



**NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-V**

C.P. 1358 OF 2020

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Unity Small Finance Bank

(Formerly known as Punjab & Maharashtra Co-operative Bank Ltd.)

Office No. 4 & 5, 3rd Floor, Dreams Mall, Bhandup (W), Mumbai 400 078

... Financial Creditor

V/s

M/s. Privilege Power and Infrastructure Pvt. Ltd.

3rd, floor, HDIL Tower, Anant Kanekar Marg, Bandra (e), Mumbai 400 051

...Corporate Debtor

Order Reserved on: 19.12.2022

Order Pronounced on: 15.02.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via videoconference)

For the Petitioner: Mr. Rohit Gupta (Advocate).

For the Corporate Debtor/ Respondent: Mr. Nausher Kohli a/w Mr. Subir Kumar and Ms. Disha Shah (Advocates).

Per: Smt. Anuradha Sanjay Bhatia, Member (Technical)



ORDER

1. The above Company Petition is filed by Unity Small Finance Bank (Formerly known as “Punjab & Maharashtra Co-operative Bank Ltd”), hereinafter called as “**Petitioner**” seeking to initiate of Corporate Insolvency Resolution Process (“**CIRP**”) against M/s. Privilege Power and Infrastructure Pvt. Ltd. hereinafter called as “**Corporate Debtor**” by invoking the provisions of Section 7 Insolvency and Bankruptcy code (hereinafter called “**Code**”) read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of an unresolved Financial Debt of Rs.138,48,08,867.90/-.
2. The captioned Petition was originally filed through the Administrator of Punjab and Maharashtra Co-operative Bank Limited (“**PMC**”), which has now merged with Unity Small Finance Bank by way of a scheme of amalgamation approved and notified by the Reserve Bank of India (RBI) on 25.01.2022. Pursuant thereto, an IA 624 of 2022 was preferred before this Tribunal to bring Unity Small Finance Bank on record. The said Application has been allowed by this Tribunal vide Order dated 11.03.2022. Pursuant thereto, the name of Unity Small Finance Bank, has been substituted in place of PMC.
3. The Petitioner enclosed the following details of documents, records and evidence of default:
 - a. Copy of Bank Statement of Overdraft account;
 - b. Copy of Certificate under Bankers’ Book of evidence Act;
 - c. Copy of Sanction letter dated 16.08.2018;
 - d. Copy of Confirmation from Corporate Debtor;
 - e. Copy of Charge Certificate;
 - f. Copy of Promissory Note dated 16.08.2018;
 - g. Copy of SARFAESI Notice Dated 07.10.2019;



- h. Statement of Account of the Respondent;
- i. Copy of Recall Letter dated 12.06.2020;
- j. Copy of Record of default submitted with NeSL.
- k. An additional affidavit was filed on 02.08.2022, annexing the re-casted balance sheet as on 31.03.2019.

Facts of the case

- 4. The Petitioner submits that the Respondent had approached it in the year 2007, for financial assistance by way of an Overdraft facility. The Petitioner had opened the Overdraft Account bearing number 002140700001790, and, thereby started extending financial assistance by way of overdraft facility, to the Respondent, from 12.03.2007. In furtherance, a significant amount of Rs. 11.81 Crores was extended during the period of 12.03.2007 to 31.03.2007.
- 5. Thereafter, the Respondent had executed documents such as Demand Promissory Note dated 16.08.2018 (Annexure 17 of the Company Petition 1358/2020) and Mortgage Deeds dated 13.04.2017 and 24.05.2018 (Annexure-19 to 21 of the Company Petition 1358/2020) with respect to two of its properties. After the execution of the said documents the Petitioner had issued a “**Renewal of your Mortgage Overdraft Limit**” (Annexure-11 of the Company Petition 1358/2020) for an amount of Rs. 81.50 Crores. The renewal of the Mortgage Overdraft limit letter, dated 16.08.2018, is reproduced below:



PUNJAB & MAHARASHTRA CO-OPERATIVE BANK LIMITED
MULTI-STATE SCHEDULED BANK

Corporate Office
Office No.4 & 5, 3rd Floor, Dreams Mall, LBS Marg, Bandrup(W), Mumbai - 400 070.
Tel : (022) 6756 4000 Fax : (022) 6756 4040

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Ref. No./PM/CO/CREDIT/660/18-19

DATE: 16-08-2018

The Director/s,
M/s.Privilege Power & Infrastructure Pvt Ltd.
3rd Floor, HDIL Towers,
Anant Kanekar Marg, Bandra E,
Mumbai 400051.

