IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT-III, MUMBAI BENCH

C.P.(IB) 2103/MB/2019

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

In the matter of **Reliance Commercial Finance Limited** having its head office Reliance Centre, 6th Floor, South Wing, Off Western Express Highway, Santacruz (East)

......Financial Creditor/Petitioner

V/s

SKIL Shipyard Holdings Private Limited, having its registered office at Bank Street, Cross lane, Fort Mumbai, Maharashtra: 400 023

......Corporate Debtor/Respondent

Order Reserved On: 01.02.2023

Order Pronounced On: 19.04.2023

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Smt. Madhu Sinha, Member (Technical)

Appearances (via video conferencing)

For the Petitioner: Mr. Ankit Lohia, Himanhsu Vidhani, Harsh Salgia

i/b Khaitan & Co, Advocates

For the Respondent: Ld Senior Counsel Mr. Vikram Nankani a/w Mr. Ashish Kamat, Mr. Kunal Mehta, Mrs. Manik Joshi, Mr. Mantul Bajpai, Ms. Priyam Sharma i/b Crawford Bayley & Co.

***Per:* Smt. Madhu Sinha, Member (Technical)**

ORDER

1. The above Company Petition is filed by **Reliance Commercial Finance Limited** (hereinafter called as "**Petitioner/Financial Creditor**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against **SKIL Shipyard Holdings Private Limited**, (hereinafter called as "**Corporate Debtor**") by invoking the provisions of Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter called "**Code**" read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a resolution of an unresolved financial debt of **Rs. 336,28,63,497/- (together with Principal and Interest Amount as on 22.05.2019).**

2. **Brief Submissions on behalf of the Petitioner:**

i. The Petitioner states that financial assistance was provided to the Corporate Debtor through two Loan Facilities (hereinafter referred as "Facilities") under the Facility-Cum-Hypothecation Agreements dated 29.09.2017 and 02.07.2018 ("Facility Agreements") for a sum of Rs. 40,00,00,000 (Rupees Forty Crores only) (hereinafter referred as "**Loan No. 1**") and Rs. 243,00,00,000 (Rupees Two Hundred Forty-Three Crores only) (hereinafter referred as "**Loan no. 2**") respectively amounting to a total of Rs. 283,00,00,000/- (Rupees Two Hundred Eighty-Three Crores only)].

ii. The Petitioner to prove the existence of the financial debt have attached the following documents: a.) Facility cum Hypothecation Agreement dated 29.09.2017 for Loan no. 1 and 02.07.2018 for Loan no. 2; b.) Sanction Letter dated 29.09.2017 for Loan no. 1 and Sanction Letter dated 02.07.2018 for Loan no. 2; c.) The CRIF Report of Corporate Debtor dated 23.04.2019 showing the disbursement of Loan no. 2(i.e., 243 crores); d.) Recall Letter dated 07.05.2019 issued by the Petition recalling the Loan no. 1 and Loan no. 2; Statements of Account maintained by the Petitioner in his Company Books showing the transaction of an amount of Rs. 243 crores (i.e., Loan no. 2.)

iii. The Petitioner states that both the Facility Agreements are identical in terms of their clauses. Further, the Corporate Debtor provided security in the form of hypothecation of its assets for availing the aforesaid facilities, which included "*(i) first and exclusive charge in favour of RCFL by way of hypothecation on the Purchased Assets, (ii) first and exclusive charge in favour of RCFL, by way of hypothecation on all the book-debts of the Borrower and all other movable assets including all machinery and equipment of the*

Borrower described in general terms in the Fourth Schedule hereto and all other tangible movable properties of the borrower....".

iv. The Petitioner states that the Corporate Debtor failed to fulfil the re-payment obligation provided under the said Facility Documents. On account of default, the Petitioner, by way of their Letter dated 07.05.2019, recalled the entire Facilities. However, the Corporate Debtor failed to make any re-payments despite the aforesaid Recall Letter.

v. Further, the Corporate Debtor has admitted his liability which is evident from the receipt of amounts from the facility into their accounts and mention of the loan in Corporate Debtor's Audited Financial Statements 01.04.2019 to 31.03.2020. The Petitioner has attached a Statement of Account from his own books showing disbursal of the loan amount of 243 crores (i.e., Loan 2) to the Corporate Debtor.

