Insolvency and Bankruptcy Board of India

7th Floor, Mayur Bhawan, Connaught Place, New Delhi – 110001

13th June, 2023

Subject: Judgment[1] dated 5th June 2023 of National Company Law Appellate Tribunal, Chennai in the matter of IFCI Limited Vs. Sutanu Sinha and anr. CA (AT) (CH) (Ins) No. 108/2023

I. BRIEF BACKGROUND

A concession agreement dated 25/03/2010 was entered into between NHAI and 'IVRCL Chengapalli Tollways Limited' ("ICTL"), Corporate Debtor (CD) and IVRCL, Corporate Guarantor, for execution of the project. IFCI agreed to provide financial assistance to the CD through 'Compulsorily Convertible Debentures' (CCDs) and agreed to subscribe to the CCDs on the basis of Debenture Subscription Agreement and entered into a share buyback agreement.

FC agreed for a one time settlement with CD on the condition that a sum of Rs. 135 crores shall be paid within one month. As there was a default committed by the CD, the concessions granted under restructuring of CCDs were withdrawn. While the corporate insolvency resolution process (CIRP) initiated against the corporate guarantor was in progress, the lenders consortium assigned the debt to Asset Care Reconstruction Enterprise Limited (ARCE)/ Assignee who has initiated CIRP against the CD. FC's claim with respect to interest on the credit facilities provided to CD was rejected. An application was filed before AA, was dismissed holding that CCDs subscribed by the applicant are to be treated as equity and not as debt. Subsequently, this appeal was filed.

II. ISSUES

Whether the fully Convertible Debentures should be treated as an 'Equity Instrument' or as a 'Debt' and if the amount stated to be due and payable falls within the definition of 'Financial Debt' as defined under the Code.

III. OBSERVATION

NCLAT observed that there is no express definition or interpretation regarding whether CCDs are to be treated as 'Debt' or 'Equity'. There is no condition in any of the agreements entered by the parties, which changes the nature of the CCDs on the happening of any event. Merely because of the fact that interest is payable on the CCDs, in the case of a default, it cannot be construed that the CCDs fall within the definition of Section 5(8) of the Code. Further, the reading of section 71(8) of the Companies Act, 2013, which states that 'debt' means a 'liability' or 'obligation' in respect of a `Claim' which is due from any person and includes a `Financial

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Debt' and `Operational Debt'. From the record, NCLAT, held that the investment was in the form of debentures which are convertible into equity. The terms and conditions of the CCD and the intention of the parties nowhere specify that the instrument would take the character of a 'Financial Debt', on the happening of any event. At the time of disbursal of the amount, it was to be treated as Equity alone and not as 'Debt'. Even if these amounts were reflected in the financial statements of the CD as 'Other Financial Liability', it would depend on the facts of each case as to whether such an entry in the balance sheet construes a 'Financial Debt' as defined under the Code. NCLAT while disposing of the appeal, in the facts of the case held that the CCDs are in the nature of equity instruments and do not fall within the definition of 'Financial Debt' as defined under Section 5(8) of the Code.

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