

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.37 of 2024

(Arising out of Order dated 13.12.2023 passed by the Adjudicating Authority
(National Company Law Tribunal), New Delhi, Court-III in (IB)-40(ND)/2023)

IN THE MATTER OF:

Sandeep Mittal,
15, New Sabji Mandi, Azadpur,
Delhi – 110033.

... Appellant

Versus

1. M/s ASREC (India) Ltd.
Building No.2, Unit No.201-202A,
Ground Floor, Andheri Ghatkopar,
Link Road, Andheri East, Mumbai, Maharashtra – 400093.
2. M/s Shree Industries Ltd.
(erstwhile known as Rama Finance Ltd.)
Having its registered office at:
15, New Sabzi Mandi, Delhi – 110033.
3. Mr. Gaurav Singhal
Interim Resolution Professional of
M/s Shree Industries Ltd.,
DA-9, 3rd Floor, Enkay House, Veer Savarkar Block,
Metro Pillar No.54, Opposite Nathu Sweets,
Main Vikas Marg, Shakarpur, Delhi-110092. ... Respondents

Present:

For Appellant : Mr. Krishnendu Datta and Mr. Ratan Singh, Sr. Advocates with Mr. Rahul Gupta, Ms. Pallavi Anand, Advocates.

For Respondent : Ms. Vibha Datta Makhija, Sr. Advocate with Ms. Usha Singh, Mr. Shahrukh Inam, Mr. Karan, Ms. Goeta, Ms. Nidhi Mehrotra, Mr. Rajesh, Mr. Karan Mamgain, Advocates for R-1.

Mr. Ravi Raghunath, Advocate for R-3

Mr. Vishal Ganda, Mr. Srijan Jain, Advocates with Mr. Gautam Singhal, RP in person

Mr. Gaurav Mitra, Sr. Advocate with Mr. Pervinder, Mr. Shikher Upadhyay, Ms. Lavanya

**Pathak, Mr. Avinash Bhati, Advocates for
Intervenor-GIIC.**

With

Company Appeal (AT) (Insolvency) No.573 of 2024

(Arising out of Order dated 13.12.2023 passed by the Adjudicating Authority
(National Company Law Tribunal), New Delhi, Court-III in (IB)-40(ND)/2023)

IN THE MATTER OF:

Ravi Mittal,
8 Kripa Narain Marg,
Civil Lines, Delhi – 110 054.

... Appellant

Versus

1. M/s ASREC (India) Ltd.
Building No.2, Unit No.201-202A,
Ground Floor, Andheri Ghatkopar,
Link Road, Andheri East,
Mumbai, Maharashtra – 400093.
 2. M/s Shree Industries Ltd.
(Through Resolution Professional,
Gautam Singhal,
DA-9, 3rd Floor, Enkay House,
Veer Savarkar Block,
Metro Pillar No.54, Opposite Nathu Sweets,
Main Vikas Marg, Shakarpur, Delhi-110092.
Also at: 15-A, Kewa Park, Extension, New Delhi.
 3. Gaurav Singhal
DA-9, 3rd Floor, Enkay House,
Veer Savarkar Block,
Metro Pillar No.54, Opposite Nathu Sweets,
Main Vikas Marg, Shakarpur, Delhi-110092.
- ... Respondents

Present:

For Appellant : Mr. Ajay K. Jain, Mr. Atanu Mukherjee, Mr. Rajiv Bajaj, Mr. Yash Karan Jain, Advocates.

For Respondent : Ms. Vibha Datta Makhija, Sr. Advocate with Ms. Usha Singh, Mr. Shahrukh Inam, Mr. Karan, Ms. Goeta, Ms. Nidhi Mehrotra, Mr. Rajesh, Mr. Karan Mamgain, Advocates for R-1.

Mr. Ravi Raghunath, Advocate for R-3

**Mr. Vishal Ganda, Mr. Srijan Jain, Advocates with
Mr. Gautam Singhal, RP in person**

**Mr. Gaurav Mitra, Sr. Advocate with Mr.
Pervinder, Mr. Shikher Upadhyay, Ms. Lavanya
Pathak, Mr. Avinash Bhati, Advocates for
Intervenor-GIIC.**

J U D G M E N T

ASHOK BHUSHAN, J.

These two Appeal(s) have been filed by Suspended Directors/ Promoters (Shri Sandeep Mittal and Shri Ravi Mittal) of the Corporate Debtor, challenging order dated 13.12.2023 passed by National Company Law Tribunal, New Delhi, Court-III, admitting Section 7 Application filed by M/s ASREC (India) Ltd. Aggrieved by the order admitting Section 7 Application, these Appeal(s) have been filed.

2. Brief facts of the case necessary to be noticed for deciding the Appeal(s) are:

- (i) Gujarat State Financial Corporation (“**GSFC**”), Gujarat Industrial Investment Corporation (“**GIIC**”), Bank of Baroda, and Dena Bank had advanced Term Loan of Rs.30 lakhs; Rs.60 lakhs; Rs.16.50 lakhs; and Rs.16.50 lakhs respectively to M/s Ganpati Pulp and Paper Ltd. (hereinafter referred to as the “**GPPL**”), Bavla, District, Ahmedabad.

- (ii) The GPPL has created charge over the immovable assets in village Rajoda, Bavla, District Ahmedabad, admeasuring about 24 acres, along with all building and structures thereon. On account of default committed by GPPL, GSFC took possession of the assets. GSFC in exercise of powers conferred under Section 29 of the State Financial Corporation Act, 1951 issued a sale notice by public advertisement for sale of the assets of GPPL. M/s Rama Finance Limited (renamed as Shri Industries Limited) has submitted an offer for purchase of the assets of the GPPL. GSFC, GIIC, Bank of Baroda and Dena Bank have accepted the offer of Rs.3.88 crores for sale of the assets in favour of M/s Rama Finance Limited (now Shree Industries Limited and hereinafter referred to as “**SIL**”)
- (iii) An Agreement dated 27.11.1990 was entered between M/s Rama Finance Limited on one part and GSFC acting for itself and as an agent of GIIC, Bank of Baroda and Dena Bank as other party, accepting the offer of Rs.3.88 crores submitted by M/s Rama Finance Limited and terms and conditions for purchase of the assets of the immovable property together with all buildings and structure, plant and machinery thereof was entered between the parties. According, to which an amount of Rs.50 lacs was to be paid as down payment within a period of 30 days and balance

amount of Rs.3.38 crores was to be paid by purchaser (Rama Finance Limited) to the GSFC within a period of five years in 20 equal quarterly installments commencing from 01.05.1991. The Agreement further provided that the Purchaser shall after payment of Rs.50 lakhs shall provide a Bank Guarantee and Corporate Guarantee of a Company for balance amount. The Agreement further provided that if the purchaser commit default in payment of any two installments of the principal or interest amount, GSFC shall be entitled to revoke the sale and take possession of the assets and properties of the Company and resell the same for recovery of the outstanding dues of the financial institutions as per the provisions of Section 29 of the State Financial Corporation Act, 1951. The share of Bank of Baroda in the total sale consideration was about 14%.

- (iv) M/s Shree Industries Limited (“**SIL**”) (earlier known as Rama Finance Limited) was declared a sick industrial company under Section 3(1) (o) of Sick Industrial Companies (Special Provisions) Act, 1985 on 12.11.1997.
- (v) Before the Board for Industrial and Financial Reconstruction (“**BIFR**”), GSFC filed an application praying for assets in the possession of SIL be handed over to the GSFC. The BIFR rejected the prayers of GSFC. GSFC filed an Appeal before the Appellate

Authority of Industrial Finance Reconstruction (“**AAIFR**”), which Appeal was rejected. Special Civil Application No.11116 of 2008 was filed by GSFC before the Gujarat High Court. During the pendency of the writ petition, one time settlement was entered into between GSFC and SIL.

- (vi) The Guarantors of GPPL had filed a writ petition claiming ownership over the assets of GPPL being Special Civil Application No.12979 of 2009 in the matter of Lalitaben Govindbhai Patel and Ors. vs. Gujarat State Financial Corporation & Ors. challenging the one time settlement dated 10.06.2009 between GFSC and SIL, which Application came to be dismissed by the Gujarat High Court, against which Letters Patent Appeal (LPA) No.2480 of 2010 was filed by Lalitaben Govindbhai Patel and Ors. vs. Gujarat State Financial Corporation and Ors. Writ Petition filed by Guarantors of GPPL was dismissed on 06.10.2010. The Gujarat High Court also noticed that winding up petition, which was filed by some unsecured creditors of the GPPL in the High Court was pending. The Division Bench of the Gujarat High Court vide its judgment and order dated 26.07.2021 disposed of the LPA as well as Special Civil Application. It is useful to notice paragraph 10.8 and 10.9 of the judgment, which are as follows:

“**10.8** In the inherent & plenary jurisdiction under **Article 226** of the Constitution of India read with **Clause 15** of the Letters Patent vested

in us, while deciding the present Letters Patent Appeal and Special Civil Application No.11116 of 2008, we are therefore of the considered opinion that entire litigation of these two corporate bodies viz. **GPPML** and **SIL** deserves to be decided by the **NCLT** by examining the claims, counter-claims, defences and other relevant aspects of all the parties involved in the matter afresh in respect of both the corporate entities in question **GPPML & SIL** without being influenced by any observations made by any Forum below or OTS Settlement by **GSFC & SIL** nor such transfer of proceedings depends upon filing of the application by any party. Some Creditors have already agreed to this proposal and therefore, that is sufficient compliance with Section **434(1)(c)** of the Companies Act, 2013. There is no question of the **NCLT** sitting over the judgment and orders passed by previous bodies like **BIFR, AAIFR** or even learned Single Judge as was sought to be made out. On the contrary, we feel that the development of new law in the form of **IBC** is an opportunity for all these stakeholders to get their claims adjudicated and corporate insolvency resolved in a best appropriate manner on the Forum of **NCLT** which is the most competent body under the law as available now for these issues.

10.9 Since we are not seized of the winding-up of proceedings in the present Letters Patent Appeal, we make our aforesaid proposed order absolute now and dispose of this Letters Patent Appeal No.2480 of 2010 as well as Special Civil Application No.11116 of 2008 by requesting the learned Company Judge, who is seized of the winding-up proceedings of Company Petition No.139 of 1985 to consider all the aforesaid relevant aspects of the matter and then take appropriate decision in the matter to transfer the winding-up proceedings to **NCLT, Ahmedabad Bench** which we strongly recommend. We may make it clear that we have not made any pronouncement on the merits of claims or counter-claims of any of the parties in this matter and advisedly so left the said aspects to be considered and decided by the **NCLT** afresh, once the proceedings are transferred by learned Company Judge, who may pass

appropriate orders in its his discretion in this regard and for that purpose only the impugned orders and OTS Settlement will not stand in the way of NCLT.”