vi. The Petitioner states that the receipt of amounts towards the facility has been admitted by the Corporate Debtor in its audited financial statements of the Financial year 2019-20. As per the Independent Auditors' Report for Financial Year 2019-20 submitted by the Petitioner , the Corporate Debtor admits having taken a loan of Rs. 2,30,21,38,000 from the Reliance Capital Limited (which was later demerged into the Applicant) and having committed default on the same. The note reads as under:

i. *"According to the records of the company examined by us and the information and explanations given to us, the Company has not defaulted in repayment of dues to banks, financial institutions and debenture holders except for amount payable to banks aggregating to Rs. 3,78,01,65,596/-*

The lender wise details are tabulated as under: The Petitioner states that the Corporate Debtor has in its Audited Financial Statements for the year ended March 31, 2019 itself admitted, acknowledged and classified monies received from the Financial Creditor as a "Loan".

Sr. no.	**Particulars**	**Principal Default**	**Period of default since**	**Interest Default (Rs. in Lacs)**	**Period of default since**
1	14% Non Convertible Debentures	82,11,72,515/-	Jan 2019	5,97,46,772/-	Jan 2019
				2,89,77,266/-	Sep 2019
				2,89,77,266/-	Dec 2019
				1,12,91,777/-	March 2020
8	Reliance Capital Limited	2,30,21,38,000/-	October 2018	21,26,79,708	Mar 17

				31,51,82,292	Apr 18
	Total	3,12,33,10,515/-		65,68,55,081/-	

vii. Further, the Petitioner states that the record of default from the Center for Research in International Finance (CRIF) (a Credit Rating agency) dated April 23, 2019 shows that the Corporate Debtor has defaulted on the facility availed from the Petitioner. The Petitioner states that the transactions in question are clearly of the year 2017/2018 being the ones in question.

viii. The Petitioner states that the Corporate Debtor in its Audited Financial Statements, has itself admitted and acknowledged *inter alia* :

(i) the disbursal and receipt of amounts under the Facility Agreement;

(ii) that the amounts received from the Financial Creditor are classified as a “Loan”;

(iii) security has been created against the loan availed from the Financial Creditor; and

(iv) default has been committed by the Corporate Debtor in repayment. The affidavit in Reply at page 119 para 5 (xvi) also admits that the disbursal of amounts took place.

ix. From the above submissions, The Petitioner states that there is no dispute on the existence and execution of the Facility Agreement. The Corporate Debtor has itself acknowledged the loan availed from the Petitioner in its audited financial statements and security has been created under the Facility Agreement by way of hypothecation. Further, the Petitioner had sent a notice of default dated May 07, 2019 recalling both the Facilities i.e., Loan no. 1 and Loan no. 2, which was not replied to by the Corporate Debtor. Further, Master Data of the Corporate Debtor as shown on the Ministry of Corporate Affairs website depicts that charge was created on 29th September 2017 by the Corporate Debtor over the loan amount of Rs. 40,00,00,000. Master Data of the Corporate Debtor showing charge over its assets is annexed to the Petition.

3. **<u>Brief Submissions on behalf of the Corporate Debtor:</u>**

i. The Corporate Debtor has filed a detailed reply dated 08.11.2019, denying and opposing each averments raised in the present Petition.

ii. The Corporate Debtor states that the amount of Rs. 40 crores stands repaid which has not been denied by the Petitioner in his Additional Affidavit dated 10.12.2019. Furthermore, the Petition is incurably defective as it fails to disclose the fundamental pre-requisite of disbursement of the alleged principal sum of Rs. 243.00.00.000/- and does not fulfill the mandatory requirements stipulated in the definition of a "financial debt" under Section 5(8) of the Insolvency and Bankruptcy Code, 2016.

iii. The Corporate Debtor states that the Part 4 of the Petition demonstrates that a sum of Rs. 283 crores was disbursed to the Corporate Debtor. Further, date of disbursement is stated to be 01st July, 2018 for the purported loan of Rs. 243 Crores while the Sanction Letter for the loan is dated 2nd July 2018. Even if the case of the Petitioner is to be believed, then the alleged disbursement of Rs. 243 Crores took place even prior to issuance of a sanction letter. These discrepancies have to be viewed in the context of the fact that that the Petitioner has been unable to prove disbursement of loan to the Corporate Debtor.

