the Corporate Debtor had availed loan from time to time from the Financial Creditors. In the present case, loan agreements were signed on 21.07.2016, 27.05.2019, 03.12.2019 and 31.12.2019 basis which loan had been disbursed by the financial creditors which not having been repaid signified default. It was submitted that the loan agreements categorically prescribed an interest @ 12% p.a. and the Financial Creditors had calculated interest implications on the basis of the loan agreements. The total amount under default was Rs.1,20,90,682/- including Rs.23,90,682/- as interest which conjointly crossed the statutory prescribed threshold of Rs. one crore for Section 7 application.

14. The details of loan agreements and the amount due and payable as culled out from details provided by the Appellants is as placed below:

S.No.	**Financial Creditor**	**Date of Loan Agreement**	**Amount of Loan (In Rs.)**	**Date of Default**	**Amount due and Payable**
1.	Acute Daily Media Private Limited ("Financial Creditor 1")	21.07.2016	50,00,000/-	31.01.2020	72,33,710/-
2.	Rekha Jain (Proprietor of Hotel Amar Vilas) ("Financial Creditor 2")	27.05.2019	7,00,000/-	26.02.2020	7,63,000/-
3.	Deepanshi Jain ("Financial Creditor 3")	03.12.2019	30,00,000/-	28.02.2020	30,73,972/-
4.	Ojaswi Jain ("Financial Creditor 4")	31.12.2019	10,00,000/-	28.02.2020	10,20,000/-
Total-					**1,20,90,682/-**

15. It was further contended that the loan agreements executed between the Financial Creditors and the Corporate Debtor is also backed by disbursal of corresponding loan amounts by the Financial Creditors to the Corporate Debtor. The records of the Corporate Debtor clearly reflect the transaction/loan having been received from the Appellants. There is no evidence to deny the debt advanced by the Financial Creditor to the Corporate Debtor. Hence, there exists a financial debt which was due and payable by the Corporate Debtor to the Financial Creditors. Emphatically asserting that the bank entries are undeniable and have not been controverted, this clearly cements the case that loan was disbursed to the Corporate Debtor. That the loan amount remained unpaid has not been controverted and therefore remains undisputed. Even the Resolution Professional ("**RP**" in short) has confirmed the veracity of the loan disbursement made by the Appellants. The RP in his affidavit has clarified that: "*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 Respondent/Resolution Professional shows that the same under the head of Unsecured Loans.*"

16. Advancing their counter arguments, it was stated by the Respondent No.1 that the Section 7 application had been filed by the Appellants with the help of fabricated and manufactured documents as well as by suppression of material facts not for the purpose of insolvency resolution but for the ulterior motive of preventing the Respondent No.1 from regaining majority shareholder

position in the Corporate Debtor which was likely to happen in the face of the anticipated success of the Respondent No.1 in their OMP. Hence, in the present factual matrix, the Adjudicating Authority rightly took cognizance of the Section 65 application filed by the Respondent No.1 as the Adjudicating Authority has an important role to play in preventing any blatant effort to be made by any party to bring a Corporate Debtor under the rigours of CIRP by taking recourse to malicious and/or collusive filing of insolvency petition.

17. In support of their contention, it was pointed out that the loan agreements relied upon by the Appellants were a sham having been fabricated and antedated. Elucidating further, it was submitted that the claim of the Appellants that in the Board meetings of the Corporate Debtor of 20.07.2016, 02.12.2019, 26.05.2019 and 30.12.2019, resolutions were purportedly passed for obtaining loans from the Financial Creditors and the subsequent board meeting of 14.07.2019 resolving the extension of loan is false. The Annual Returns of the Corporate Debtor do not indicate that Board meetings were held on those dates. It was pointed out that when these Annual Returns which are part of the ROC records do not reflect the Board meetings, it logically follows that the resolutions which have been claimed to have been taken in these Board meetings could not have been taken. It was added that the copies of the relevant Annual Returns can be seen at pages 126-139 of additional-affidavit of the Appellant.