- (vii) The Gujarat High Court in the litigation, which was filed before it by the Guarantors of GPPL, as well as the GSFC, in which proceedings Bank of Baroda had also come on the record, disposed of all proceedings with direction for transferring of winding up proceedings to NCLT, Ahmedabad. The Division Bench of the Gujarat High Court made it clear that it is not making any pronouncement on the merits of the claims or counter-claims of any of the parties in the matter. It is also relevant to notice that Bank of Baroda vide its Assignment Agreement dated 29.03.2011 has assigned its debt to M/s ASREC (India) Ltd.
- (viii) On 15.03.2016, an OTS proposal was submitted by the SIL to ASREC (India) Ltd. for a sum of Rs.5.50 crores, which could not be complied with. The Respondent M/s ASREC (India) Ltd. sent a Notice of default on 01.03.2021 to SIL in regard to outstanding amount payable by the Corporate Debtor.
- (ix) Claiming an amount of Rs.92,35,21,674/- calculated as on 30.06.2022, Section 7 Application was filed by the Respondent before the NCLT, New Delhi dated 23.11.2022, in which Application, notices were issued and the Corporate Debtor

appeared and filed its reply. The Corporate Debtor in its reply has pleaded that there is no financial debt due to the Respondent. The Corporate Debtor was only purchaser of the assets of GPPL and the dues are dues of vendor towards sale consideration. It is to be noted that Corporate Debtor had made payment to the GSFC towards its sale consideration and the payments made by the Corporate Debtor from time to time were about more than Rs.3 crores.

- (x) The Adjudicating Authority after hearing the parties, returned a finding that Sale Agreement dated 27.11.1990 is not a Loan Agreement. The Adjudicating Authority has returned a finding that the amount in question was disbursed to the Corporate Debtor, which was disbursed against the consideration for the time value of money. The Adjudicating Authority thus, returned a finding that there was a financial debt and the Corporate Debtor is in default of the said amount, hence, Application under Section 7 was admitted. The Appellant(s) aggrieved by the said order dated 13.12.2023, admitting Section 7 Application, have filed these Appeal(s).

3. We have heard Shri Krishnendu Datta, learned Senior Counsel and Shri Ratan Singh, learned Counsel appearing for the Appellant in Company Appeal (AT) (Ins.) No.37 of 2024; Shri Ajay K. Jain, learned Counsel appearing for the

Appellant in Company Appeal (AT) (Ins.) No.573 of 2024; Ms. Vibha Datta Makhija, learned Senior Counsel appearing for Respondent No.1; Shri Gaurav Mitra, learned Counsel appearing for GIIC.

4. Learned Counsel for the Appellant(s) challenging the impugned order submits that the Application filed by Respondent M/s ASREC (India) Ltd. was not maintainable under Section 7, since there was no financial debt in the transaction, which was entered on 27.11.1990 with the Corporate Debtor and Financial Institutions. It is submitted that the Term Loan was taken by GPPL from the Financial Institutions, including Bank of Baroda. On default being committed, GSFC proceeded to sale the assets under Section 29 of the State Financial Corporation Act, 1951, in which sale the Corporate Debtor, emerged as the highest bidder and the assets of GPPL were sold to the Corporate Debtor for an amount of Rs.3.88 crores, out of which Rs.50 lakhs was required to be paid in advance and rest of the amount was to be paid within five years. The Agreement dated 27.11.1990 was a Sale Agreement and not a Loan Agreement entered between the Corporate Debtor and the Financial Institutions. There was no disbursement of any amount in favour of the Corporate Debtor by the Financial Institutions and the Financial Institutions were only vendors of the assets, which was agreed to be purchased by the Corporate Debtor for Rs.3.88 crores. The Corporate Debtor paid down payment of Rs.50 lakhs and also paid different amounts from time to time, totaling to Rs.3.05 crores. However, in event there was any default on the part of purchaser, i.e. Corporate Debtor,

it was open for Financial Institutions to recover the amount from sale of the assets, on which the Financial Institutions have charge. It is submitted that the Corporate Debtor has settled the dues with GSFC and Dena Bank. The Adjudicating Authority in the impugned order has accepted the submission of the Appellant that Agreement dated 27.11.1990 was a Sale Agreement. However, after recording the said finding, the Adjudicating Authority jumped on the conclusion that there was disbursement by Financial Institutions in favour of the Corporate Debtor, whereas disbursement of Term Loan was in favour of GPPL and not in favour of the Corporate Debtor. The Corporate Debtor was only purchaser of the assets in a sale, which was made by Financial Institutions under Section 29 of State Financial Corporation Act. There was no disbursement of any money in favour of the Corporate Debtor by the Financial Institutions and the Application filed by Respondent was not maintainable and Respondent No.1 has filed the Application under Section 7, only for the purpose of recovery. It is submitted that total loan, which was given by Bank of Baroda was Rs.16.50 lakhs and the Corporate Debtor has made the payment of Rs.50.42 lakhs to the Bank of Baroda from time to time. It is submitted that Gujarat High Court vide its judgment and order dated 26.07.2021 has directed for transfer of winding up petition from High Court to NCLT, Ahmedabad and all the parties were given liberty to raise their claim and counter-claim before the NCLT. Respondent No.1 instead of making his claim before the NCLT has filed Section 7 Application, which was wholly not

maintainable. For a loan of Rs.16.50 lakhs, provided by the Bank of Baroda to the GPPL, now Respondent No.1 has filed an Application under Section 7 against the Corporate Debtor for recovery of Rs.92,35,21,674/-, which itself indicate the malafide approach of Respondent No.1 and to use the IBC as recovery mechanism. The submission of Respondent that by Agreement dated 27.11.1990, the sale transaction was converted into loan transaction is incorrect and cannot be accepted. The reliance of Respondent on certain letters of the CD by which OTS was offered to Respondent No.1, referring to the transaction dated 27.11.1990 as a loan transaction is also not acceptable. True nature of transaction has to be determined before accepting any debt as financial debt.

5. Learned Senior Counsel for Respondent No.1, Ms. Vibha Datta Makhija, refuting the submissions of learned Counsel for the Appellant(s) contends that Agreement dated 27.11.1990 has to be treated as loan transaction, since the balance amount of Rs.3.38 crores with interest was agreed by the Financial Institutions to be paid by the Corporate Debtor in installments, which is nothing but conversion of sale transaction into loan transaction. It is submitted that for a transaction to be 'financial debt' within the meaning of Section 5, sub-section (8), it is not essential that disbursement of money should take place in favour of the Corporate Debtor. There can be transaction without any disbursement to the Corporate Debtor, which can be accepted as financial debt. It is further submitted that disbursement of the property,

which was handed over to the Corporate Debtor, after down payment of Rs.50 lakhs is clearly a transaction, which is covered by Section 5, sub-section (8) of the IBC. It is submitted that vide Agreement dated 27.11.1990, facility was extended to Corporate Debtor to pay the balance amount in installments with interest, which is clearly in the nature of financial transaction, covered by definition of Section 5, sub-section (8). It is submitted that Corporate Debtor itself subsequently in its letter dated 04.03.2021, which was written to the Managing Director of Respondent No.1 has admitted that sale consideration was converted into loan by the Consortium Members as per the terms and conditions mentioned in the Agreement dated 27.11.1990, by which the GSFC and other Consortium Members, became lenders and SIL became a lonee. It is submitted that Deed of Guarantee was also given by the Corporate Debtor to discharge the sale consideration and charge was created on the assets, which was subject matter of the Agreement dated 27.11.1990. It is further submitted that Gujarat High Court in its order dated 26.07.2021, while noticing the facts of the case has observed that balance amount of Rs.3.38 crores was in the nature of loan to be paid in six years, by way of half yearly equal installments and charge was created on the property. The learned Counsel for the Respondent has referred to the order passed by the Gujarat High Court and order passed by AIFR dated 02.05.2008, which clearly indicate that transaction dated 27.11.1990 treated to be financial transaction containing a financial debt.

6. Learned Counsel appearing for GIIC, intervening in the Appeal has also contended that the GIIC, has advanced the loan to GPPL and it is a Member of Committee of Creditors (“**CoC**”) of the Corporate Debtor and also supports the case of Respondent no.1 in the present Appeal.

7. We have heard submissions of learned Counsel for the parties and have perused the records.

8. The principal question, which need consideration in the Appeal is as to whether there was a ‘financial debt’ in the transaction dated 27.11.1990 on the basis of which Respondent No.1, claiming to be a Financial Creditor had filed Section 7 Application against the Corporate Debtor. While noticing the facts, we have noted that the Term Loan was extended in favour of GPPL where an amount of Rs.30 lakhs was provided by GSFC, Rs.60 lakhs by GIIC, Rs.16.50 lakhs by bank of Baroda and Rs.16.50 lakhs by Dena Bank. The Financial Institutions have *pari passu* charge of Survey Nos.725, 729, 730/1, 730/2, 732, 732 (part), 782 and 787/2 of Village Rajoda, Bavla, District, Ahmedabad admeasuring about 24 acres and 11½ gunthas. The GPPL having committed default in repayment, the GFSC took possession of the assets on 22.10.1986. In the meantime, winding up order was passed in Company Petition No.139 of 1985, which was filed by some unsecured creditors of the Company against GPPL. The GSFC issued sale notice on 27.08.1990 for sale of the assets of the GPPL. In response to the advertisement, initial offer of Rs.2,12,12,121/- was given by Rama Finance, which offer was raised to

Rs.3.88 crores. The GSFC issued a letter dated 07.11.1990 to the SIL, communicating the acceptance of offer and terms and conditions for sale of assets. It is useful to extract letter dated 07.11.1990 sent by GSFC to M/s Rama Finance Company Ltd., which is as follows:

“Ref.No.GSFC/Sec.Section/Sale/B-1/Board/1965

Date: 7/11/90

To

M/s. Rama Finance Company Ltd.
Delhi Cold Storage Building
15, New Subzemandy
Azadpur
NEW DELHI - 110 033,

Dear Sirs,

Re : Sale of assets, viz. Land, building, Plant and machinery of M/s. Ganpati Pulp & Paper Mills Ltd., in exercise of powers conferred under section 29 of the SFCs Act, 1951.