Sir,

Subject: Renewal of your Mortgage Overdraft Limit.

With reference to your application for Renewal of Mortgage Overdraft limit, we are pleased to inform that you have been sanctioned as follows:

Nature of Limit	Mortgage Overdraft
Amount	Rs.81,50,00,000.00 (Rupees Eighty One Crore and Fifty Lakh Only)
Prime Security	Continuation of Registered Mortgage of land situated at Village Shirgaon, Taluka Vasai, District Thane, total Area in 50,575.00 sq mtrs and also land situated Village Doliv, Dahisar, Kasrall, Khardi, Taluka Vasai, District Palghar, having Total area 1,95,766 Sq Mtrs standing in the name of Company (Details of the property as per annexure attached)
Rate on Interest	13.00%p.a. (Floating Rate) subject to revision in rate of interest by Bank from time to time OR as per RBI Directives
Repayment	On Demand/ Annual renewal
Penal Interest	2 % on overdrawn Amount
Inspection	Yearly
Sureties	1. Mr.Rakesh Kumar Wadhawan 2. Mr.Sarang Rakesh Kumar Wadhawan

SUBJECT TO COMPLIANCE OF FOLLOWING TERMS & CONDITIONS:-

1. All Terms and Conditions to be observed and documents to be submitted.

2. Conditions for Registered Mortgage of Property:

- Property will be continue kept as security in Bank's favour till pendency of credit facility.
- Our Bank's charge to be noted in Record of Rights (7/12 Extracts).
- All Original Title deeds pertaining to the said property should retain with the Bank till pendency of credit facility.

Inspection of property will be done by Bank official and cost for the same to be borne by applicant.



For PRIVILEGE POWER & INFRASTRUCTURE PVT. LTD.

Director/Authorised Signatory





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PUNJAB & MAHARASHTRA CO-OPERATIVE BANK LIMITED
MULTI-STATE SCHEDULED BANK
Corporate Office
Office No.4 & 5, 3rd Floor, Dreams Mall, LBS Marg, Phandup(W), Mumbai - 400 078
Tel : (022) 8788 4308 Fax : (022) 8788 4040

- To ensure that all conditions stated in legal opinion report obtained for the said property for sustaining a clear and marketable title on the property are complied with.
- 3. Stamp & document charges as per State Stamp Act will have to be borne by you.
- 4. The Company & Sureties should execute necessary documents for Renewal of Credit facility.
- 5. The rate of interest applicable for the proposed mortgage overdraft limit is 13.00% p.a. Floating rate (Monthly rest) subject to revision rate of interest of Bank from time to time or as per RBI directives from time to time.
- 6. (a) Board resolution of M/s. Privilege Power and Infrastructure Pvt Ltd for renewal of Mortgage Overdraft limit, authorising director to execute bank documents and any other documents and continuation of registered mortgage of the above mentioned property pertaining to said limit to be submitted
- 7. Company should undertake the following:
 - a. To authorize the Bank to deduct all the documentation, valuation charges and any other related charges in respect of the said credit facility to the account.
 - b. That the funds will not be utilised for speculative purposes.
 - c. That cheque will not be returned in the account for want of funds.
 - d. That the account will be operated within the sanctioned limit.
- 8. Renewal of limits / Review of loans
Limit is subject to renewal on annual basis. While Limit accounts will be reviewed annually by the Bank.
 - a) Borrower should submit request for renewal of limit along with latest Audited Financial Statements, latest Provisional Financial Statements, Latest KYC documents, latest Statutory dues Paid certified by borrower's Chartered Accountant.
 - b) The documents should be submitted one month prior to expiry of the term to avoid withdrawal of limit / operations.
 - c) Borrower should cooperate the Bank for submission of documents and charges for renewal / review of credit facilities.
- 9. The Bank shall have all the right to securitise the secured assets and in the event of such securitisation, the Bank is not bound to send a prior intimation as to that effect to the borrower and/or guarantor.
All assets financed by the Bank and all such assets lodged as security and located at



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For PRIVILEGE POWER & INFRASTRUCTURE PVT. LTD.

[Handwritten signature]

Director/Authorised Signa. /



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PUNJAB & MAHARASHTRA CO-OPERATIVE BANK LIMITED
MULTI-STATE CO-OPERATIVE BANK
Corporate Office
Office No.4 & 5, 3rd Floor, Green's Mall, LBS Marg, Bandra (W), Mumbai - 400 076.
Tel. (022) 6786 4000 Fax: (022) 6786 4000

different places should be insured against all applicable risks for full market value thereof, with the Bank Clause and the policy/policies will be held by the Bank. The cost of the insurance will be borne by the applicant/s. It will be necessary for the borrower/s to make punctual payment of all premium amounts and to ensure that no acts/ omissions occur in this regard which may invalidate such insurance during the currency of the advance.