18. The Respondent No. 1 has come up with other surrounding facts which show that the alleged loan agreements by the Financial Creditors were fabricated and antedated and nothing more than a sham. The loan agreement dated 21.07.2016 mentions its registered office to be at "E-3/235, 10 No.

Market, Arera Colony, Bhopal- 462016". However, the registered office of the Appellant as on 21.07.2016 was at "D.K.-1, Danish Kunj, Kolar Road, Tehsil Huzur, Bhopal." The change of the address to Arera Colony happened only on 30.04.2019 as reflected in Form No. INC-22 filed by it with ROC. That the loan document executed in 2016 depicted an address which came into existence 3 years later in 2019 goes to show that the loan agreement was antedated. Further, all the four alleged loan agreements dated 21.07.2016, 03.12.2019, 27.05.2019 and 31.12.2019 are verbatim copies of each other which lends credence that the agreements were all fabricated together at one place at a later point of time. Further, the loan agreement of 21.07.2016 refers to remedy under IBC at a time when IBC had not been notified on 21.07.2016. Thus, the fact that the agreement referred to IBC which legislation was not notified at that point of time reinforces the point that the loan document was antedated. It was also submitted that the Appellants have admitted that these loan agreements did not carry any stamp duty. Had the loan agreements been genuinely executed, appropriate stamp duty would definitely have been paid.

19. It is therefore the contention of the Respondent No.1 that all these lapses show that no genuine loan transaction had taken place between the Corporate Debtor and the Financial Creditors. The loan agreements did not reflect genuine loan transactions and were mere routine business transactions with the Appellants which were subsequently misrepresented as loans fraudulently to enable initiation of CIRP against the Corporate Debtor with the hidden motive of defeating the Respondent No.1 from taking over the Corporate Debtor as the dominant shareholder.

20. Elaborating on other false material particulars, it was submitted that the balance sheets for F.Y.s 2016-17 and 2019-20 during which period the alleged loans were supposed to have been disbursed by the Appellant-Financial Creditors do not mention the names of these Financial Creditors. The reasons for not showing the particulars of these Appellants in the balance sheets has also not been suitably explained by the Appellants.

21. Further adverting reference to Annexure 10 at page147 of the additional-affidavit of the Appellant, it was submitted that the statutory auditor in the Audit Report for FY 2016-17 has clearly stated that the company did not raise any money by way of IPO and term loans during the year. A similar entry by the statutory auditor is found in the Audit Report of the Corporate Debtor for FY 2019-20 though the Appellants have claimed that they had given loan to the Corporate Debtor during that FY. These entries run contrary to the claim of the Appellant that the Corporate Debtor had taken the loans from the Appellant during those FYs.

22. Adding further, it has been contended that the statutory audit report of the Corporate Debtor for FY 2020-21 also mentions in the notes to the balance sheet that there was no borrowing cost to the company as at page186 of the additional-affidavit of the Appellant. It was pointed out by the Respondent No.1 that a plain reading of this note in the statutory audit report would lead to the unambiguous understanding that the Corporate Debtor had not taken any sum of money on interest terms from any party. Thus, when the statutory audit report negates the fact that any sum of money was taken as loan on interest by the Corporate Debtor from any quarter including the Appellants, the calculation of interest in computing the debt and default is intriguing. It

was emphatically asserted that the balance sheet is required to record all interest income which accrues during the year. However, the balance sheet of the Appellant No.1 did not indicate any interest income which had accrued to them. The fact that no accrued interest income is reflected shows that no loan transaction ever took place. When no interest income had been reflected in the balance sheet, computing the same in the Section 7 application to achieve the threshold limit is irregular and not permissible. The interest income was added just for the sake of crossing the minimum threshold hurdle of Rs. one crore so that the Section 7 application would become maintainable under IBC. Their own ledgers have failed to provide basis for calculation of interest. Hence, the amount taken from the Appellants by the Corporate Debtor not having interest component or any time value of money, this does not qualify to be a financial debt as defined under Section 5(8) of the IBC.