iv. Further, the Corporate Debtor states that, for there to be a disbursement, the Petitioner ought to have demonstrated that on 01st July, 2018, a sum of Rs. 243 Crores (purported Loan no. 2), was credited into a bank account of the Corporate Debtor from Petitioner's own bank account. The Financial Creditor could however only show that the alleged money was "disbursed by merely assigning a loan account number" which is reflected in the Petition. This cannot be stated to have proved "disbursement". Apart from the fact that no proof of disbursement is produced, in its loan recall notice dated 7th May 2019, the Petitioner has asserted that the loan amount of Rs. 243 crores was disbursed on 02nd July, 2018. The paragraph 2 of the notice at pg. 95 with Schedule 2 at Pg. 99 of the Petition mentions the date of the disbursement as 02nd July 2018. Whereas, Part IV of the Petition mentions the disbursement of Rs. 243 Crores on 1st July, 2018. These are unexplainable contradictions in the submissions of the Petitioner.

v. The Corporate Debtor further states that for the Petitioner to even assert a debt and a default, it was incumbent to produce bank statements reflecting disbursal of Rs. 243 crores from the Petitioner's bank account to the Corporate Debtors' bank account either on 1st July, 2018 or 2nd July 2018. The Petitioner has completely failed in demonstrating disbursement on either of these two dates.

vi. The Financial Creditor had thus failed to produce entries as per Banker's Book of Evidence Act as per requirement of Regulation 2(A) of the Insolvency and Bankruptcy Board of India (Insolvency Process for Corporate persons) Regulations, 2016. Further the Corporate Debtor states that the Financial creditor has hopelessly failed in discharging its burden of demonstrating the disbursement of the financial debt of loan prescribed under the section 5(8) of the IBC.

vii. The Corporate Debtor states that the documents produced by the Financial Creditor to prove the existence of loan account is forged and fabricated on account of the following:

a) The Company Statement of Account submitted by the Financial Creditor is purported to be from the period of 22.05.2000 to 22.05.2019, whereas the Financial Creditor has entered into an alleged purported facility cum Hypothecation agreement with the Corporate Debtor only on 02.07.2018.

b) The asset description in the purported Account Statement states "balancing equipments". The Corporate Debtor states that it is not engaged in the business of balancing equipment and the alleged loan is not even stated to be equipment financed loan.

c) The purported Account Statements states that the frequency of the repayment of alleged loan is "monthly EMIs" which is again incorrect as per the purported Facility cum Hypothecation Agreement wherein it is stipulated in clause 6(g) that the repayment was to be a bullet repayment of principle and the interest, and which is also ex-facie contrary to the Sanction letter dated 02.07.2018 which stipulates that the repayment terms to be a “Bullet Principle and Interest Repayment at the end of the Tenor”

d) the Corporate Debtor further states that the Account Statements produced by the Financial Creditor to give the impression that the sum of Rs 243 crores was disbursed to the Corporate Debtor on 01.07.2018. In fact, there has been no such disbursement on 01.07.2018 or 02.07.2018 in any of the Bank Accounts of the Corporate Debtor.

viii. Additionally, the Corporate Debtor also states that there is no valid authorization underlying the Petition as the Petition is signed by one Mr. Punit V. Thakkar who is the legal Manager of the Financial Creditor. However, he is not authorized to file the Petition as the Board Resolution dated 01.03.2019 puportedly authorizes Dhanajay Tiwari i.e., The Executive Director of the Financial Creditor however, nothing in the resolution authorizes him to file a Petition.

ix. The Corporate Debtor also states that the instruments on the basis of which the Petition is filed are insufficiently stamped, hence the same cannot be acted upon by this Hon’ble Tribunal and no relief can be granted on the basis thereo. As stated by the Corporate Debtor:

a) The Petition is entirely on the basis of the Facility cum Hypothecation Agreements dated 29th September 2017 (for Rs. 40 Crore) and 2nd July, 2018 (for Rs 243 Crore). Whilst the status of these Facility Agreements as documents which pertain to a purported lending is denied, according to the Petitioner, they have a monetary value of an amount aggregating to Rs. 2,830,000,000/-.