With reference to the above, we are pleased to inform you that the Board of Directors of the Corporation in its meeting held on 23/10/1990 has considered your offer for purchase of assets viz, land, building, plant, and machinery of M/s. Ganpati Pulp & Paper Mills Ltd., at Vill: Rajorda, Bavla, Dist: Ahmedabad, and decided to accept your offer of Rs. 388.00 lacs (Rs. Three hundred eighty eight lacs) in. exercise of the powers conferred upon the Corporation under Section 29 of the State Financial Corporation's Act-1951, on the following and additional terms and conditions stated in Annexure – ‘1’ enclosed herewith.

1. Payment of 50,00,000/- (inclusive of Earnest Money Deposit (ED) of Rs.10,00,000/-) shall be made as ‘Down Payment’ within a period of 30 days from the date of acceptance letter failing which this offer is liable to be cancelled and-EMD of

Rs.10,00,000/- shall stand forfeited and Corporation may accept the second highest bidder and call for the payment.

2. Balance amount of Rs.338,00 Lacs shall be paid within a period of 5 years in 20 quarterly instalments commencing From 1-5-1991 with interest thereon @ 15 % p.a. (Gross) (including 6 months moratorium).
3. The approval will be subject to similar approval being given by other participating institutions/Banks, viz. GIJC Ltd., Bank of Baroda and Dona Bank.

It may please be noted that this communication shall not be construed as giving right to any binding obligation on part of the Corporation unless you communicate in writing to the Dy. General Manager (Recovery) at Navjeevan Trust Building, Behind Gujarat Vidhyapith, Ahmedabad-380014 within 15 days from the date of this letter that the terms and conditions as set out herein above are acceptable to you.”

9. It was subsequent to the letter dated 07.11.1990 and after the concurrence was given by other Financial Institutions, including Bank of Baroda, an Agreement dated 27.11.1990 was entered between M/s Rama Finance Company Ltd. on one part and GSFC, acting for itself as an agent of GIIC, Bank of Baroda and Dena Bank on the other part. The Agreement itself noticed the entire background facts and the Term Loan given to GPPL in which GPPL having been defaulted, sale notice was issued by GSFC and offer made by the purchaser (Rama Finance Ltd.). It is useful to notice the statement as noted in the Agreement regarding the entire transaction, which is as follows:

“AGREEMENT

THIS AGREEMENT of acceptance of the offer for the purchase of the assets of M/s. GANPATI PULP & PAPER MILLS LIMITED (in liquidation), Bavla, District: Ahmedabad (hereinafter referred to as "the Company") entered into at Ahmedabad on this 27^a day of November, One Thousand Nine hundred Ninety between M/s. RAMA FINANCE COMPANY LIMITED, a Company incorporated and registered under the Companies Act, 1956 and having its registered Office at Delhi Gold Storage Building, 15 New Subzi Mandi, Azadpur, Delhi (hereinafter referred to as "the Purchaser", which expression shall, unless it be repugnant to the subject or context thereof, includes its successors and assigns) of the One Part AND GUJARAT STATE FINANCIAL CORPORATION, a Corporation established under the State Financial Corporation Act, 1951 (LXIII of 1951) for the State of Gujarat, having its Head Office situated at 'Jaldarshan' Building, Opp. Natraj Cinema, Ashram Road, Ahmedabad 300 009, hereinafter for brevity's sake referred to as "GSFC" (which expression shall, unless it be repugnant to the subject or context thereof, include its successors and assigns), GSFC acting for itself and as agent of GUJARAT INDUSTRIAL INVESTMENT CORPORATION LIMITED (GIIC), BANK OF BARODA (BOB) AND DENA BANK (DNB), of the Other Part.

The expression GSFC, GIIC, BOB and DNB shall hereinafter collectively be referred to as "the financial institutions".

WHEREAS the Company had charged its immovable properties and hypothecated its movable plant and machinery by way of pari passu charge to secure the financial assistance by way of Term Loans sanctioned by the financial institutions, namely:

Rs.30.00 lacs provided by GSFC;

Rs.60.00 lacs provided by GIIC;

Rs.16.50 lacs provided by BOB, and

Rs.16.50 lacs provided by DNB,

Together with interest and charges thereon. The financial institutions have thus pari passu charge on the assets of the Company consisting of Survey Nos. 725, 729, 730/1, 730/2, 731, 732(part), 782 and 787/2 of Village Rajoda, Bavla, District: Ahmedabad, admeasuring about 24. acres 11/½ gunthas of thereabout together with all buildings and structures thereon and all plant and machinery attached to the earth or permanently fastened to anything attached to the earth, more particularly described in Schedule-I and machinery as described in Schedule-II appended hereto. Further, for securing the repayment of the said termloans, the Company had executed in favour of GSFC an irrevocable power of attorney for sale, mortgage, transfer, etc. of its property.

AND WHEREAS the Company could not run its unit efficiently and continued to commit defaults in making repayment of outstanding dues of principal amounts and payment of interest thereon for a long period, and ultimately the Company was closed down in 1985. GSFC therefore initiated action for recovery of its dues in exercise of the powers conferred under the provisions of Section 29 of the State Financial Corporations Act, 1951 and issued show-cause notice to the Company, and subsequently issued the final notice.

AND WHEREAS the financial institutions, in their inter-institutional meeting held on 7-10-1986 considered various schemes for revival of the Company. However, in absence of justifiable and acceptable proposal, it was decided that GSFC should go ahead with its actions under section 29 of the State Financial Corporations Act, 1951 and take possession of the unit. Accordingly, with the consent of GIIC, BOB and DNB, possession of the assets of the Company was taken over by GSFC on 22.10.1986.

Meanwhile, order of winding-up of the Company was passed by the Hon'ble High Court of Gujarat in Company Petition no. 139 of 1985 filed by some unsecured creditors of the Company, and Official Liquidator was appointed as the Liquidator of the Company. Against the said order the Company filed O.J. Appeal before this Hon'ble High Court which is pending for hearing. GSFC filed a Judges' Summons in O.J. Appeal No.5 of 1989, mentioning the details of the offers received; and thereafter with the permission of the Hon'ble High Court of Gujarat the assets of the Company were offered for sale by issuing public advertisements from time to time. Last advertisement for sale of the assets of the Company was released on 22nd August, 1990 and the same was published, amongst other newspapers, in the Hindustan Times, New Delhi, dated August 27, 1990.

AND WHEREAS in response to the said advertisement the purchaser made offer for purchase of the assets of the Company as "as it where is basis" for Rs.2,12,12,121/- which has been subsequently raised to Rs.3,88,00,000/- (Rupees three hundred eighty eight lacs only). With the approval of GIIC, BOB and DBN, the offer of the purchaser has been accepted by GSFC as per the resolution of the Board of Directors of GSFC passed in their meeting held on October 23, 1990, subject to the terms and conditions set out in the letter No.Sec.Section/Sale/B-1/Board/1965 dated November 7, 1990 which is the basis of this agreement and in case of any doubt or dispute regarding the same the decision of GSFC shall always be final and binding to the purchaser."

10. After noticing the aforesaid, the Agreement enumerates the terms and conditions. It is useful to notice Condition Nos.1 to 12, which are as follows:

"NOW THIS AGREEMENT ON THE ABOVE PREMISES WITNESSETH THE TERMS AND CONDITIONS AS UNDER:

1. Pursuant to the offer made by the purchaser and the acceptance thereof by GSFC, GSFC acting for itself and on behalf of GIIC, BOB and DNB, by the Resolution of its Board of Directors passed in their meeting held on October 23, 1990 and communicated to the purchaser by letter dated November 7, 1990, the purchaser agrees to purchase and GSFC agrees to sell to the purchaser for a consideration of Rs.3,88,00,000/- (Rupees three hundred eighty eight lacs only) the assets of the Company consisting of Survey Nos. 725, 729, 730/1, 730/2, 731, 732(part), 782 and 787/2 of Village Rajoda, Bavla, District: Ahmedabad, admeasuring about 24. acres 11½ gunthas or thereabout together with all buildings and structures thereon and all plant and machinery attached to the earth or permanently fastened to anything attached to the earth, more particularly described in Schedule-I and machinery as described in Schedule-II appended hereto.
2. Out of the purchase price, payment of Rs.50,00,000/- (Rupees fifty lacs) (inclusive of the earnest money deposit of Rs.10.00 lacs) shall be made as "down payment" by the purchaser within a period of thirty days (30 days) from the date of execution of these presents, failing which earnest money deposit of Rs.10.00 lacs shall stand forfeited to GSFC and it will be open to GSFC to accept the offer of the second highest bidder and call for payment.
3. The balance amount of Rs.3,38,00,000/- (Rupees three hundred thirty eight lacs) shall be paid by the purchaser to the Corporation within a period of five years in 20 (twenty) equal quarterly installments commencing from 1-5-1991.
4. The purchaser shall pay interest on the balance amount of Rs.338.00 lacs calculated at the rate of 16% per annum (gross) (including the period of moratorium) with half-yearly rests on 31 January and 31" July of every year. The amount of interest shall be paid regularly over and above the installments of principal mentioned in Clause 3 above.

- 4.1 The purchaser shall be eligible to rebate in interest calculated at the rate of 1% per annum if all the amount of principal and interest inferred to above are paid within the stipulated time as mentioned hereinabove. However, if there is any default or delay in payment as aforesaid, the purchaser shall pay penal interest at the rate of 6% per annum over and above the aforesaid interest at the rate of 15% per annum for the amount in default and for the period in default.
5. After payment of Rs.50.00 lacs as stated above, the purchaser shall furnish solvent security to the satisfaction of and in favour of GSFC, GIIC, BOB and DNB in any of the following manner:
- (i) a bank guarantee from a nationalized bank.
 - (ii) a corporate guarantee of the Company (the purchaser) and the personal guarantee of its Directors.
- 5.1 The amount of bank guarantee, Corporate guarantee and / or personal guarantee shall be for the balance amount due and payable by the purchaser inclusive of interest, cost and other expenses mentioned in this agreement.
6. On payment of Rs.50.00 lacs and on furnishing guarantee in favour of the financial institutions as mentioned above for securing the balance purchase prices, the GSFC shall handover possession of the assets of the Company to the purchaser on behalf of the financial institutions referred to above.
7. In case of the purchase furnishing corporate guarantee or collateral security as per clause 5(i) or 5(ii), until the entire sale consideration is paid in accordance with the terms and conditions stipulated herein, the assets of the Company shall be subject to the charge for the amount of the sale consideration and the purchaser shall hold the assets of the Company on behalf of GSFC, GIIC, BOB and DNB.
8. The purchaser agrees and gives their consent that the titled deeds of the immovable property of the Company and the deeds of

hypothecation of plant and machineries, etc., deposited with the GSFC shall continue in possession and be retained with GSFC, GSFC acting for itself and on behalf of GIIC, BOB and DNB, by way of equitable mortgage till the balance amount as aforesaid is fully paid along with interest, costs, charges and other expenses.