11. In case of default in repayment of the Principle amount or Interest amount thereon or any of the agreed Principle/Interest or both of the limit on due date/s by the borrower, the Bank and/or the RBI will have an unqualified right to disclose or publish the borrower name or the name of the borrower company/unit and its directors/partners/proprietors as defaulter in such manner and through such medium as the Bank or the name of the borrower company/unit and its directors/partners/proprietors as defaulter in such manner and through such medium as the Bank or RBI in their absolute discretion may think fit.

12. Directors of M/s. Privelege Power and Infrastructure Pvt Ltd should affix the Digital Signature for creation of charge with ROC on mortgage property.

13. General Conditions :

1) The Bank shall have all the right to securitise the secured assets and in the event of such securitisation, the Bank is not bound to send a prior intimation as to that effect to the borrower/s and / or guarantor/s.

2) In case of default in repayment of the loan / advances or in the payment of the interest thereon or any of the agreed installments of the loan on due date/s by the borrower, the Bank and / or the RBI will have an unqualified right to disclose or publish the borrower's name or the name of the borrower's company / unit and its directors / partners / proprietors as defaulter in such manner and through such medium as the Bank or the name of the borrower's company / unit and its directors / partners / proprietors as defaulter in such manner and through such medium as the Bank or RBI in their absolute discretion may think fit.

3) The Bank will have the right to share credit information as deemed appropriate with CIBIL or any other institution as approved by RBI from time to time.

4) The company should not induct into its Board a person whose name appears in the willful defaulters list of RBI / CIBIL (other than as a Nominee / Professional / Honorary Director). In case such a person is already on the Board of the borrowing company, it would take expeditious and effective steps for removal of that person from its Board.

5) The company / firm shall keep the Bank informed of the happening of any event likely to have substantial effect on their profit or business. The same shall accompany with explanation and the remedial steps proposed to be taken.

Any material changes relating to constitution, any action having impact or



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For PRIVELEGE POWER & INFRASTRUCTURE PVT. LTD.
[Handwritten signature]
Director/Authorized Signatory



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PUNJAB & MAHARASHTRA CO-OPERATIVE BANK LIMITED
MULTI STATE SCHEDULED BANK
Corporate Office
Office No.4 & 5, 3rd Floor, Greens Mall, 165 Marg, Bandra(W), Mumbai -400 076
Tel. (022) 4780 4800 Fax : (022) 4780 4040

appropriation of profit or reduction in profit or information provided to the Bank while considering the sanction of proposal should be intimated to the Bank and approval for the same to be obtained by the loan applicant/s failing which Bank has a right to call back entire facilities sanctioned, at once.

7) Any material changes relating to constitution, Board of Directors, Shareholding Pattern, Management actions like dividend declaration, bonus declaration, any action having impact of appropriation of profit or reduction in profit or information provided to Bank while considering the sanctioning of proposal should be intimated to Bank & approval for the same to be obtained by party failing which Bank has a right to call back entire facilities sanctioned at once.

Acknowledgement:

Please return to us the duplicate copy of this letter duly signed by the Director in Token of the acceptance of the terms and conditions stipulated herein above.

Assuring you of our best services.

Yours faithfully,



Handwritten signature

Authorised Signatory

I/We accept the above Terms and conditions
M/s. Privilege Power & Infrastructure Pvt Ltd.,

For PRIVILEGE POWER & INFRASTRUCTURE PVT. LTD.

Handwritten signature

Director/Director/Authorised Signatory

Handwritten signature

Sureties

Handwritten signature





Thereafter the Respondent issued Balance Confirmations, Viz:

- a. On 21.04.2011 for Rs. 30,36,82,307.41/-;
- b. On 27.06.2011 for Rs. 29,99,61,736.20/-;
- c. On 11.07.2018 for Rs. 101,69,36,070.27/-;
- d. On 07.08.2019 for Rs. 115,25,89,280.27/-;
- e. On 08.08.2019 for Rs. 120,07,71,521.27/-.

The Corporate Debtor had also issued a Letter of Continuing Security dated 16.08.2018 for an amount of Rs. 81.50 Crores. It is submitted that the debt is confirmed and admitted from time to time by the Corporate Debtor and there is no dispute as to the existence of these documents.