b) This Agreement therefore attract the provisions of Articles 5(h)(A)(iv) of the Maharashtra Stamp Act, 1958 and ought to be stamped accordingly. the Corporate Debtor states that The Facility cum Hypothecation Agreements were executed in New Delhi. However, now that the Financial Creditor has brought the Facility Agreement into Maharashtra and is calling upon this Hon'ble Tribunal to grant relief on the basis thereof, the Corporate Debtor submits that as per the provisions of the Maharashtra Stamp Act, it was liable to be stamped as per Article 5 (h)(A)(iv) and the Financial Creditor is liable to pay the stamp duty thereon.

x. Without first paying the stamp duty on the Facility Agreement, the Corporate Debtor submits that it is impermissible for this Hon'ble Tribunal to even take cognisance of the Facility Agreements let alone pass any orders in the Petition on the basis thereof. This Hon'ble Tribunal cannot act upon the Facility Agreement. In fact, as per the procedure prescribed by the Maharashtra Stamp Act, this Hon'ble Tribunal is mandated to impound the Facility Agreement and forward the same to the stamp authorities for the purpose of adjudication vis-à-vis stamp duty and penalty payable thereon. The Petition demonstrates that the Facility Agreement is the basis on which default is alleged. The Written Submissions tendered by the Petitioner at the time of hearing demonstrates that the default is alleged to have taken place on the basis of Clauses in the Facility Agreement. This forms the purported basis of the filing of the Petition. Clearly, the Petition cannot be sustained without express reliance on the Facility Agreement. The contention that the objection vis-à-vis stamp duty cannot be agitated in an IBC proceeding is plainly incorrect. There is nothing inconsistent between the Maharashtra Stamp Act ("MSA") and the IBC. It cannot be that the provisions of the MSA are ignored or not given effect to. Therefore, the Corporate Debtor prays that the in view of the above circumstances the Petition should be dismissed with costs.

xi. The Corporate Debtor states that a similar case under Section 7 was filed by the Financial Creditor against a group company of Corporate Debtor which was dismissed by Hon'ble Mumbai Bench Court II vide their order dated 10.02.2023.

xii. The Corporate Debtor also states that the purported loan amount of Rs. 283 crores (Loan no. 1 and Loan no. 2) shown in its own Audited Balance Sheet for a period 01.04.2019 and 31.03.2020 is not a actual loan or financial transaction as claimed by the Financial Creditor but was towards the fulfilment of the obligation of the Reliance Group (of which Rs. 176 crores was invested in Reliance Naval whilst the balance of Rs. 24 crores and was kept with the Corporate Debtor). The amount of Rs. 24 crores was only as and by a way of compensation until such time as the Reliance ADA Group could secure the release of the securities created by the SKIL Group and compensate the SKIL group. Upon the Reliance ADA Group making payment to the Corporate Debtor for the losses suffered by the SKIL Group, the transaction was to be reversed. This position is also borne out from the Annual Returns for the year ending 31st March 2019 of the Corporate Debtor wherein the following has been stated:

Note 8 (f):

The amount of Rs. 2,30.21,38000/- received from Reliance Commercial Finance Ltd., as per point no.

d above along with interest accrued thereon, a part of ADAG Group Company, promoted, owned and controlled by Shri Anil Dhirubhai Ambani, are not payable till such time a sum of Rs.2,07,96,22,378/- as receivable / recoverable along with interest accrued thereon from E Complex Private Limited and Reliance Defence Engineering. Company Limited, ADAG Group Companies, promoted, owned and controlled by Shri Anil Dhirubhai Ambani shown under the head Other advances, shall be received and obligations in accordance with the Purchase Agreement dated 4" March, 2015 signed between SKIL Infrastructure Limited, the Company, and others with the ADAG Group Companies, promoted, owned and controlled by Shri Anil Dhirubhai Ambani, viz, Reliance Infrastructure Limited and Reliance Defence Systems Pvt. Ltd. are fulfilled by ADAG Group Companies. Is a part of composite transaction emanating from and in connection with the sale of Pipavav Defence project to ADAG Group in accordance with the said Purchase Agreement and also based on the facts, circumstances and documents available on record."

xiii. Therefore, the Corporate Debtor states that the purported claim underlying the Petition as alleged by the Financial Creditor is not a financial debt as understood and defined by Section 5(8) of the IBC. Since the said transactions were dictated by the Reliance ADA Group and they emanate only out of a Purchase Agreement dated 04.03.2015 and not under the Facility Documents dated 29.09.2017 and 02.07.2018 as claimed in the Petition by the Financial Creditor.