9. If the purchaser commits default in payment of any two installments of the principal and/or interest amount as aforesaid, GSFC shall be entitled to revoke the sale and take over possession of the assets and properties of the Company and resell the same for recovery of the outstanding dues of the financial institutions as per the provisions contained in Section 29 of the State Financial Corporation Act, 1951. In that event, the amount of earnest money of Rs:10.00 lacs paid by the purchaser shall stand forfeited. The balance amount paid by the purchaser, after deducting therefrom the interest amount remaining due till then, if any, the value of properties not returned and / or loss suffered on account of damage caused to the properties, shall be refunded to the purchaser.
10. In the event of revocation of sale as stipulated in clause (9) above, the purchaser shall hand over vacant and peaceful possession of all the assets and properties both movable and immovable to the nominee of the Corporation (GSFC).
11. The purchaser shall execute necessary legal documents in favour of the financial institutions to secure the repayment of the balance outstanding as may be advised by GSFC within fifteen days from being called upon to do so.
12. The entire amount of the purchase price paid to GSFC by the purchaser as per the terms and conditions mentioned hereinabove, shall be distributed by GSFC amongst GIIC, BOB and DNB on pro-rata basis of documents of pari-passu charge and surplus if any, shall be paid as per the provisions of Section 29(4) of the State Financial Corporations Act, 1951. In the same way the amount

forfeited in terms of clause 9 above shall also be distributed amongst the financial institutions on pro-rata basis.”

11. The question as noticed above, which need to be answered, is the nature of transaction, which culminated into Agreement dated 27.11.1990. Whether the Agreement dated 27.11.1990 is an Agreement for sale of the assets, belonging to GPPL on which Financial Institutions have *pari pasu* charge, which were taken possession by GSFC, in the year 1986 or the transaction can be treated to be a loan transaction extended by Financial Institutions in favour of the Corporate Debtor, as contended by learned Counsel for the Respondent? The ‘financial debt’ as defined in Section 5, sub-section (8) of the IBC, provides as follows:

“5(8) “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;”

12. It is well settled position of law that ‘financial debt’ means a debt disbursed against consideration for time value and money and includes the transactions as enumerated in sub-clause (8) of Section 5. The ‘financial debt’, came for consideration before the Hon’ble Supreme Court in large number of cases. We may first notice judgment of the Hon’ble Supreme Court in **Pioneer Urban and Infrastructure Ltd. vs. Union of India and ors. –**

(2019) 8 SCC 416. The Hon'ble Supreme Court in the above judgment held that definition of 'financial debt' goes on to state that a "debt" must be "disbursed" against the consideration of time value of money. It was further held that the expression "disbursed" refers to money, which has been paid against the consideration for the "time value of money". In paragraphs 70 and 71 of the judgment, the Hon'ble Supreme Court laid down following:

"70. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in Black's Law Dictionary (10th Edn.) to mean:

"1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose."

71. In the present context, it is clear that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money. Thus far, it is clear that an allottee "disburses" money in the form of advance payments made towards construction of the real estate project. We were shown the Dictionary of Banking Terms (2nd Edn.) by Thomas P. Fitch in which "time value for money" was defined thus:

"present value : today's value of a payment or a stream of payment amount due and payable at some specified future date,

discounted by a compound interest rate of discount rate. Also called the time value of money. Today's value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in discounted cash flow analysis.”

(emphasis supplied)

That this is against consideration for the time value of money is also clear as the money that is “disbursed” is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).”

13. In subsequent judgment of the Hon’ble Supreme Court in **Global Credit Capital Limited and Anr. vs. Sach Marketing Pvt. Ltd. & Anr. – (2024) SCC OnLine SC 649**, the Hon’ble Supreme Court has again dealt with the definition of ‘financial debt’ as occurring in Section 5, sub-section (8) of IBC and after noticing the judgments, the law was summarized in paragraph 20, which is as follows:

SUMMARY

20. Subject to what is held above, we summarize our legal conclusions:

- a. There cannot be a debt within the meaning of subsection (11) of section 5 of the IB Code unless there is a claim within the meaning of sub-section (6) of section 5 of thereof;

- b. The test to determine whether a debt is a financial debt within the meaning of sub-section (8) of section 5 is the existence of a debt along with interest, if any, which is disbursed against the consideration for the time value of money. The cases covered by categories (a) to (i) of sub-section (8) must satisfy the said test laid down by the earlier part of sub-section (8) of section 5;
- c. While deciding the issue of whether a debt is a financial debt or an operational debt arising out of a transaction covered by an agreement or arrangement in writing, it is necessary to ascertain what is the real nature of the transaction reflected in the writing; and
- d. Where one party owes a debt to another and when the creditor is claiming under a written agreement/arrangement providing for rendering 'service', the debt is an operational debt only if the claim subject matter of the debt has some connection or correlation with the 'service' subject matter of the transaction."

14. The Hon'ble Supreme Court in the above case has clearly laid down that for deciding as to whether the debt is a 'financial debt' the real nature of the transaction reflected in the writing has to be dealt with. It needs no emphasis that real nature of transaction need to be found out by the Court, when the issue is raised before the Court that transaction is not a 'financial debt'.

15. Before we proceed further, it is relevant to notice the pleadings in Section 7 Application filed by the Financial Creditor and the reply, which was filed by the Corporate Debtor. In Part-IV, Respondent No.1 has only referred to the total amount and working for computation. There was no other fact

mentioned regarding the financial debt. Part-IV of the Application is as follows:

“PART IV

PARTICULARS OF FINANCIAL DEBT

1.	Total amount of debt granted date(s) of disbursement	Total amount of debt is Rs.92,35,21,674.03/- as on 30.06.2022. The schedule of disbursement is as follow:- <table><tr><th>Date of Disbursals/ Adjustments</th><th>Amount of disbursals/ Adjustment (in INR)</th></tr><tr><td>23.10.1990</td><td>48,16,500/-</td></tr><tr><td>Total outstanding</td><td>92,35,21,674.03</td></tr></table>		Date of Disbursals/ Adjustments	Amount of disbursals/ Adjustment (in INR)	23.10.1990	48,16,500/-	Total outstanding	92,35,21,674.03
Date of Disbursals/ Adjustments	Amount of disbursals/ Adjustment (in INR)								
23.10.1990	48,16,500/-								
Total outstanding	92,35,21,674.03								
2.	Amount claimed to be in default and the date on which the default occurred (attach the workings for computation of amount and days of default in tabular form)	Total amount of debt in default (i.e. overdue) from the Corporate Debtor is Rs.92,35,21,674.03 as on 30.06.2022 Date of Default is as mentioned below: <table><tr><th>Date of default</th><th></th></tr><tr><td>01.04.2017</td><td>92,35,21,674.03</td></tr></table> Copy of workings for computation of the amount due and Form C submitted before NeSL by the Applicant till is enclosed and marked as ANNEXURE V . Total amount debt outstanding from the corporate debtor is _Rs.92,35,21,674.03/- including the aforesaid defaulted amount, calculated as on 30.06.2022. The defaulted amounts and Outstanding amounts are mentioned above shall be paid along with further interest at the rate as given		Date of default		01.04.2017	92,35,21,674.03		
Date of default									
01.04.2017	92,35,21,674.03								

		in the Financial Documents, till receipt of payment of the same by the Financial Creditor to our satisfaction. The Financial Creditor craves leave of this Hon'ble Tribunal to Amend the claims in the table in the Annexure V above and/or submit further claims, if and when required.”
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16. In Part-V of Section 7 Application, under heading ‘Particulars of Financial Debt’, financial documents have been referred to at Item No.5. It is useful to extract Item No.5 of Part-V, which is as follows:

“5.	The latest and complete copy of the financial contract reflecting all amendments and waivers to date (attach a copy)	The following are financial documents executed, <i>inter- alia</i>, between the Financial Creditor and the Corporate Debtor:- 1. Letter dated 07.11.1990 addressed to Rama Finance Corporation Limited (Now SIL i.e Shree Industries Limited) shown interest for purchase of asset i.e Plant and Machinery and Land and Building of GPPL (Borrower Company assets) power conferred under Section 29 of SFCs Act,1951 2. Deed of Guarantee dated 12.12.1990 executed by Corporate debtor 3. Registered Agreement Assignment dated 29.03.2011 4. Proposal Letter 15.03.2016 issued by Corporate Debtor
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		5. OTS Sanction letter dated 23.03.2016 issued by Applicant Copies of Security documents set out above are enclosed herewith and marked as ANNXURE VIII [Colly]”
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17. The Financial Creditor has referred to the letter dated 07.11.1990, which was addressed to Rama Finance Corporation as noted above, which according to Respondent No.1 is a document shown as a finance document. Deed of Guarantee dated 12.12.1990 has also been referred to. Reply was filed by the Corporate Debtor to Section 9 Application, where the Corporate Debtor denied the claim of the Applicant that there was any loan transaction between the parties. In paragraph 8 of the reply, relevant clauses of Agreement dated 27.11.1990 was extracted. After extracting the relevant clauses in paragraph 9, 10, and 11, following was stated:

- “9. A bare perusal of the above said clauses as well as agreement as a whole would clearly demonstrate that the above said agreement dated 27.11.1990 was an agreement to sale and not a loan agreement.
- 10. Under an agreement to sale, entitlement to the proposed seller is to seek relief of specific performance, if the proposed seller wants the Sale to be effectuated. The proposed seller is not entitled to claim the unpaid sale consideration as debt and initiate proceedings under the IBC Code.