6. The Petitioner submits that on 23.08.2019, the management of the Petitioner Company was taken over by the Administrator appointed by the Reserve Bank of India. The Reserve Bank of India, in view of existing irregularities in the conduct of the Petitioner, had asked the Petitioner to recast/re-audit its books of accounts. Resultantly, the Petitioner re-casted/ re-audited its books of account. Upon conclusion of the said re-audit, the Petitioner classified the account of the Respondent as a Non-Performing Asset (NPA), with effect from 31.08.2012. In order to substantiate its claim, Petitioner has placed on record the statement of account from 12.03.2007 to 30.06.2020 (Annexure-9 of the Company Petition 1358/2020). The accounts demonstrate regular debit and credit entries, which substantiate disbursement as well as default in repayment.
7. The Petitioner submits that upon non-payments towards the amounts advanced by the Petitioner, it had issued a notice under Section 13(2) of the SARFAESI Act, dated 07.10.2019 (Annexure -23 of the Company Petition 1358/2020). The Respondent did not respond to the said notice.



Thus, the Petitioner had also issued a loan recall notice dated 12.06.2020 (Annexure -24 of the Company Petition 1358/2020) for recalling the outstanding amounts due and payable by the Respondent. In addition to this, the Petitioner has also placed on record the record of default submitted with NeSL dated 12.07.2020.

8. In view of the Respondent did not respond to the abovesaid notice and the recall letter, and the debt claimed by the Petitioner which is due and payable by the Respondent, and the same is within limitation.
9. The Petitioner submits that the Petition is within limitation and placed reliance on the following:

Sr.	PARTICULARS	DATE
1.	Disbursal of 2.50 crores	12.03.2007
2.	Respondent issued balance Confirmation for Rs. 29,99,61,736.20	27.06.2011
3.	Date of NPA	31.08.2012
4.	Disbursal of 6.79 crores	25.02.2013
5.	Credit transaction through Bharti Airtel (22,428)	22.10.2013
6.	Credit Transaction through Bharti Airtel (2,61,000)	17.02.2016
7.	Mortgage Deed for Rs. 10 crores	13.04.2017
8.	Mortgage Deed for Rs. 81.50 crores	13.04.2017
9.	Mortgage Deed for Rs. 81.50 crores	24.05.2018
10.	Balance confirmation for Rs. 101,69,36,070.27	11.07.2018
11.	Sanction letter for Rs. 81.50 crores	16.08.2018
12.	Demand Promissory Note for Rs. 81.50 crores	16.08.2018



13.	Letter of continuing security for Rs. 81.50 crores	16.08.2018
14.	Respondent issued balance confirmation for Rs. 115,25,89,280.27	07.08.2019
15.	Respondent issued balance confirmation for Rs. 120,07,71,521.27	08.08.2019
16.	SARFAESI Notice	07.10.2019
17.	Recall Letter	12.06.2020
18.	Record of default submitted with NESL	12.06.2020
19.	Petition filed on	01.07.2020

10. The Petitioner states that there was a clear-cut Debt and Default in the repayment, Hence, the Petitioner filed this Petition under Section 7 of the Code, with a prayer to initiate CIRP Proceeding against the Corporate Debtor.

Reply by the Respondent

11. The Respondent has filed an affidavit in reply controverting the allegations sought against it.

12. In its Affidavit in Reply, the Respondent has challenged the maintainability of the Petition under Section 7 of the Code, filed by the Petitioner. The Respondent further stated that the documents annexed in support of the alleged debt are fraudulent documents produced by the Petitioner on which no reliance could be placed.

13. The Respondent submitted that the present Petition filed by the Petitioner comes within the purview of fraudulent or malicious initiation of proceedings.

14. It is the Petitioner's own case that the Petitioner had declared the account of the Corporate Debtor as NPA with effect from 31.08.2012 and hence it is time barred. It was also contended by the Respondent that



the Petition suffers from various laches and deficiencies and ought to be dismissed.

15. It was submitted by the Respondent that the amount claimed by the Petitioner in the Petition i.e. 81.50 crore never took place. The Corporate Debtor has not utilized any such facility as claimed by the Petitioner. Hence, the Petition should be dismissed as the same is not maintainable.

Findings

16. Heard the counsel appearing for parties and perused the records.

17. The present Petition is filed by the Petitioner under Section 7 of the Code, for resolution of debt of Rs. Rs.138,48,08,867.90/-.