4. **<u>Rejoinder on behalf of the Financial Creditor:</u>**

The Financial Creditor filed a Rejoinder dated 21st November 2019. While dealing with the contentions filed in the Reply by the Corporate Debtor, the Financial Creditor submits that the same is wholly irrelevant for determination of the present application. In addition to the opposition of averments made by the Corporate Debtor, the Financial Creditor further states that the Petition is maintainable as:

i. the board meeting held on March 01, 2019, the Executive Director of the Financial Creditor was authorized inter alia to initiate any proceedings in the name of the Financial Creditor. The board resolution inter alia states as under:

"*RESOLVED THAT in suppression of the resolution passed by the Board of Directors, by way of* *circular resolution dated January 4, 2019, Shri Dhananjay Tiwari, Executive Director of the Company, being over all in-charge of day-to-day business affairs of the Company be and is hereby authorised to do and execute all or any of the following acts, deeds and things for and on behalf of the Company:*

a) Institute, prosecute and defend any proceeding in the Company's name;

…RESOLVED FURTHER THAT Shri Dhananjay Tiwari, Executive Director, be and is hereby authorized/ empowered to appoint / delegate from time to time, the executive(s) of the Company and/or any other person(s) as Attorney(s)/authorized persons of the Company, for attending to such matters and for such purposes and delegate them with such powers and authorities as he deems expedient and necessary." (emphasis supplied)

ii. By way of a Power of Attorney dated May 03, 2019 the Financial Creditor authorized Mr. Puneet Thakkar to initiate "any insolvency proceeding in the National Company Law Tribunals in India" and to "make, declare, swear, affirm, sign, seal, deliver, verify all plaints, pleadings, affidavits, declarations, vakalatnamas, applications, petition, whatsoever usual necessary or expedient for or in furtherance of the aforesaid proceedings".

iii. Furthermore, by an authority dated May 23, 2019, the Financial Creditor has authorized Mr. Puneet Thakkar to specifically initiate proceedings under section 7 of the IB Code 2016 against the Corporate Debtor and its group company called SKIL Shipyard Holdings Private Limited. Further the Petitioner states that the order of dismissal in the matter of SKIL Infrastructure by NCLT Mumbai Court II Order dated 10th February 2023 has no bearing on the facts of the present case in as much as in the present case and the same are independent. In view of the aforesaid, the Financial Creditor submits that this Hon'ble Tribunal be pleased to admit the present Petition against the Corporate Debtor.

FINDINGS:

5. Heard the Ld. Counsel appearing for the Financial Creditor and the Ld. Counsel appearing for the Corporate Debtor at length. We have gone through the evidence and the materials placed on record via Rejoinder, Additional Affidavits and Written Submission by both the parties.

6. The Corporate Debtor has raised the contention challenging the maintainability of the present Company Petition as the Financial

Creditor has failed to place on record the evidence of disbursement of Loan no. 2 granted under the Facility Document dated 02.07.2018. Additionally, the Corporate Debtor raised the contention that the Financial Creditor has forged the Statement of Accounts maintained by the Financial Creditor's Company with respect to the Loan no. 1 i.e., Rs 40 crores as the said amount has been repaid by the Corporate Debtor to the Financial Creditor. Apart from these contentions, the Corporate Debtor has also raised the issues of under-stamping of Facility-cum-Hypothecation documents and lack of valid authorization for filing the Petition. This Bench has carefully examined the documents, and the issues that needs to be dealt with are:

- *Whether the financial loan claimed in the Petition under section 7 of IBC filed by the Financial Creditor* ***Reliance Commercial Finance Limited*** *could qualify as "financial debt" under IBC ?*

- *Whether there is any under-stamping of documents and inadequacy of authorization while filing the Petition by the Financial Creditor?*