11. The lead member of the consortium, Le., GSFC had submitted to the Hon'ble BIFR, in Case No. 129/97, a representation dated 29.09.2006 on behalf of the Consortium, which stated as follows-

“The original unit Mis. Ganpati Pulp and Paper Mills Ltd. Was sold out to the applicant unit Mis. Shree Industries Ltd. by the Corporation on behalf of 4 Institutions (GSFC, GILC, BANK OF BARODA AND DENA BANK) on 07.11.90 for Rs. 388 Lacs. On receipt of the down payment, "POSSESSION WITHOUTSALE" WAS GIVEN TO THE PURCHASER Mis. Shree Industries Ltd. The full sale price has not yet been received, and hence documents in favour of purchaser have not been executed. We on behalf of institutions, continue to ownership right on the assets. We request that Assets under our ownership right be exempted from the HON'BLE BIFR Proceedings, and permission be granted for initiating recovery action ...”

“This clearly evinces that it has always been the case of the lead member of the Consortium, Le., GSFC, that the said agreement dated 27.11.1990 was an Agreement to Sale. True Typed Copy of the representation dated 29.09.2006 is annexed herewith and marked as **Annexure R-3.**”

18. The Corporate Debtor has also referred to the order passed by BIFR dated 19.07.2007 and AAIFR dated 02.05.2008, as well as the order passed by Gujarat High Court in SCA No.11116/2008, which has been extracted in the reply. Pleadings in the Gujarat High Court were quoted in the reply, which indicate that GSFC always pleaded that Agreement dated 27.11.1990 is an Agreement to Sale. It was also pleaded that Bank of Baroda filed SCA No.11116/2008 for transposition in place of GSFC.

19. As observed above, the main issue to be answered in this Appeal is as to whether transaction dated 27.11.1990 was a loan transaction or it was a simple sale and purchase transaction. We need to first notice the relevant documents, which have been relied by Financial Creditor in support of Section 7 Application. The Financial Creditor has relied on the letter of the GSFC dated 07.11.1990 in support of its claim of transaction being a 'financial debt'. The letter dated 07.11.1990 has already been extracted above. The subject of the letter itself provides "*Sale of assets, viz. Land, building, Plant and machinery of M/s. Ganpati Pulp & Paper Mills Ltd., in exercise of powers conferred under section 29 of the SFCs Act, 1951*". The letter clearly mentions that "*....your offer for purchase of assets viz, land, building, plant and machinery of M/s. Ganpati Pulp & Paper Mills Ltd., at Vill: Rajoda, Bavla, Dist: Ahmedabad, and decided to accept your offer of Rs.388.00 lacs*". Thus, the offer of M/s Rama Finance Company Limited (now Shree Industries Ltd.) was for purchase of the assets, which offer was accepted by GSFC and by the letter it communicated its acceptance of sale of assets of offer at Rs.388.00 lacs. The letter dated 07.11.1990 in no manner can be read as any loan transaction of any 'financial debt', which is owed by Corporate Debtor to the Financial Creditor. The Agreement dated 27.11.1990, which is an Agreement containing all terms and conditions of sale of the assets, which was issued after approval of the Bank of Baroda, Dena Bank and GIIC has been referred to and relied by both the parties. The Corporate Debtor in its reply has also referred to the

said Agreement, which Agreement has been filed by both the parties in this Appeal. The Agreement dated 27.11.1990 has already been extracted above. The opening part of the Agreement as extracted above, clearly indicates that offer of purchase given by M/s Rama Finance Company Ltd. was accepted by the GSFC. Clauses of the Agreement as extracted above, also fully supports the case of the Appellant that Agreement was for sale and purchase of the assets of GPPL. Clause 1 of the Agreement, containing terms and conditions provides following:

“1. Pursuant to the offer made by the purchaser and the acceptance thereof by GSFC, GSFC acting for itself and on behalf of GIIC, BOB and DNB, by the Resolution of its Board of Directors passed in their meeting held on October 23, 1990 and communicated to the purchaser by letter dated November 7, 1990, the purchaser agrees to purchase and GSFC agrees to sell to the purchaser for a consideration of Rs.3,88,00,000/- (Rupees three hundred eighty eight lacs only) the assets of the Company consisting of Survey Nos. 725, 729, 730/1, 730/2, 731, 732(part), 782 and 787/2 of Village Rajoda, Bavla, District: Ahmedabad, admeasuring about 24. acres 11½ gunthas or thereabout together with all buildings and structures thereon and all plant and machinery attached to the earth or permanently fastened to anything attached to the earth, more particularly described in Schedule-I and machinery as described in Schedule-II appended hereto.”

20. Clause 2 of the Agreement provides that out of purchase, price, payment of Rs.50 lacs has to be made in down payment by the purchaser and the rest amount was to be paid by the purchaser within a period of five years in 20

equal quarterly installments commencing from 01.05.1991. Clause 2 and 3 are as follows:

“2. Out of the purchase price, payment of Rs.50,00,000/- (Rupees fifty lacs) (inclusive of the earnest money deposit of Rs.10.00 lacs) shall be made as "down payment" by the purchaser within a period of thirty days (30 days) from the date of execution of these presents, failing which earnest money deposit of Rs.10.00 lacs shall stand forfeited to GSFC and it will be open to GSFC to accept the offer of the second highest bidder and call for payment.

3. The balance amount of Rs.3,38,00,000/- (Rupees three hundred thirty eight lacs) shall be paid by the purchaser to the Corporation within a period of five years in 20 (twenty) equal quarterly installments commencing from 1-5-1991.”

21. Thus, what was payable by the Corporate Debtor was payment of balance purchase price. The letter dated 07.11.1990 and Agreement dated 27.11.1990, do not indicate that transaction was any kind of loan transaction. The Agreement clearly indicates that loan was taken by GPPL, who having committed default, assets were taken possession of by GSFC and was auctioned and sold to recover its dues.

22. The Financial Creditor in his Section 7 Application has relied on the Deed of Guarantee dated 12.12.1990 to support its claim of transaction being a financial transaction. The copy of Deed of Guarantee dated 12.12.1990 has been brought on record by Respondent No.1 along with its reply. The Deed of Guarantee in paragraphs 1, 2 and 3, give the details of loan advanced by the

GSFC and other Financial Institutions to GPPL and the charge of the Financial Creditor on the assets, which properties were offered for sale by public advertisement. Paragraphs 1 and 2 of the Deed of Guarantee are as follows:

- “1. The GSFC had advanced Term Loan of Rs. 30.00 Lacs GIIC Rs. 60.00 ., Lakhs, Bank of Baroda Rs. 16.50 Lakhs and Dena Bank Rs.16.50 Lakhs together with interest and charges thereon to. M/S Ganpati Pulp & Paper Mills Limited (in liquidation), Bavla, Distt Ahmedabad. (Hereinafter referred to as "the Company"). GSFC, GIIC, Bank of Baroda and Dena Bank are financial Institutions having pari passu charge over the assets of the Company in liquidation.
2. The company had charged its immovable property and hypothecated its movable plant and machinery by way of passu charged to secure the financial assistance of Rs. 30.00 Lakhs provided by the corporation; Rs. 60.00 Lacs granted by Gujarat Industrial Investment Corporation Ltd. (GIIC); Rs. 16.50 Lakhs granted by Bank of Baroda and Rs. 16.50 Lakhs granted by Dena Bank together with interest and charges thereon. The corporation and the other three financial institution have thus Pari Passu charge on the assets of the company consisting of survey nos. 725, 729, 730/1, 730/2, 731,732 (part), 782 and 787/2 of village Rajoda, Bavla Distt, Ahmedabad, admeasuring about 24,115 acres or thereabout together with all the buildings and structures thereon and all plant and machinery attached to the earth or permanently fastened to anything attached to earth and the movable machinery. On account of default in repayment of the outstanding dues of the principal amount and payment of interest thereof, the corporation Initiated action in exercise of the powers conferred under the provisions of section 29 of the

state Financial Corporation Act, 1951 and had offered for sale the properties of the company by public Advertisement.”

23. In paragraph 3 of the Deed of Guarantee, offer of Rama Finance Company Ltd. for Rs.388.00 lacs and terms and conditions for payment and purchase price have been incorporated. Letter dated 07.11.1990 issued by GSFC has also been referred to. Paragraph 3 of the Deed of Guarantee is as follows:

3. M/S RAMA FINANCE COMPANY LTD. incorporated under the companies Act, 1956 and having its registered office at Delhi Cold Storage Buldge, 15, New Subzi, Mandi, Azadpur, Delhi-110033. (hereinafter referred to as the Purchaser") has given Its offer for purchases of, some of the properties of the Company viz, lands, buildings, plants and machinery belonging to the Company and mortgaged to GSFC, GIIC Dena Bank and Bank of Baroda for the lumpsum of Rs. 388.00 Lakhs to be paid as under:

- a) Out of purchase price payment of Rs. 50.00 Lakhs (inclusive of the earnest money deposit of Rs. 10.00 Lakhs to be made as downs payment within 30 days from the date of acceptance of the offer the corporation of the terms and conditions thereof by the Purchaser;
- b) Balances 338.00 Lakhs to be paid by the Purchaser to corporation within a period of five years in 20 (Twenty) equal quarterly installment. Commencing from 1.5.91 together with interest 0.15% per annum (Gross) with half yearly rest.”

24. The Corporate Debtor has given irrevocable and unconditional guarantees that the purchaser shall make due payment of the balances

including interest. Paragraphs 1 and 2 as incorporated in the Deed of Guarantee in the heading 'Now this Deed witnessth as under' are as follows:

“NOW THIS DEED WITNESSTH AS UNDER:-

1. The guarantor hereby irrevocable and s unconditionally guarantees that the purchaser shall make due payment of the balance purchase price of Rs. 338.00 Lakhs together with interest thereon at the aforesaid rate and all other charges as and when payable by the purchaser in the manner mentioned and within the period stipulated in the letter of Acceptance of the offer furnished by GSFC, a copy whereof is annexed hereto and marked as "Annexure 'A'".
2. We hereby agree that the demand duly signed by the officer of GSFC, GIIC, Bank of Baroda and Dena Bank as the case may be shall be final and binding upon as to the question as to the amount of such default and the demand by GSFC, GIIC, Bank of Baroda and Dena Bank or any one of them would be conclusive and that we shall not be entitled to question the Correctness of the same.

In the event of default being committed by the purchaser in payment of balance purchase price with interest thereon at the aforesaid rate and other charger if any, as aforesaid the guarantor shall, pay to GSFC, GIIC Bank of Baroda and Dena Bank Jointly and/ or to any one of them on behalf of all, first demand by any one of them the balance purchase price together the interest thereon at the aforesaid rate and other charge if any without objection, demar or protext and without reference to the purchase and without questioning the legal relationship subsisting between GSFC and the purchaser.”