18. The Petitioner states that it had advanced financial assistance by way of an overdraft account to the Respondent in the Year 2007. The Petitioner had opened an Overdraft Account with the Respondent and thereby started extending financial assistance in the nature of overdraft facility to the Respondent from 12.03.2007. The Petitioner had extended an amount of Rs. 11.81 crores to the Respondent for a period from 12.03.2007 to 31.03.2007. The Petitioner has stated that on 23.08.2019, the management of the Petitioner was taken over by an Administrator appointed by the Reserve Bank of India. The RBI had directed the Petitioner to recast its books of accounts after getting them audited. Upon the conclusion of the said re-audit, the Petitioner classified the account of the Respondent as NPA, with effect from 31.08.2012. It is seen from the records that the Petitioner had issued an "Renewal of Mortgage Overdraft Limit" dated 16.08.2018, for an amount of Rs. 81.50 crores (Annexure-11 of the Company Petition 1358/2020). The Respondent has also from time to time confirmed the balance outstanding of the said overdraft account, by way of confirmation certificates dated 27.06.2011, 11.07.2018, 07.08.2019



and 08.08.2019. The Petitioner in view of the non-payments made by the Respondent issued a notice under Section 13(2) of the SARFAESI Act. Apart from that the Petitioner had also issued a recall letter dated 12.06.2020. The Respondent thereafter failed to repay the outstanding amount, thus the Petitioner filed the present Petition.

19. The Respondent in its reply has set out a case that the Petition is barred by laws of limitation and thus not maintainable, since the Petitioner had provided the Overdraft facilities in the year 2007, and the account of the Respondent were classified as NPA in the year 2012, and the fact that the present Petition was filed in 2020. Therefore, the present debt cannot be said to be within limitation. The Respondent has also made a defence that the transaction in question is not of a nature of a financial debt due to the fact that the Petitioner itself has committed fraud and is undergoing various investigations and scrutinise by various authorities including the Economic Offences Wing and the Enforcement Directorate.
20. The Respondent further stated that the date of default is 31st August 2012. Therefore, it is contended that the Petition is barred by limitation as not filed within the period of 3 years from the date of default. It is also contended that the Petitioner itself has alleged fraud and therefore the Petition is not maintainable as the transaction is fraudulent transaction.
21. On the issue of limitation, the Ld. Counsel for the Petitioner has relied upon the documents produced on record, which clearly demonstrate that the Petition is within limitation. In any event having executed the documents in the year 2017 to 2018 confirming creation of mortgage, it is not open for the Corporate Debtor to contend that the debt is time barred. The Ld. Counsel for the Petitioner placed reliance on following documents executed–

1.	Mortgage Deed for Rs. 10 crores	13.04.2017
2.	Mortgage Deed for Rs. 81.50 crores	13.04.2017



3.	Mortgage Deed for Rs. 81.50 crores	24.05.2018
4.	Sanction letter for Rs. 81.50 crores	16.08.2018
5.	Demand Promissory Note for Rs. 81.50 crores	16.08.2018
6.	Letter of continuing security for Rs. 81.50 crores	16.08.2018

22. The Ld. Counsel for the Petitioner has relied upon certain documents executed by the Respondent namely, Mortgage Deeds, Promissory Notes and Balance Confirmations made by the Respondent. The parties herein had executed mortgage deeds dated 13.04.2017, 13.04.2017 and 24.05.2017, and the Promissory Note was issued on 16.08.2018. Furthermore the Ld. Counsel for the Petitioner has relied upon a Letter for continuing the Security, dated 16.08.2018. The same is reproduced below:



NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-V

C.P. 1358 OF 2020

Ms. ...
Punjab & Maharashtra Co-operative Bank Ltd.
240, Shaheed Sadan, Opp. Maharashtra
Mumbai - 400 022

Punjab And Maharashtra Co-operative
Bank Limited, State Branch
240, Shaheed Sadan, Opp. Maharashtra
Museum, Mumbai-400 022.
(Center of Continuing Security)

To,
D-5/STPW/C.R.105/04/05/1521-24
PUNJAB & MAHARASHTRA CO-OP BANK LTD.