7. We note that the present Petition under section 7 of the IBC was filed by the Financial Creditor on 27.05.2019, claiming a financial debt 'of Rs, 336,28,63,497/- (including the principal amount,

accrued interest and default interest, as on 22.05.2019) based on Facility -cum - Hypothecation Agreement dated 29.09.2017 for (Loan no. 1) and 02.07.2018 for Rs. 243 crores (Loan No. 2) Rs. 40 crores respectively. However, the Corporate Debtor has claimed that Rs. 40 crores was repaid on the same day, whereas there is no proof of disbursement of the loan of Rs. 243 crores into Corporate Debtor's Bank Account by the Financial Creditor.

8. In order to deal with the issue, we have perused Part IV and Part V of the Section 7 Petition, which contains particulars of financial debt (documents, records and evidence of default), copy of a Sanction Letters and Facility-cum-Hypothecation Agreements. We observe that Financial Creditor's information pertaining to Facility-cum-Hypothecation dated 02.07.2018, shows the disbursement of Loan amount of Rs. 243 crores on 01.07.2018 and Sanction Date as 02.07.2018, which unveils that the disbursement was made one day prior of issuing the Sanction Letter. Further, the Recall Notice dated 07.05.2019 issued by the Financial Creditor to the Corporate Debtor, displays the date of disbursement of Rs. 243 crores as 02.07.2018. After thorough scrutiny of the dates mentioned in the Petition as well as the documents, the Bench observes that there is a clear discrepancy in the dates, wherein the date of the disbursement in one document is mentioned as 01.07.2018 while in the other

document mentioned as 02.07.2018. Therefore, the documents on record indicates clear contradictions with respect to the dates.

9. Further, to prove the disbursement of the Loan amount of Rs. 243 crores on 01.07.2018 in favour of the Corporate Debtor, the Financial Creditor has relied on the Statement of Accounts from their company books annexed at "Exhibit D". In response to this, the Corporate Debtor has contended that these Statements of Accounts are fabricated. While inspecting this purported proof of disbursement, it is noted that the Statement of Accounts is extracted from Financial Creditor's own records and is provided for a period from 22.05.2000 to 22.05.2019. The Corporate Debtor has contended that till 2015, they had no relationship with Reliance Anil Dirubhai Ambani Group of which the Financial Creditor is part of it. Furthermore, the Asset description in the purported Statement of Account with respect to the alleged Loan states as "balancing equipment" whereas as per the Sanction Letter and clause 4 of Facility cum Hypothecation Agreements, the facility of Loan was granted for a limited purpose of Working Capital Term Loan. Upon the perusal of the Statement of Accounts it demonstrates the Asset description/purpose of Loan does not match with the Loan description under the Facility-cum-Hypothecation Agreements /Sanction Letters. Further, the Certificate mentions the "Frequency" of the alleged loan is "monthly EMIs" which is contrary to the clause 6(g) of the Facility

cum Hypothecation Agreements, wherein it states that the repayment was to be a bullet principal and interest repayment. Therefore, from the above observations the Bench notes that the Account of Statements produced by the Financial Creditors are contradictory and not convincing in their content.

10. Further, the Corporate Debtor contented that the Loan amount of Rs. 40 crores provided under Facility cum Hypothecation dated 29.09.2017 has been duly repaid by the Corporate Debtor to the Financial Creditor. The Corporate Debtor has invited the attention of this Tribunal to the document "NEFT/RTGS Remittance Challan" dated 29.09.2017 annexed as "Annexure-3" which evidences the payment made by the Corporate Debtor to the Financial Creditor of the Amount of Rs. 40 crores. They have also submitted a Bank Statement showing this entry.

11. It is well settled that the initial onus lies on the Financial Creditor to establish that there is a debt and it shall be proved by the Financial Creditor by submitting the "ROD" issued by NESL and in the absence of which by relying on the documents available with them for initiation of CIRP. Further, the Section 215 governs submission of financial information to an "information utility". This record of information is a conclusive proof about the occurrence of a default. In the present matter, the Financial Creditor has not produced any Record of Default in the form of

NESL Report, to corroborate the status of the loans and default in the present case.