23. It was further pointed out that the balance sheet of the Corporate Debtor showed a deposit of Rs.50.00 lakhs in FY 2016-17. However, in 2021 the same figure has been shown as Rs.97.00 lakhs which sum was equivalent to the alleged combined principal amount purportedly disbursed as loan by all the Financial Creditors. When the Financial Creditors were all separate and distinct juristic and natural persons, clubbing of loans purportedly taken from individual persons with those secured by a corporate entity is a clear indication of the pre-planned collusion and connivance between the Appellants exposing their fraud.

24. Pointing out another incidence of infraction of the Companies Act, it was submitted that the Corporate Debtor being a private company was not eligible under Section 76 of the Companies Act, 2013 to accept any loan from

the Appellants as they were not members or share-holders of the Corporate Debtor. This further goes to expose the fraud played upon the Adjudicating Authority into believing normal business entries to be loan entries. Further, under the Section 186(2)(a) of Companies Act, a company cannot grant a loan exceeding 60% of its paid up share capital. The Appellant No.1 had paid-up share capital of only Rs.10 lacs but had allegedly given a loan amounting to Rs.50 lacs. Moreover, there is no special board resolution authorising the said loan exceeding the limits during the year 2016. This also shows that these transactions were not loan transactions but transactions undertaken with a different motive but given the garb of a loan transaction.

25. The Appellants in their defence stated that the allegations of the Respondent No. 1 are frivolous. There is a clear record of loan disbursal and the tally records of the Corporate Debtor as per the RPs report which clearly evidences the disbursal of debt by the Appellants to the Corporate Debtor. Against these debts, loan recall notices had been issued. The disbursal of debt was not denied by the Corporate Debtor. Neither has the Corporate Debtor claimed to have cleared the outstanding debt. Thus, there being a clear-cut case of loan having been disbursed by the Financial Creditors to the Corporate Debtor which remained unpaid and the said amount exceeded Rs one crore, this met the test of Section 7 application.

26. On the allegations of mistakes and discrepancies in the loan agreement documents, it was argued that even if inadvertent errors had crept into the loan agreement like insertion of a wrong address, such mistakes have no material bearing on the validity of a financial debt owed by the Corporate Debtor to the Appellant when such loan transactions are reflected in the

balance sheets of the Corporate Debtor. Further, on the plea taken by the Respondent No.1 that the Appellants had antedated the fabricated loan agreements which is borne out of the fact that all the loan agreement documents were verbatim copies of each other, it was clarified that use of a standard format for all the loan agreements was not unusual since in this case the Financial Creditors of the Corporate Debtors belonged to the same family. That the mention of remedy of IBC in the loan agreement cannot be a ground to prove that it was ante-dated, it was contended that the loan agreement was executed on 21.07.2016 by which time the IBC had already been assented to by the President of India. On the allegation of non-stamping of the loan agreements rendering them invalid, it was stated that as long as there is sufficient material on record which substantiates the debt in question, the non-stamping of agreement is not relevant. Unstamped loan agreement does not render a Section 7 application non-maintainable. Such errors do not either negate or alter the nature or character of loan transactions undertaken between the parties. It was asserted that it is a well settled legal precept that a loan transaction even in the absence of written agreement is sufficient to fulfill the requirements of Section 7, hence, even if there are some infirmities in the loan agreements, as long as the loan was disbursed to the Corporate Debtor who thereafter defaulted in repaying the said debt, the tests laid down under Section 7 of IBC stand fulfilled.