भारत R03 ONE HUNDRED ONLY
198442 JUN 18 2018
Adv-9
R.0000100/-P85342
INDIA STAMP DUTY MAHARASHTRA

Re: Demand Cash Credit Account - Limit ₹
Demand Overdraft Account - Limit ₹ 81,50,00,000/-
Demand Loan Account - Limit ₹

With reference to the Demand Promissory Note dated 16/8/2018 in your favour signed and/or endorsed me/us for ₹81,50,00,000/- in respect of the above mentioned account, I/We do and each one of us doth hereby agree and undertake that the said Demand Promissory Note is to stand and be regarded as a continuing security and be enforceable for all monies which now are or which may at any time hereafter become due and owing by the undersigned Ms. Privilege Power and Infrastructure Pvt Ltd
Rakesh Kumar Wadhawan
Sarang R Wadhawan

to the Bank on the said account and on any other account or accounts and whether or not from time to time there be nothing owing in such account or the same may be in credit.

The undersigned further agree's that the minimum amount of interest payable during the year on the above mentioned account will not be less than _____

_____ at the rate of interest mentioned in the said Demand promissory Note or at any revised rate decided at the discretion of Bank in accordance with changes in RBI directives.

The undersigned hereby expressly authorize and permit the bank to transmit, provide, exchange, share or part with all the information relating to the banking transactions, financial accommodations granted by the Bank to the borrowers, to other banks, financial institutions, credit bureau/agencies/statutory bodies of the banks or as may be directed by RBI or any other regulatory authority from time to time.

The undersigned confirms that such disclosure by the Bank shall not be construed as breach of Bank's liability to maintain secrecy towards the undersigned and the undersigned shall not hold the Bank liable for such a disclosure in any manner whatsoever.

Dated at Mumbai this 16 day of Aug 2018

R. N. Wadhawan
Signature of Surety

S. R. Wadhawan
Signature of Borrower
For PRIVILEGE POWER & INFRASTRUCTURE PVT. LTD.
Authorized Signatory

the above-mentioned documents are duly signed by the authorized signatory of the Respondent. By the virtue of the above documents the Respondent duly acknowledged the debt due and payable by it. Furthermore, the Ld. counsel for the Petitioner has relied upon balance confirmations dated 27.06.2011, 11.07.2018, 07.08.2019 and



08.08.2019 made by the Respondent wherein the outstanding dues are acknowledged by the Respondent. It is noteworthy that the Petitioner has also brought our attention to the Sanction Renewal Letter dated 16.08.2018. The said letter was of indicative of the fact that the Respondent was inclined to keep the transaction alive.

23. The Ld. Counsel for the Petitioner has stated that the Reserve bank of India had taken over the management of the Petition through Section 36AAA of the Banking Regulations Act, 1949. The RBI had further appointed an Administrator for managing the affairs of the Petitioner. Thereafter, the books of account of the Petitioner were re-audited and the exercise of re-audit concluded on 27.12.2019. It was only upon the conclusion of the said re-audit the Petitioner became aware of the existence of fraud that was committed by the one Housing Development and Infrastructure Limited and the erstwhile management of the Petitioner. The Ld. Counsel for the Petitioner states that since the fraud came to knowledge of the Petitioner on 27.12.2019, the limitation period has to be considered from the said date and not from the date of default. The Ld. Counsel for the Petitioner has further appraised this Bench about the applicability of Section 17 of the Limitations Act, 1963 in the present case. Section 17 of the limitation act provides that the Application should be made within 1 year of the discovery of fraud.

24. Apart from that the Ld. Counsel for the Petitioner has relied upon the ruling of **S.S. Ghulam Mohiuddin Vs. S.S. Ahmed Mohiuddin, 1971 (1) SCC 597** wherein the Hon'ble Apex Court has held that:

“19. Section 18 of the Limitation Act, 1908 provides that when a person having a right to institute a suit has by means of fraud been kept from the knowledge of such right or of the title on which it is founded, the time limited for instituting a suit against the person guilty of the fraud shall be computed from the time when the fraud first became known to the person affected thereby. In



Rahimboy v. Turner Lord Hobhouse said “When a man has committed a fraud and has got property thereby it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit”.”

25. The Ld. Counsel for the Petitioner further relied another ruling of the Hon’ble Supreme Court in **Pallavi Seth vs. Custodian and Others, (2001) 7 SCC 549**, wherein it was held that:

“Section 17 of the Limitation Act, inter alia, provides that where, in the case of any suit or application for which a period of limitation is prescribed by the Act, the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of the defendant or his agent (Section 17(1)(b)) or where any document necessary to establish the right of the Plaintiff or Applicant has been fraudulently concealed from him (Section 17(1)(d)), the period of limitation shall not begin to run until the Plaintiff or Applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the Plaintiff or the Applicant first had the means of producing the concealed document or compelling its production. These provisions embody fundamental principles of justice and equity, viz, that a party should not be penalised for failing to adopt legal proceedings when the facts or material necessary for him to do so have been wilfully concealed from him and also that a party who has acted fraudulently should not gain the benefit of limitation running in his favour by virtue of such fraud.