25. The Deed of Guarantee dated 12.12.1990 as extracted above and relied by the Financial Creditor, clearly proves that transaction in question was sale

and purchase transaction of the assets of GPPL and the Corporate Debtor was the purchaser and it has to make balance payment of purchase price in the time allowed and the guarantee was given for payment of the balance purchase price by the Corporate Debtor. The guarantee by the Corporate Debtor for payment of purchase price, cannot in any manner be read as any financial debt owned by the Corporate Debtor. The letter dated 07.11.1990, Agreement dated 27.11.1990 and Guarantee Deed dated 12.12.1990 are part of the same transaction of sale purchase of the assets of GPPL to the Corporate Debtor and all the three documents clearly indicate and prove that transaction was sale and purchase transaction and in no manner can be said to be a financial transaction under which financial debt was undertaken to be paid by the Corporate Debtor to the Financial Creditor. We have already noticed the clauses in the Agreement dated 27.11.1990 stating that in event Corporate Debtor fails to pay the purchase price within the time allowed, it was open for the Financial Creditor to revoke the Agreement and recover the assets from the Corporate Debtor and realise its all dues. The GSFC has written a letter dated 17.10.2020 to all other Financial Institutions, including Bank of Baroda on the subject "Maintaining of account of M/s Shree Industries Limited – The purchaser of M/s. Ganpati Pulp & Paper Mills - A/c No.C/G/316/97. The said letter give the details of the net sale price and bifurcation of sale price on the sharing ratio between all Financial Institutions including Bank of Baroda. The letter further noticed that total payment received after the down payment

comes to Rs.3,05,72,307. It is useful to extract letter dated 17.10.2000 written by GSFC, which has been brought on record by Respondent No.1 as Annexure R-1/7, which letter is as follows:

“Ref. No.GSFC:ACCTS:

DATE: 17/10/2000

M/s G.I.I.C Ltd.;
Jdhyo* Bhavan,
GANDHINAGAR

M/s. Bank of Baroda
Opp: Natraj Cinema
Ashram Road Branch
AHMEDABAD

M/s Dena Bank
188 A, Ashram road,
Der*laxmi Building
P.B. No.4089, Na**angpura
AHMEDABAD

Dear Sirs,

Reg: Maintenance of account of M/s. Shree Industries Limited –
The purchaser of M/s. Ganpati Pulp & Paper Mills – A/c No.C/C/316/97.

A reference is please requested to the Sale Order No.GSFC/SEC.SEC/SAL.E/B-1 Board/1965 Dated 07/11/1990.

We have been maintaining the accounts since inception on your behalf as per the sharing ration approved.

However, since the purchaser is not making the payments regularly, we find it very difficult to continue with the maintenance of account on your behalf. We have, therefore, separated the accounts based on the sharing ration agreed to between GSFC, GIIC, Dena Bank and Bank of Baroda.

We are forwarding herewith the account in details from the date of possession given to the purchaser. The details in gist based on which the accounts are opened are given below:

Total sale price	: Rs.3,88,00,000/-
Loss: Expenses as	: GSFC : 6,58,617/-
On date of sale	GIIC : 31,610/-
	BOB : 69,651/-
	Dena Bank: 42,572/-

		:Rs. 8,02,450/-
Net Sale Price		: Rs.3,79,97,550/-
: Down Payment	:Rs.50,00,000/-	
Less: Expenses as state above	:Rs. 8,02,450/-	
Net down payment is again bifurcated as per ratio as under	:Rs.41,97,550/-	
The amount at which the accounts are opened		:Rs.3,38,00,000/-

The above net sale price is bifurcated based on the sharing ratio fixed as under

Sr. No.	Name of Institution	Sharing ratio	Gross Sale Price after adjusting expenses	Share of down payment after expns.	Net amt. at which the a/cs are opened
1	G.I.I.C Ltd.	47.95%	Rs.1,82,19,825/-	Rs.20,12,725/-	Rs.1,62,07,100/-
2	G.S.F.C.	23.65%	Rs. 89,48,425/-	Rs. 9,88,525/-	Rs.79,59,900/-
3	Bank of Baroda	14.25%	Rs.54,14,650/-	Rs.5,98,150/-	Rs.48,16,500/-
4	Dena Bank	14.25%	Rs.54,14,650/-	Rs.5,98,150/-	Rs.48,16,500/-
5	Total	100.00%	Rs.3,79,97,550/-	Rs.41,97,550/-	Rs.3,38,00,000/-

The parameters based on which the accounts opened are as under:

- The net amount at which the accounts are opened was to be repaid by 20 equal quarterly installments from 01/05/1991 to 01/02/1996.
- The rate of interest charged in the account is 15% from 23/10/1990 i.e. Date of possession of 21% from 02/02/1996 i.e. After the last repayment date.
- Penalty is charged @ 6% from 01/02/1991, 4% from 01/01/1992 and 2% from 01/04/1996.
- Upto 01/02/1991, the system of charging the interest was half yearly and from 01/02/1991, it has been changed to quarterly system. Hence, the interest is calculated and provided from 23/10/1990 to 31/01/1991 and debited on 01/02/1991; the next interest is calculated from 01/02/1991 to 31/05/1991 and debited on 01/08/1991; next interest from 01/06/1991 to 31/08/1991 and debited on 01/11/1991; interest calculated from 01/09/1991 to 31/12/1991 and debited on 01/02/1992. Thereafter, the interest is calculated for the quarters from 1st January to 21st March, which is debited on 1st May; from 1st April to 30th June, which is debited on 1st August, from 1st July to 30th September, which is debited on 1st November and from 1st October to 31st December, the interest debited on 1st February and this system continued thereafter.
- The interest and penalty calculated upto 31/12/2000, (the statement is enclosed herewith).

- The payments received after down payment is again bifurcated based on the ratio agreed to and date wise credit is given in the accounts on the date on which the same is received.

The total payment received after down payment comes to Rs.3,05,72,307/-. The proportionate credit has been given in the different accounts.

The final dues recoverable based on interest and penalty calculated upto 31/12/2000 as well as the dues recoverable from the party, institution wise, as on 01/11/2000 are also shown at the bottom of the statement.

Since, the purchaser is not making regular payment, we request you to maintain your part of account at your level henceforth.

You are requested to please let us know the details of payment made by us till date so as to reconcile the same.

We regret the inconvenience caused to you in this regard.

Thanking you,

Yours faithfully,

Sd/

Dy. Manager (A/cs.)”

26. The above letter, which has been written after 10 years of the sale of the assets, clearly notes that account of Corporate Debtor as purchaser of the Ganapati Pulp & Paper Mills has been maintained and net sale price is bifurcated based on the sharing ratio of Bank of Baroda was mentioned as 14.25% and gross sale price, which was to be received by Bank of Baroda was Rs.54,14,650/- and share of down payment after adjusting expenses was Rs.5,98,150/- and net amount at which the account was opened was Rs.48,16,500/-. The above letter indicates that Corporate Debtor after payment of Rs.50 lakhs as down payment has also made payment of Rs.3,05,72,307. Thus, from the perusal of letter dated 07.11.1990, Agreement dated 27.11.1990, Guarantee Deed dated 12.12.1990, it is amply clear that transaction between parties was transaction of sale and purchase of the assets

of GPPL and the proceedings initiated by Financial Creditor – Respondent No.1 were for recovery of balance purchase price, which do not involve any financial debt.

27. The Adjudicating Authority after hearing the parties has returned a finding after perusing the Agreement dated 27.11.1990 that Agreement was a Sale Agreement and not a Loan Agreement. In paragraph 30 of the judgment, the Adjudicating Authority held as follows:

“30. We have carefully perused the contents and terms and conditions of the loan agreement dated 27.11.1990. The Clauses mentioned in the said agreement as well as the representation given by one of the consortium members (GSFC) before the Board of Industrial Financial Reconstruction (BIFR) as well as the statement made by the GSFC and Applicant before the Hon’ble Gujarat High Court stating that the agreement dated 27.11.1990 is a sale agreement, makes it very clear that the Applicant has changed its stand in the present case and claiming itself to be a Financial Creditor based on the said agreement which in our considered opinion is a sale agreement and not a loan agreement.”

28. The Adjudicating Authority after returning the said finding, proceeded to examine the question as to whether any money has flown into the account of the Corporate Debtor by virtue of the said agreement. In paragraph 31, the Adjudicating Authority noticed as above:

“31. Having given a finding that the document in question is a sale agreement and not a loan agreement, we have to now examine as to whether any money has flown into the account of the Corporate Debtor by virtue of the said document/agreement and

that the said money qualifies the test of being a “Financial Debt” under the definition of Section 5(8) of the IBC, 2016 and whether the Applicant is a “Financial Creditor” within the meaning of Section 5(7) of the IBC, 2016.”

29. The Adjudicating Authority after noticing the judgment of the Hon’ble Supreme Court in **Innoventive Industries vs. ICICI Bank** and **M. Suresh Kumar Reddy vs. Canara Bank & Ors.** has noted that under the consortium loan agreement, the Financial Institutions advanced certain amount to M/s. Ganpati Pulp and Paper Limited by way of term loans and Respondent No.1 stepped into the shoes of Bank of Baroda by assignment deed dated 29.03.2011. The Adjudicating Authority further noticed that assets of the GPPL were sold by GSFC and were purchased by the Corporate Debtor. However, after recording the said finding, the Adjudicating Authority jumped on the conclusion that it is not in dispute that the amount in question has been disbursed to the Corporate Debtor which was disbursed against the consideration for the time value of money. Paragraphs 38 and 39 of the order of the Adjudicating Authority are as follows:

“**38.** The assets of the GPPL were put on sale by the GSFC. The said assets were purchased by the Corporate Debtor i.e. Shree Industries Limited (previously known as M/s. Rama Finance Ltd.) and the Corporate Debtor was put in possession of the said assets.

39. Therefore, it is not in dispute that the amount in question has been disbursed to the Corporate Debtor which was disbursed against the consideration for the time value of money.”

30. The finding returned by the Adjudicating Authority that it is not in dispute that amount in question has been disbursed to the Corporate Debtor, are without any basis and incorrect. The purchase of assets of GPPL to Corporate Debtor were on consideration and which consideration was purchase price. The purchase price was payable to the Corporate Debtor by the Financial Creditor. No amount was disbursed by the Financial Creditor to the Corporate Debtor in the transactions, culminating into Agreement dated 27.11.1990.