27. On the contention of the Respondent No. 1 that the notes to balance sheets of the relevant FYs show that there were no borrowing costs for the Corporate Debtor during the FYs when the loans had been disbursed, it was contended that this assertion was misplaced and wholly misconceived. Both

the Loan Agreement of 21.07.2016 and Loan Extension Agreement of 01.08.2019 clearly provided for levy of 12% interest. The reason for the interest calculation not getting reflected in the balance sheet was because of the accounting standards followed by the company which allows both receipt basis or on accrual basis. In any case even if the loan transactions were sans interest, they still qualify to be a financial debt in terms of Section 5(8) of IBC. In support of their contention, the Appellants have placed reliance on the judgment of Hon'ble Supreme Court in the matter of ***Orator Marketing Pvt. Ltd. vs. Samtex Desinz Pvt. Ltd. 2021 SCC Online SC 513*** which clearly held that a reading of Section 5(8) of the IBC makes it amply clear that existence of interest is not mandatory and does not expressly exclude an interest free loan. In the light of the above judgment, the argument of the Respondent No.1 that as per the balance sheet, the loan transactions being interest free, the same did not qualify to be financial debt does not stand to reason.

28. To rebut the contention of the Respondent No.1 that the Board meetings as well as the resolutions approving the loan agreements were a sham, reference was made to the judgement of this Tribunal in the matter of ***Agarwal Polysacks Ltd. vs. K.K. Agro Foods and Storage*** in ***CA (AT)(Ins) No. 1126 of 2022*** which held that a written financial contract is not the only basis for proving of a financial debt. Much emphasis was laid that the Hon'ble Supreme Court after taking note of the findings of its judgment in ***Asset Reconstruction Company (India) Ltd. Vs Bishal Jaiswal (2021) 6 SCC 366*** had held in the matter of ***Vidya Sagar Prasad vs. UCO Bank*** in ***Civil Appeal No. 1031 of 2022*** that the entry made in the balance sheet clearly amounts

to acknowledgement of the liability. It has also been asserted that any non-compliance under the Companies Act cannot negate a petition filed under Section 7 as long as there is a valid debt and default in payment of the said debt.

29. Before we come to our analysis and findings, we would like to see the observations of the RP in respect of the allegations made by the present Respondent No.1 as submitted in compliance of the directions of the Adjudicating Authority. It is pertinent to note that it was submitted by the RP that prior to making their observations, they had sent emails on 09.08.2022 and 20.08.2022 to the Financial Creditors seeking clarifications. When the financial creditors did not give their clarifications, the RP after perusing the records of the Corporate Debtor including the Balance sheet submitted a compliance affidavit to the directions of the Adjudicating Authority dated 23.08.2022. These observations have been placed in a tabular format by the RP in their affidavit before this Tribunal, the relevant excerpts of which are reproduced below though not in the original tabular format:

> ***"4.Allegation*** *- Mentioning of new registered office in the alleged old loan agreement.*
>
> ***Remarks****- It is to be noted that as per form INC-22 filed with Registrar of Companies, the Registered office of Acute Daily Media Private Limited was shifted from:*
>
> *D.K-1, Danish Kunj, Kolar Road*
> *Tehsil Huzur*
> *Bhopal*
> *To*
>
> *E-3/235 Arera Colony, Bhopal-462016 on 30.04.2019.*
>
> ***5. Allegations****-Mentioning of the remedy of IBC in the alleged loan agreement dated 21.07.2016.*

Remarks- *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. Allegations- *All loan agreements verbatim copy of each other.*

Remarks- *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.*

7. Allegations-*No stamp duty was paid on the loan agreements.*

Remarks- *The loan agreements have been entered into between the Respondents and the Corporate Debtor on their respective letter heads.*

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.

8. Allegations-*Date of alleged Board meetings not recorded in the Annual return of CD.*

Remarks- *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. Allegations- *No specific loan to CD shown in the Balance sheets and audit reports of CD.*

Remarks- *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 Respondent/Resolution Professional, shows that the same under the head of Unsecured Loans.*

Further, as alleged in the para 13(g) of the IA that "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". However, RP has gone through the point no 9 to the annexure A of audit report which is reproduced below:

> ***"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."***

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.