The provisions of Section 17 of the Limitation Act are applicable in the present case. The fraud perpetuated by the Appellant was unearthed only on the Custodian receiving information from the Income Tax Department, vide their letter of 5th May, 1998. On becoming aware of the fraud application for initiating contempt proceedings was filed on 18th June, 1998, well within the period of limitation prescribed by Section 20.”

26. Therefore, in view of the above judgements cited by the Petitioner and perusal of Section 17 of the Limitation Act, 1953, coupled with the fact



that the transaction documents executed between the parties and the fraud came to be discovered by the Petitioner in the year 2019. Along with this the execution of the transaction documents also obligates the Respondent to pay a time-barred debt as per provisions of Section 25 (3) of the Indian Contracts Act, 1872.

27. In this regard it is noteworthy that, the Balance Confirmation is a promise to pay the debt and therefore it is within the period of limitation. The Petition further reveals that there is unconditional acknowledgment to make payment of the debt by virtue of executing the mortgage deeds as well as promissory notes and acknowledgment letters thereafter.

28. In any event the abovementioned documents are not taken as acknowledgment of debt or it is presumed that there is no acknowledgment of debt between 2013 and 2016, in that event also the transaction documents are in nature of contract between the parties to pay a time barred debt as per Section 25(3) of Indian Contract Act, 1872. It is thus submitted that the unconditional acknowledgment by the Respondent to repay the debt to the Petitioner is an express promise to pay. Therefore, even if Section 18 is not applicable, independently, the failure to make payment under subsequent documents entitles the Petitioner to maintain this Petition irrespective of the date of default. In support thereof, reliance is placed on the judgment of the Hon'ble NCLAT in the matter of ***Edelweiss Assets Reconstruction Company Limited Versus Nishiland Park Limited, Company Appeal (AT) (Insolvency) No. 528 of 2021***, whereby the Petition was held to be within limitation on the ground that the assignment agreement executed even fifteen years after the date of default amounts to an express promise to pay a time barred debt under Section 25(3) of Contract Act and it was therefore held that limitation period would begin to run afresh from the date of the assignment agreement.

“14. There are two issues in this appeal. The first issue is as to what is the import of Section 25(3) of the Indian Contract Act, 1872 and the second issue is as to whether the period of



limitation has been extended in view of Section 18 of the Limitation Act, 1961 with the time-to-time partial payment and admission of debt by the Corporate Debtor?

15. It is an admitted fact that the period of three years had expired from the alleged date of default occurred in the year 1998 but there is no denial to the fact also that the Assignment Agreement was executed on 27.09.2013 between TFCI and the Appellant, assigning their entire debt of the Corporate Debtor and in the said agreement the Corporate Debtor and one Mr. Paresh Shah (as mortgagor) were confirming parties to the Assignment Agreement. As a matter fact, with the execution of the Assignment Agreement dated 27.09.2013, a fresh agreement for the payment of dues came into being and a period of three years began from the said date."

Therefore, in view of the law laid down in the matter of Nishliand Park Ltd. (Supra), this Petition is well within the limitation. There is even otherwise no explanation that if the claim was barred and not payable, what was the reason for signing balance confirmation and executing mortgage deed as late as in 2018. It is pertinent to note that the Petitioner has also annexed a NeSL Certificate which is not disputed by the Respondent. In view of the above, the Ld. Counsel for the Petitioner has satisfied this Bench that the present Petition is not hit by the bar of limitation.

29. The next contention raised by the Respondent is that the transaction occurred between the parties is a fraudulent one and therefore the said claimed amount cannot be termed as a "Financial Debt".

30. Addressing this contention raised by the Respondent the Ld. Counsel for the Petitioner has stated that the Respondent had executed, the security documents namely, the Mortgage Deeds dated 13.04.2017 and 24.05.2018 and the Demand Promissory note dated 16.08.2018 to further avail the overdraft facilities. However, the Respondent has not disputed the said Security Documents termed the transaction as