31. We may also notice one more submission, which has been advanced by learned Counsel for Respondent No.1 that Section 5, sub-section (8), does not contemplate disbursement of money only. It is submitted that it is not essential that disbursement of money should take place in favour of the Corporate Debtor. There can be transaction without any disbursement to the Corporate Debtor, which can be treated as financial debt. It is submitted that in the present case, the property has been disbursed to the Corporate Debtor by the Financial Creditor. Learned Counsel for Respondent No.1 has referred to Section 5, sub-section (8), sub-clause (f) and submits that sub-clause (f) is residuary clause, which encompasses all other transactions, which are not covered by clauses (a) to (e). The submission of the learned Counsel for Respondent No.1 is that disbursement of money is not essential condition and disbursement of property, which had taken place in the present case is also covered by financial debt.

32. The Hon'ble Supreme Court in **Pioneer Urban and Infrastructure Ltd.** (supra) has categorically held that the disbursement as contemplated in Section 5, sub-section (8) is disbursement of money, which has been paid against the consideration for time value and money. In paragraphs 70 and 71 of the judgment, the Hon'ble Supreme Court has categorically held that the "expression 'disbursed' refers to money which has been paid against consideration for the 'time value of money' ". The above pronouncement of the Hon'ble Supreme Court is clear and disbursal of property as suggested by learned Counsel for Respondent No.1, cannot be accepted to be covered by definition of 'financial debt' under Section 5, sub-section (8).

33. The learned Counsel for Respondent No.1 has relied on letter dated 04.03.2021, which was written by Corporate Debtor to Respondent No.1 on the subject "Settlement proposal – towards term loan". It is submitted that in the said letter, the Corporate Debtor has also admitted that sale consideration was converted into loan by Consortium Members. Copy of the said letter has been brought on the record as Annexure R1/9 in the reply of Respondent No.1. Paragraphs 5 and 9 of the said letters are as follows:

- "5. SIL, under the terms and conditions of the said agreement was required to pay a sum of Rs.50.00 lacs as down payment and the balance sale consideration was converted into loan by the aforesaid consortium members as per the terms and conditions as mentioned in the Agreement. After the payment of Rs.50.00 lacs, by virtue of the said agreement, GSFC as well as the other consortium members became lenders and SIL became a lonee for

the amount of the balance purchase price, which SIL had to pay to such institutions. The consortium members, therefore, attained a status of secured creditors of SIL.”

9. Though the other consortium members opened separate account of SIL and credited the payment received from SIL to the said account, Bank of Baroda did not open a separate account of SIL but credited the amount received from SIL to the account of GPPL, towards the payment of the term loan of Rs.16.50 lacs secured on the assets of SIL. SIL has paid a sum of Rs.50.42 lacs to Bank of Baroda and after accounting for the same only a sum of Rs.5.17 lacs remained unpaid to Bank of Baroda by SIL.”

34. The above letter, which was written by Corporate Debtor, where it was mentioned that sale consideration was converted into loan by the aforesaid consortium members as per the terms and conditions mentioned in the Agreement, suffice it to say that Agreement dated 27.11.1990, does not refer to any conversion of sale price into loan and any statement in the letter written after 30 years of transaction, cannot be put in service by the Respondent to deny the true nature of transaction, which took place on 27.11.1990. We have noted above that in the letter written by GSFC on 17.10.2000, the transaction was clearly referred to as sale transaction and sharing ratio of different Financial Institutions provided towards net sale price. We have already noted above the judgment of Hon’ble Supreme Court in **Global Credit Capital Limited** (supra), where the Hon’ble Supreme Court has categorically held that the true nature of the transaction has to be found out to determine as to whether the transaction is a financial debt. While determining the true nature

of transaction, the transaction and action of the parties at the relevant time, throw light on the true nature of the transaction. We have already discussed all contemporaneous materials, which clearly indicate that transaction in question was wholly sale and purchase and was not a financial debt.

35. The learned Counsel for the Respondent has put much emphasis on the letter written by Corporate Debtor to Respondent No.1 dated 04.03.2021, where the SIL has admitted the conversion of sale consideration to loan consideration. The true nature of transaction is to be determined from the documents reflecting transaction, which in the present case are letter dated 07.11.1990, Agreement dated 27.11.1990 and Deed of Guarantee dated 12.12.1990. Any pleading of the parties or any statement made by the parties subsequently, may not be held to be decisive of nature of transaction. The Hon'ble Supreme Court in **(2015) 16 SCC 787 in Yellapu Uma Maheshwari and Anr. vs. Buddha Jagadheeswararao and Ors.** has held that the nature and substance of the transaction has to be determined with reference to the terms of the documents and it cannot be determined on the basis of pleadings set up by the parties, who seeks to introduce the document in question. In paragraph 15 of the judgment, the Hon'ble Supreme Court has laid down following:

“**15.** It is well settled that the nomenclature given to the document is not decisive factor but the nature and substance of the transaction has to be determined with reference to the terms of the documents and that the admissibility of a document is entirely dependent upon the recitals

contained in that document but not on the basis of the pleadings set up by the party who seeks to introduce the document in question. A thorough reading of both Exts. B-21 and B-22 makes it very clear that there is relinquishment of right in respect of immovable property through a document which is compulsorily registrable document and if the same is not registered, it becomes an inadmissible document as envisaged under Section 49 of the Registration Act. Hence, Exts. B-21 and B-22 are the documents which squarely fall within the ambit of Section 17(1)(b) of the Registration Act and hence are compulsorily registrable documents and the same are inadmissible in evidence for the purpose of proving the factum of partition between the parties. We are of the considered opinion that Exts. B-21 and B-22 are not admissible in evidence for the purpose of proving primary purpose of partition."

36. We, thus, are of the clear opinion that nature of transaction is to be determined from the documents reflecting the transaction and any subsequent letter or subsequent pleadings of the parties cannot be considered in the facts of the present case.

37. The learned Counsel for Respondent No.1 also in its reply has referred to the order passed by Gujarat High Court in LPA No.2480 of 2010, where the Gujarat High Court, while noticing the facts of the case has noted that balance amount of Rs.338 lakhs in the nature of loan to be paid in six years by way of half yearly equal installments. In paragraph (H) of the reply, relevant extract of the judgment of the High Court as well as the order passed by AIFR has been referred to. It is useful to extract paragraph (H) of the reply of Respondent No.1, which is as follows:

“H. At this juncture it is necessary to reproduce certain excerpts from the Ld. BIFR, Ld. AIFR, and orders passed in SCA No. 11116/2008 and LPA No. 2480/2009 by Hon'ble High Court, whereunder the status of the Assignor Bank has already been established as Financial Creditor/ Secured Creditor:

- Order dated 26.07.2021 passed by the Hon'ble Gujarat High Court in LPA No. 2480/2009

*"The respondent no. 1 GSFC accepted the offer of respondent no.5 SIL for transfer of the said mortgaged properties of GPPL, under Section 29 of the SC Act for an amount of Rs.3.88 Crores. Out of the said amount, Rs.SO lacs were to be paid immediately at the time of taking possession of the properties and the balance amount of Rs.338 lakhs **in the nature of loan** to be paid in six years by way of half yearly equal installments carrying interest at the rate of 14% per annum.*

*For the said purpose **charge was created on the said properties** transferred to SIL. The SIL paid a total sum of Rs.3,45, 72,307 till the year 1996, In the meanwhile SIL had taken term loan o Rs.56 lakhs from IFCI Rs.47 lakhs from Punjab National Bank and Cash Credit Facility of Rs.150 lakhs from Punjab National Bank. For the said purpose, *pari passu* charges against the properties transferred to it by GSFC were created in favour of IFCI and Punjab National Bank and second charge for working capital. The said charge was created with the consent of GSFC, GIC, Dena Bank and Bank of Baroda who were the members of the consortium."*

- Order dated 17.02.2021 passed in LPA 2480/2009

"This, *prima facie*, means that while the productive Assets of the Company are going junk because of disuse and no effective resolution of the matter is happening, **either by payment to the Secured Creditors** and other Creditors nor the Secured Creditors are allowed to take further recovery measures, subject to the rights and contentions of the various parties involved in the matter, therefore, as an interim measure at this stage, we feel it appropriate to modify the aforesaid blanket Status Quo (1) We direct the Respondent No. 5 - Shree Industries Ltd. and the Respondent No. 9 - **ASREC {India} Ltd., the Assignee of Bank of Baroda and other Secured Creditors**, who have not yet been finally settled and paid off by the Respondent No.5 - Shree Industries Ltd., to undertake the negotiation process for Settlement of the dues of such Secured Creditors and try to settle the dues of such Secured Creditors in the interregnum period. If the Settlement can be arrived at, let such Settlement Document be produced before this Court ... "

- Order dated 02.05.2008 passed by AIFR

"In view of the aforesaid facts, we find that there is a no infirmity in the order of the BIFR dated 19.03.2007. BIFR has after appreciating the factual matrix observed that the issue of possessions without has been brought for the first time by the appellant. **The appellant's rights as a secured creditor of the company whose dues have to be settled at par with the other secured creditors have been protected.** The impugned order is, therefore not

- prejudicial to the interest of the appellant. We do not find any merit in the appeal. The Appeal is therefore dismissed."

In view of the documents mentioned hereinabove it is amply made clear that the dues of Bank of Baroda, i.e. the Assignor of the Financial Creditor were not settled viz the Corporate Debtor and hence the present application was filed against the default committed. The debt of sum of Rs. 92,35,21,674.03/- remained unpaid to Answering Respondent by Corporate Debtor as on 30.06.2022 and therefore, the Section 7 Petition filed by the Answering Respondent against Corporate debtor has been rightly admitted against the Corporate Debtor.

38. Coming to the final judgment of the Gujarat High Court, which was delivered by the Division Bench vide order dated 26.07.2021. The Gujarat High Court in paragraph 10.9 of the judgment has held:

“10.9 Since we are not seized of the Winding-up of proceedings in the present Letters Patent Appeal, we make our aforesaid proposed order absolute now and dispose of this Letters Patent Appeal No.2480 of 2010 as well as Special Civil Application No.11116 of 2008 by requesting the learned Company Judge, who is seized of the winding-up proceedings of Company Petition No.**139 of 1985** to consider all the aforesaid relevant aspects of the matter and the matter and then take appropriate decision in the matter to transfer the winding-up proceedings to **NCLT, Ahmedabad Bench** which we strongly recommend. We may make it clear that we have not made any pronouncement on the merits of claims or counter- claims of any of the parties in this matter and advisedly so left the said aspects to be considered and decided by the **NCLT** afresh, once the proceedings are transferred by learned Company Judge, who may pass appropriate orders in its his discretion in this regard and for that purpose only the impugned orders and OTS Settlement will not stand in the way of NCLT.