12. Further, in order to prove the financial debt, it is worthwhile to mention the Regulation 2(A) of the Insolvency and bankruptcy Board of India (Insolvency Resolution Process for the Corporate Persons), 2016 Regulations 2A provide as under

Regulation 2A: Record or evidence of default by financial creditor.

[2A. For the purposes of clause (a) of sub-section (3) of section 7 of the Code, the financial creditor may furnish any of the following record or evidence of default, namely:-

(a) certified copy of entries in the relevant account in the bankers' book as defined in clause (3) of section 2 of the Bankers' Books Evidence Act, 1891 (18 of 1891);

(b) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, where the period of appeal against such order has expired.]

Further, it is worth to reproduce sub-Section of (5) of S. 7 of the Code as follows:

(5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub- section (2) is complete, and there is no disciplinary proceedings pending

against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub- section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

13. We find that the Financial Creditor has claimed a financial debt evidently having no document as prescribed by Regulation 2A i.e., certified copy of entries in the relevant account in the Bankers' Book as proof of disbursement of the loan. A bare perusal of Part IV and Part V shows that the Financial Creditor has failed to substantiate the debt with any supporting documentary evidence proving the disbursement of debt. At this juncture, the Bench notes the reliance placed by the Corporate Debtor on Hon'ble NCLT in the matter of ***Dr. B.V.S. Lakshmi vs. Geometrix Laser Solutions Private Limited*** which states that

> *"Financial Creditor" coming within the definition of 'Financial Debt' as defined under sub-section*

> *(8) of Section 5 the Claimant is required to show that (I) there is a debt along with interest, if any, which has been disbursed and (ii) such disbursement has been made against the 'consideration for the time value of money"*

14. The said proposition has been set by the Hon'ble Supreme Court in ***Pioneer Urban Land and Infrastructure Pvt. Ltd. & Anr. Vs. Union of India & Ors. MANU/SC/1071/2019: (2019) 8 SCC 416***, the relevant para are extracted hereinafter:

> *"68. Thus, in order to be a "debt", there ought to be a liability or obligation in respect of a "claim" which is due from any person. "Claim" then means either a right to payment or a right to payment arising out of breach of contract, and this claim can be made whether or not such right to payment is reduced to judgment. Then comes "default", which in turn refers to non-payment of debt when whole or any part of the debt has become due and payable and is not paid by the corporate debtor. Learned counsel for the Petitioners relied upon the judgment in Union of India v. Raman Iron Foundry MANU/SC/0005/1974 : (1974) 2 SCC 231, and, in particular relied strongly upon the sentence reading:*

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 ed.) 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."

74. What is clear from what Shri Venugopal has read to us is that a wide range of transactions are subsumed by paragraph (f) and that the precise scope of paragraph (f) is uncertain. Equally, paragraph (f) seems to be "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:*

(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 installments 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 (Second Edition, *2000) for the meaning of the expression "borrow" and the meaning of the expression*

"commercial". They are set out herein below:

"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. lender. 2. to adopt (ideas, words, etc.) from another source; appropriate.

3. Not standard. to lend.

4. (intr) Golf. To put the ball uphill of the direct path to the hole: make sure you borrow enough." 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 home buyers 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 home buyers. 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.*

15. The Corporate Debtor relied upon ***Budhpur Buildcon Pvt. Ltd. vs. Abhay Narayan Manudhane, RP of Corporate Debtor Housing Development and Infrastructure Limited (09.09.2022 - NCLAT) : MANU/NL/0697/2022*** which mentions Pioneer Urban Land and Infrastructure Pvt. Ltd. & Anr. (supra) and holds that :-

"Para m - All the above citations reflect one thing categorically and clearly that there must be a disbursal of fund by the Creditor to the Debtor purely in the form of release of fund as a "borrowing" and must have a "time value of money". The method may be different but the nature must be borrowing and in extended terminology even the liability in respect of guarantee is also covered. There must be a "Financial Debt" which is owed by the other side i.e. the Debtor. It should be amply clear that the CD owe the "Financial Debt" to the Creditor. There is a difference between the levy of liquidated damages or penal interest for default and the financial debt per se. Hence, we cannot borrow unrelated concept from

unrelated judgments to prove that wherever a word "interest" is there it means corresponding to a "Financial Debt" and we accordingly confirm that "Financial Debt" will always carry an interest towards time value of money. However, interest per se in any business contract cannot be termed to make the "debt" as a "Financial Debt", if it is in the nature of liquidated damages or in the nature of penal interest, which is a result of compensation for breach of contract which is stipulated for penalty. Hence, while examining the case, whether the Appellant is a Financial Creditor or not we are now arriving at a conclusion based on above said discussions both on law & on facts and the citations produced by the parties, some of which have been explicitly cited as above reveals that the Appellant is not a "Financial Creditor" and hence, we are upholding the order of the Adjudicating Authority."