fraudulent one. The Ld. Counsel for the Petitioner submits that the said transactions cannot be termed as fraudulent since the execution of the said transaction documents is indicative of the fact that the Respondent was inclined to secure the financial assistance in its favour. It is further stated by the Ld. Counsel for the Petitioner that if the transaction was a fraudulent one as claimed by the Respondent, then the latter could not have claimed the benefits arising out of the said transaction. Thus, the plea of the transaction being a fraudulent one is liable to be dismissed. Upon carefully examining the record we are of the view that the Respondent had availed the said financial assistance provided by the Petitioner by way of the overdraft account and in order to avail the said facility the Respondent had also executed the above said transaction documents. The record further reveals that a charge dated 09.05.2017 (Annexure-22 of the Company Petition 1358/2020), was also created in favour of the Petitioner. The Respondent has not disputed the same. The Respondent has disputed the Balance Confirmations on the ground that the said Balance Confirmations are not signed by the Respondent Company. In this regard the record reveals that the said Balance Confirmations are duly signed by the authorized signatory of the Respondent company. In order to further reinforce its argument the Respondent has relied upon a judgement of hon'ble Supreme Court **Pheonix ARC Private Limited V/s Spade Financial Services Limited** **anr. [2021 SCC Online SC 51]**, wherein the hon'ble Apex Court has stated that:

“A transaction which is sham or collusive would only create an illusion that the money has been disbursed to a borrower with the object of receiving consideration in the form of the time value of money, when in fact the parties have entered into the transaction with a different or an ulterior motive. In other words, the real agreement between the parties is something else.”

31. In the above finding of the Hon'ble Supreme Court the transaction in question was an illusory one. However, in the present case the Respondent Company had availed the benefit of the financial assistance



provided by the Petitioner and issued the Balance Confirmations for the same.

32. The Ld. Counsel for the Respondent has also relied upon an Order Hon'ble NCLAT in ***Ocean Deity Investment Holdings Limited, PCC v. Suraksha Asset Reconstruction Limited, Company Appeal (AT) No. 795 of 2021***, was a circular transaction in which the money was disbursed and diverted to discharge the liabilities of the Bank itself. In this case there is no such case pleaded or demonstrated. The allegation of fraud is not as to the existence of the transaction. Having failed to repay the debt there is default and debt, accordingly the Petition is liable to be admitted.
33. Furthermore, the Respondent company has also taken effort to secure the said financial assistance by way of execution of the transaction documents. Petitioner submits that perusal of the charge sheet shows that financial assistance was extended and documents were executed. Allegation in the charge sheet is that though the loans were in default the alarm was not raised at the appropriate time by the officer and there were lacunas in creation of security and documentation at the time of giving loans. There is no allegation or contention contending that there was no loan given and the loan itself is fraudulent. There is distinction between the same. In this regard, the defence raised by the Respondent Company that the impugned transaction is a fraud one and therefore cannot be termed as a financial debt does not survive.
34. In view of the above discussion, we are of the considerate view that the the Petition otherwise is complete in all aspects. There being promise to pay the debt in the form of mortgage deed as well as balance confirmation, the Petition cannot be said to be barred by law of limitation.



35. With regard to the contention that the transaction cannot be termed as a financial debt, in view of the Respondent itself executed the transaction documents with a view to secure the debt and further confirmed the debt. This conduct of the Respondent renders this defence as a self-contradictory one.
36. It is established that the Corporate Debtor is liable to pay the Petitioner and it has defaulted in making the payment to the Petitioner. Considering the above facts, we come to conclusion that the nature of Debt is a “Financial Debt” as defined under Section 5 (8) of the Code. It has also been established that there is a “Default” as defined under Section 3 (12) of the Code on the part of the Debtor. The two essential qualifications, i.e., existence of ‘**debt**’ and ‘**default**’, for admission of a petition under section 7 of the I&B Code, have been met in this case. Accordingly, the Petition is **admitted** in the following terms.

ORDER

- a. The above Company Petition No. 1358 OF 2020 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **M/s. Privilege Power and Infrastructure Pvt. Ltd.**
- b. The Petitioner has proposed the name of Insolvency Professional. The IRP proposed by the Petitioner, **Mr. Anurag Kumar Sinha**, having Address – 75/76, Mittal Court, Wing C, Nariman Point, Mumbai- 400 021 and having registration No. IBBI/IPA-001/IP-P00427/2017-2018/10750, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Petitioner shall deposit an amount of Rs. 5 Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon



communication of this Order. The IRP shall spend the above amount towards expenses and not towards fee till his fee is decided by CoC.

- d. That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.



- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.
- k. Accordingly, C.P (IB) NO. 1358 OF 2020 is **admitted**.
- l. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

SD/-

Anuradha Sanjay Bhatia
Member (Technical)

SD/-

Kuldip Kumar Kareer
Member (Judicial)