(underlined by us)”

39. The Gujarat High Court having itself held that High Court is not making any observation on the claims and counter-claims of the parties, order of the High Court relied by Respondent No.1 does not help them with regard to nature of transaction, which was entered between the parties on 27.11.1990.

40. Coming to the order of the AIFR as relied by Respondent. In the said order, it was observed by the AIFR that *“The appellant’s rights as a secured creditor of the company whose dues have to be settled at par with the other secured creditors have been protected”*. The AIFR was not examining or expressing any opinion on the nature of transactions between the Corporate Debtor and the Financial Institutions and the said observation in no manner help Respondent No.1.

41. Now, we come to the judgment relied by learned Counsel for the Respondent. The Respondent has relied on the judgment in **Pioneer Urban and Infrastructure Ltd. vs. Union of India and ors. – (2019) 8 SCC 416**, paragraphs 74 to 77. Paragraph 74 to 77 are as follows:

“74. What is clear from what Shri Venugopal has read to us is that a wide range of transactions are subsumed by para (f) and that the precise scope of para (f) is uncertain. Equally, para (f) seems to be a “catch all” provision which is really residuary in nature, and which would subsume within it transactions which do not, in fact, fall under any of the other sub-clauses of Section 5(8).

75. And now to the precise language of Section 5(8)(f). First and foremost, the sub-clause does appear to be a residuary provision which

is “catch all” in nature. This is clear from the words “any amount” and “any other transaction” which means that amounts that are “raised” under “transactions” not covered by any of the other clauses, would amount to a financial debt if they had the commercial effect of a borrowing. The expression “transaction” is defined by Section 3(33) of the Code as follows:

“3. (33) “transaction” includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;”

As correctly argued by the learned Additional Solicitor General, the expression “any other transaction” would include an arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay instalments at various stages of construction, so that they themselves then fund the project either partially or completely.

76. Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing. We were referred to Collins English Dictionary & Thesaurus (2nd Edn., 2000) for the meaning of the expression “borrow” and the meaning of the expression “commercial”. They are set out hereinbelow:

“borrow.—vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard. to lend. 4. (intr) Golf. To putt the ball uphill of the direct path to the hole : make sure you borrow enough.”

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“commercial.—adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser : commercial television. 3. having profit as the main aim : commercial music. 4. (of chemicals, etc.) unrefined and produced in bulk for use in industry. 5. a commercially sponsored advertisement on radio or television.”

77. A perusal of these definitions would show that even though the petitioners may be right in stating that a “borrowing” is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression “borrow” is wide enough to include an advance given by the homebuyers to a real estate developer for “temporary use” i.e. for use in the construction project so long as it is intended by the agreement to give “something equivalent” to money back to the homebuyers. The “something equivalent” in these matters is obviously the flat/apartment. Also of importance is the expression “commercial effect”. “Commercial” would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is “raised” under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the “commercial effect” of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have “commercial” interests in the same—the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even without adverting to the Explanation introduced by the Amendment Act.”

42. The above observations makes it clear that Clause (f) seems to be a “catch all” provision, which is really residuary in nature and further

expression “borrow” is wide enough to include an advance given by homebuyers to a real estate developer for “temporary use”, i.e. for use of the construction project so long as it is intended by the agreement to give “something equivalent” to money back to the homebuyers. The above pronouncement of the Hon’ble Supreme Court in no manner helps the Respondent.

43. The learned Counsel for the Respondent has also relied on judgment of this Tribunal in **Kolla Koteswara Rao vs. Dr. S.K. Srihari Raju and Anr. – (2021) SCC OnLine NCLAT 110**. In the above case the Corporate Debtor had availed a financial loan from SBI to the extent of Rs.21.50 crores for the purpose of setting up a unit for manufacturing bulk drugs, formulation etc. Corporate Debtor defaulted. Thereafter, the Corporate Debtor entered into one time settlement with the Bank for Rs.11.70 crores. In compliance with the terms of the OTS, the first Respondent in agreement with the Corporate Debtor and on behalf of the Corporate Debtor, deposited amount towards the OTS in the Bank. The Corporate Debtor and the first Respondent entered into an Agreement to Sale where the Corporate Debtor had agreed to sell the land allotted by Telangana State Industrial Infrastructure Corporation (“TSIIC”) together with the structure standing on the property. The Corporate Debtor was to obtain all necessary permission including obtaining of NOC. The Corporate Debtor having failed to commence the Project, the allotment of land was cancelled by TSIIC. Section 7 Application was filed by Respondent No.1,

which Application was admitted by Adjudicating Authority. Aggrieved by which order, the suspended Director has filed the Appeal. This Tribunal while dismissing Appeal, in paragraphs 19 and 23 observed following:

“19. The aforementioned Clauses enumerated in Para 13, specify that the first Respondent shall make the payment of the consideration directly to the Lenders towards the amount payable under the OTS by the ‘Corporate Debtor’. The consideration for the purchase of the Scheduled Property structure together with the plant and machinery standing thereon shall move to the Lender from the first Respondent, at the instance of the ‘Corporate Debtor’. Hence, it is seen from the aforementioned clauses that the Agreement to Sell emanates from the One Time Settlement entered into between the ‘Corporate Debtor’ and the Lender Bank and it is only in lieu of the consideration paid by the first Respondent to the Lender Bank on behalf of the ‘Corporate Debtor’, that the Agreement of Sale for the subject property was executed. Therefore, the contention of the Learned Counsel appearing for the Appellant that the money was not utilized by the ‘Corporate Debtor’, but paid to the Lender and as the utilization of money by the ‘Corporate Debtor’ is a sine qua non and therefore, the ‘debt’ does not fall within the definition of ‘Transaction’ as defined under Section 3(33) or under ‘Financial Debt’ as defined under Section 5(8)(f), is untenable. A combined reading of Sections 5(8), 3(33), 3(11) and 3(6) together with the admitted fact that the amount was paid by the first Respondent on behalf of the ‘Corporate Debtor’ to the Lender Bank pursuant to the time bound OTS Settlement and further Clause 12 of the Agreement to Sell stipulates that the ‘Corporate Debtor’ shall refund the amount with 24% interest per annum in case of failure on their behalf to execute and register the sale deed, establishes that the ‘debt’ in the instant case satisfies the threefold criteria:—

a) ‘disbursal’

b) 'time value of money'

c) 'commercial effect of borrowing'

23. In the aforementioned case, '*Anuj Jain, IRP for Jaypee Infratech Ltd.*' (Supra) the 'Corporate Debtor' Jai Prakash Infrastructure Ltd. (JIL) mortgaged some of its assets in favor of the Lender Banks/Financial Institutions for loans advanced to the Parent Company Jai Prakash Associates Infrastructure Ltd. (JAL) thereby constituting third party security. The borrower and the security provider bore a parent and Subsidiary relationship. In this third party security, the Creditor has not disbursed any funds to the person creating the security, but instead has disbursed the funds to the Parent entity of the 'Corporate Debtor'. One of the issues in that case was whether the Respondents (Lenders of 'JAL') could be recognized as 'Financial Creditors' of the 'Corporate Debtor JIL' on the strength of the mortgage created by the 'Corporate Debtor', as collateral security of the 'debt' of its holding Company 'JAL'. The Hon'ble Supreme Court held that such Lenders of 'JAL', on the strength of the mortgages in question, may fall in the category of the Secured Creditors, but such mortgages being neither towards any facilities or advance to the 'Corporate Debtor' nor towards protecting any facility or the security of the 'Corporate Debtor', it cannot be stated that the 'Corporate Debtor' owes them any 'Financial Debt' within the meaning of Section 5(8) of the Code and hence such Lenders of 'JAL' do not fall in the category of 'Financial Creditors' of the 'Corporate Debtor JIL'. The facts are distinguishable in the instant case as the disbursement of funds was by the first Respondent to the Lender Bank on behalf of the 'Corporate Debtor' in pursuant to an OTS Settlement. There is no parent subsidiary relationship involved in this present matter. The loan was advanced to the Corporate Debtor and the amounts were disbursed by the first Respondent to the account of the 'Corporate Debtor'. For reasons cited in Para 19, we are of the considered view that the debt in question is a 'Financial Debt'. It was also pleaded that the specific intention of the first Respondent was to take over the land with the

structures and the plant and machinery so as to commence the business for which purpose the land was initially allotted by TSIIC. Hence, it can be safely construed that the first Respondent cannot be said to be having only a security interest over the assets of the 'Corporate Debtor'. Keeping in view the facts of the attendant case, we are of the considered opinion that the 'debt' is a 'Financial Debt' and the first Respondent a 'Financial Creditor'.

44. In the above case, the amount was deposited by the first Respondent to the Bank in pursuance of OTS entered between the SBI and the Corporate Debtor. The question was as to whether the said amount was a financial debt, which was accepted by the Adjudicating Authority while admitting the Application. The above case is clearly distinguishable from the facts of the present case. In the present case, the assets were sold to the Corporate Debtor in auction conducted by GSFC to sell the assets of the party, who has defaulted in payment of the term loan to the Financial Institutions. The down payments made and subsequent payments made by the Corporate Debtor was towards purchase price of the assets. Hence, the judgment of **Kolla Koteswara Rao** does not in any manner help the Respondent in the present case.

45. In view of the foregoing discussion, we are satisfied that there was no financial debt, on the basis of which Respondent No.1 could have filed Section 7 Application for initiating CIRP against the Corporate Debtor. The Adjudicating Authority committed error in returning a finding that there was

disbursement in favour of the Corporate Debtor, whereas it categorically held that transaction in question was Sale Agreement and not a Loan Agreement.

46. In result, we allow the Appeal(s). Set aside the order dated 13.12.2023 passed by Adjudicating Authority and all consequential actions, as taken in pursuance of the order dated 13.12.2023. Section 7 Application filed by Respondent No.1 is dismissed with costs, which we assess Rs.1,00,000/- (Rupees one lakh) to be paid to the Appellant in Company Appeal (AT) (Insolvency) No.37 of 2024 within one month from today. Both the Appeal(s) are allowed accordingly.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

NEW DELHI

9th September, 2024

Ashwani