16. The said proposition has been followed in ***Sudhir T. Deshpande vs. Dhanada Corporation Limited (26.08.2022 - NCLT - Mumbai) : MANU/NC/4702/2022*** wherein this corum concluded that the Financial Creditor has not established that the money was disbursed to the Corporate Debtor and hence the question of default on the part of the Corporate Debtor does not arise. In another case **Axis Bank Ltd. vs. Nageswara Rao (07.10.2022 - NCLT - Mumbai) : MANU/NC/6180/2022** which was passed by

the same coram while applying the principles Pioneer Urban Land & Infrastructure Ltd. case (supra), we had held the following:

> *"42. We also Applied the principles enunciated in Anuj Jain (supra) and Pioneer Urban Land & Infrastructure Ltd. case (supra). It is apparent that no 'financial debt' is owed to the Applicant under section 5(8) of the Code since; i. There has been no disbursal to the Corporate Debtor against consideration for the time value of money. ii. Disbursal has been made to independent juristic person, i.e. RHFL under the Commercial Papers. iii. No money has been lent to the Corporate debtor for 'temporary use.' In other words, there has been no borrowing by the Corporate Debtor. iv. RHFL had a 'commercial interest' in the Commercial papers since the same was subscribed by the Applicant. The Corporate Debtor did not have a 'Commercial interest' in the same."*

17. In the light of the abovementioned facts and observations, it appears to us that the Loan amount of 40 crores is been duly re-paid by the Corporate Debtor to the Financial Creditor which is evident from the NEFT/ RTGS Remittance Challan annexed as "Exhibit E" to the Additional Affidavit dated 11.10.2022 filed by the Corporate Debtor. Further, the Financial Creditor has failed to produce any document to show the disbursement of the Loan amount of Rs. 243 crores into Corporate Debtor's Bank Account

and therefore, the financial loan claimed in the Petition under section 7 of IBC filed by the Financial Creditor i.e., “Reliance Commercial Finance Limited” does not qualify as “**financial debt**” under IBC, 2016. The Bench also notes that a Petition filed by Financial Creditor for initiating CIRP under Section 7 against a group Company of Corporate Debtor was rejected by the Court II of Mumbai Bench vide an Order dated 10.02.2023 on similar grounds.

18. The Corporate Debtor has further drawn our attention to the fact that instruments on the basis of which the Petition is filed are insufficiently stamped and advancing the contention also stated that that the said Petition is filed by one Punit Thakker, who is not authorised to file the same on behalf of the Petitioner vide a Power of Attorney dated 3rd May 2019. In the present case the Bench is acting in a limited manner as desired by the Code and either admit or reject the Company Petition for initiation of CIRP. We are not keen on impounding based on the said contentions and shall deliver our order based on admission and/or rejection of the Company Petition.

19. As a sequel to the above discussions and upon perusal of the evidences and documents and the case laws cited above this Petition fails and the same is hereby **rejected** and **dismissed** due

to non-qualification of the Financial debt and due to lack of evidence and incompleteness of the Petition.

20. Further, from the records it is observed that the Corporate Debtor had filed a Miscellaneous Application bearing no. 3867 of 2019 challenging the maintainability of the present Petition, on the grounds of no valid authorization and the documents being sufficiently stamped.

21. Subsequently in the view of dismissal of present Petition 2103 of 2019 and in the light of above facts and circumstances, the M.A no. 3867 of 2019 hereby becomes infructuous and is disposed off.

SD/-

MADHU SINHA
MEMBER (TECHNICAL)

SD/-

H.V. SUBBA RAO
MEMBER (JUDICIAL)

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