10. Allegations*- Audit report of CD clearly shows no borrowing costs.*

Remarks*- 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 "The company does not have any borrowing cost"*

11. Allegation*-CD not eligible to accept any loan from Respondent No. 4 to 6*

Remarks*- Para 4 of the Annexure A to the Independent Auditor 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. Allegations*- Respondent No.1/ Financial Creditor not eligible to advance any loan to the CD*

Remarks*- 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. Allegations*- Alleged interest of 12% not accrued in the books of accounts of Respondent No.1/Financial Creditor.*

Remarks*- 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. Allegations**- Conduct of Respondents*

***Remarks**- 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."

30. At this juncture it may be useful to see how the Adjudicating Authority had dealt with the issue at hand. We find that the Adjudicating Authority has taken note of the allegations and counter-allegations of both the parties besides taking note of the ledger accounts and observations of the RP on the pointed allegations which were raised by the present Respondent No. 1. However, prior to taking up the matter for adjudication, the Adjudicating Authority has put in perspective Section 65 of IBC in the light of the judgements of this Tribunal in ***Pawan Kumar Ex-Director and Shareholder Vogue Clothiers Pvt. Ltd. Vs. Utsav Securities Pvt. Ltd. [(2021) ibclaw.in 368 NCLAT]; Shri Amit Katyal Vs. Mrs Meera Ahuja [(2020) ibclaw.in 326 NCLAT]; Ashmeet Singh Bhatia v. Pragati Impex India Pvt. Ltd. and Anr. [(2024) ibclaw.in 63 NCLAT]*** and ***Unigreen Global Pvt. Ltd. v. Punjab National Bank and Ors. [Company Appeal(AT)(Ins.) 81 of 2017]*** and thereafter in paragraphs 10 and 11 has proceeded to note down the reasons justifying adjudication of the allegations levelled by the present Respondent No. 1 which is as reproduced below:

"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."

31. We have no quarrel with the proposition of the Appellants that in terms of Section 7 of the IBC, what is required to be seen is the existence of a debt and default of the said debt. Once a debt becomes due or payable and there is incidence of non-payment of the said debt in full or part, CIRP may be triggered by the Financial Creditor as long as the amount in default is above the threshold limit. Be that as it may, Section 65 of the IBC is an enabling provision within the statutory framework of IBC whereby even if a Section 7 application has been filed or has been admitted, it vests jurisdiction on the Adjudicating Authority to examine an application under Section 65, if a prima facie case is made out to show that the Section 7 application had been filed 'fraudulently' or 'with malicious intent' and for purpose other than resolution of insolvency or liquidation. In the present case too, we therefore do not find any error on the part of the Adjudicating Authority to consider the Section 65 application filed by the Respondent No.1 on being prima facie satisfied that

the Section 7 application seeking initiation of CIRP proceedings had been filed by suppression of relevant material for purposes other than insolvency resolution. There is no statutory embargo on the Adjudicating Authority to exercise its discretion carefully and judiciously in a Section 65 application to prevent and protect the Corporate Debtor from being dragged into CIRP. This is a well settled proposition of law and the Adjudicating Authority has drawn reference to the binding precedents laid down by this Tribunal which have already been noticed at paragraph 30 above. We are therefore not much impressed by the argument of the Appellants that the Section 7 order of 17.05.2022 having attained finality, it cannot be relooked into by the Adjudicating Authority even when a Section 65 application is filed.

32. While returning our findings on the tenability of the impugned order, we must at the very outset add that that to prove any transaction to be collusive and fraudulent in nature, the degree of proof and evidence required should be beyond reasonable doubt and we propose to apply the same standard of proof to the facts of the present case.

33. When we see the material on record, we have no doubt that there was disbursal of money by the Financial Creditors to the Corporate Debtor. From available records, we also agree that the receipt of this amount by the Corporate Debtor has not been controverted by the Corporate Debtor. Neither has any claim been made that this entire sum was paid by the Corporate Debtor. That being the case, there was outstanding payment on the part of the Corporate Debtor qua the Appellants which remained unpaid leading to a default. Basis this premise, we notice that the Adjudicating Authority on 17.05.2022 had initiated CIRP of the Corporate Debtor in terms of Section 7

of IBC. However, when the Section 65 application was filed, the Adjudicating Authority took cognizance of the fact that several facts had not been placed before the Adjudicating Authority during the Section 7 proceedings which culminated in the order of 17.05.2022. The question which needs to be answered is whether the Adjudicating Authority in the impugned order was correct in coming to the conclusion that in the absence of knowledge of these material facts, for reasons of having been either falsified or suppressed, the earlier order of 17.05.2022 failed to note that routine business transactions were fraudulently given the colour and character of loan transactions to bring them within the meaning of Section 5(8) of the IBC. It may also not add be out of place to take note of the fact that when the Section 7 application was being considered by the Adjudicating Authority, the promoters of the Corporate Debtor kept the Adjudicating Authority in the dark about the ongoing OMP.

34. The alleged false material particulars and facts which were not put in the correct perspective before the Adjudicating Authority in the Section 7 application on having been brought to light in the instant Section 65 application has been captured at length in the impugned order which have been extracted hereunder:

> *"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."

35. We now proceed to look at the clarificatory response of the Appellants to the alleged false material particulars which have been brought to light before the Adjudicating Authority by the Respondent No.1 in the Section 65 application. On the depiction of wrong address in the loan agreement document of 21.07.2016 which has been confirmed by the RP and is also borne out by the ROC records we find that the Appellants in their response have not denied this discrepancy in the address contained in the loan agreement document except for making a counter assertion that this did not render the loan agreement document invalid. On the allegation of the loan agreement documents being verbatim copies of each other, which factum has again been confirmed by the RP, this has also been admitted with a facile explanation that common templates of loan agreements were followed since the financial creditors were all related. On the charge as to how the remedy of IBC could find mention in the loan agreement of 21.07.2016 at a time when the IBC had not come into play, the explanation offered by the Appellants is that IBC had received assent of the President of India by then. This is a weak defence since IBC came into effect on 01.12.2016 which date was clearly posteriori to the date of the loan agreement, again a fact which has been confirmed by the RP. On the allegation of non-stamping of the loan agreements, the same has not been denied but brushed aside with the

explanation that unstamped loan agreement does not render a Section 7 application non-maintainable. We are in agreement with the Adjudicating Authority that the Appellants have not been able to properly rebut these specific allegations. The tone and tenor of reply of the Appellants to all the above charges are clearly evasive and far from being resounding. The Appellants have not repelled the allegations on merits but have simply dismissed them by holding them as hyper-technical, irrelevant and obnoxious without adequate substantiation.

36. The Respondent No.1 has also raised the charge that the loan agreements did not reflect genuine loan transactions but were mere routine business transactions which were subsequently fraudulently misrepresented as loans to enable initiation of CIRP against the Corporate Debtor. In support of their allegations, it has been mentioned that the dates of Board meetings were not recorded in the Annual Returns of the Corporate Debtor, wherein resolutions were purportedly passed authorising the grant of loan. However, the Appellants have simply side-stepped this allegation by dubbing it as a hyper-technical objection. The RP has also confirmed that these Board meetings do not find place in the Annual Returns of the Corporate Debtor in Form No.MGT-7 for the financial years 2016-17 to 2019-20. When the Annual Returns which form part of the ROC records do not reflect Board meetings, it follows therefrom that resolutions claimed to have been passed in these Board meetings regarding loan agreements could not have taken place and therefore lack sanctity. Hence in the absence of a proper defence or cogent explanation given by the Appellants, the Adjudicating Authority cannot be faulted for

finding the alleged loan agreements by the Financial Creditors to be fabricated and antedated with a fraudulent intent.

37. We also notice that it has been confirmed by the RP that the statutory auditor in the Audit Report for FY 2016-17 and 2019-20 clearly stated that the company did not raise any money by way of IPO and term loans during the year. The statutory audit report of the Corporate Debtor for FY 2020-21 also mentions in the notes to the balance sheet that there was no borrowing cost to the company. The RP has also confirmed that the balance sheet of the Appellant No.1 did not indicate any interest income which had accrued/reflected/booked to them. The fact that no accrued interest income is reflected shows that no loan transaction ever took place and in the absence of interest or any other consideration to show time value of money, the transaction does not become a financial debt. There is no satisfactory explanation to justify the non-accrual of interest in the Balance Sheet of the Appellant No.1 except for attributing it to the accounting standards followed by them which is a feeble defence. When no interest income had been reflected in the balance sheet, yet computing the interest amount in the Section 7 application to cross the threshold hurdle lends credence to the narrative of precipitation of fraud.

38. It is also the case of the Respondent that even if loan is reflected in the books of the Corporate Debtor, there is no creditor-wise split-up of loans reflected in the books of the Corporate Debtor, hence, the Appellants cannot claim to have given loan. In response, the Appellants have endeavoured to rest their explanation on the ground that the RPs remarks show that the borrowings have been shown in the financial statements of Corporate Debtor

for the financial year 2016-17 and FY 2019-20 as long term borrowings and short term borrowing on consolidated basis. Since loan transactions are reflected in the balance sheets of the Corporate Debtor, mere allegations of the Respondent No.1 cannot alter the nature or character of loan transactions undertaken between the parties. It is however pertinent to note here that the RP while returning the finding that the borrowings were reflected in the Financial statements had also qualified their remark by stating that party wise data in respect of the borrowings has not been shown in the audited balance sheet and that this data figures only in the books of accounts which were being maintained on the tally accounting software of the Corporate Debtor where same is shown under the head of Unsecured Loans. However, given that tally data was prepared by the Corporate Debtor itself, the bonafide of this self-serving data cannot be relied upon.

39. No justification has also been provided by the Appellants as to how the Appellants inspite of being ineligible to advance the alleged loans had done so. That this tantamount to violation of Section 186 of the Companies Act has also not been denied. Yet another violation of the Companies Act has been the clubbing of the loans of private persons with the alleged loan of a corporate entity in the balance sheet which also has not been explained. All the non-compliance of the provisions of the Companies Act have been dealt with a stock reply that these non-compliances are of no consequence as non-compliance under the Companies Act cannot negate a petition filed under Section 7 as long as there is a valid debt and default in payment of the said debt.

40. While there is no quarrel over the fact that Section 7 vests rights on the financial creditors to initiate CIRP proceedings against the defaulting Corporate Debtor, however, debt and default cannot always be seen in isolation. We cannot be unmindful of the fact that the Adjudicating Authority is also required to take care that the provisions of Section 7 of IBC are not misused or abused in any manner either by the financial creditor or the promoters of the Corporate Debtor to take undue advantage at the cost of insolvency resolution. Present is a case where the promoters of the Corporate Debtor and the Financial Creditors in trying to create a non-existent financial debt out of routine business entries, have ended up unwittingly committing lapses which lapses when seen cumulatively points to a web of conspiracy and collusion on their part to create a contrived situation of debt and default. The mistakes and infirmities committed by the Appellants in the process are not one-off or stand-alone mistakes or inadvertent errors. These errors are also grave in that it also included violation of other statutes like Companies Act. When we take a comprehensive and holistic view of the entire conspectus of facts and circumstances, we find that there is ample proof to show that the Section 7 application was a motivated attempt to bring the Corporate Debtor into the rigours CIRP proceedings. The bonafide of the Appellants in the filing of the Section 7 application is clearly doubtful. Viewed from the angle of the totality of circumstances, the findings of the Adjudicating Authority that the insolvency proceedings in C.P.(IB)-50(PB)/2021 resulting in the 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, is neither dehors the records nor unwarranted. When such fraudulent CIRP

proceedings are initiated, the Adjudicating Authority has jurisdiction under the IBC to consider the allegations of fraudulent and malicious initiation of CIRP proceedings in terms of Section 65 and recall the CIRP admission order.

41. For the foregoing reasons as discussed, we find no good reasons which warrant any interference in the impugned order. The Appeal is found to lack merit and is dismissed. No cost.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi
Date: 16.01.2025

Harleen/Abdul