

Company Appeal (AT) (Insolvency) No. 45 of 2021

In the matter of

... Appellant

1.	Mr. Naresh Verma Resolution Professional Bohra Pratisthan Private Limited Having its Office at: 416/7 & 8, 1st Floor, Opp. Karkardooma Metro Station, Karkardooma, New Delhi-110092.	Respondent No. 1
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2. STCI Finance Limited, Respondent No. 2
Through its Authorized Representative,
Having office at:
401 & 412, 4th Floor,
Prakashdeep Building,
7, Tolstoy Marg,
New Delhi-110001.

3. Phosphate India Pvt. Ltd. Respondent No. 3
Through its Authorized Representative,
Having office at:
107-108, Anand Plaza,
University Road, Udaipur-311001.

Present

For Appellant: Ms. Anju Jain, Mr. Hitesh Sachar,

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Advocates

For Respondent: **Mr. Amol Vyas, Ms. Saumil Sharma, RP,
R-1,
Mr. Atul Sharma, Mr. Kamal Gupta,
Caveators, R-2.
Mr. Dhruv Dewan, Mr. Tabrez Malawat,
Mr. Harshita Choubey, Advocates
for R-3.**

Judgment

(Date:13.07.2021)

{Per: Dr. Alok Srivastava, Member (T)}

1. This appeal has been filed by the Appellant assailing the order dated 11.12.2020 (hereinafter referred to as the Impugned Order) passed by the Adjudicating Authority (National Company Law Tribunal, Jaipur Bench) in IA No. 294/JPR /2020 in CP (IB) No. 171/7/JPR/2019 under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter called “IBC”) read with Rule 11 of the National Company Law Tribunal Rules, 2016 seeking direction against Respondent No. 1 (Resolution Professional) to constitute the Committee of Creditors in accordance with Section 21 of IBC.

2. The brief facts of the case as presented and argued by the Appellant are that the Appellant 9M Corporation, which is a proprietorship concern, is a financial creditor of the Corporate Company Appeal (AT) (Insolvency) No. 45 of 2021

Debtor (Bohra Pratisthan Private Limited-hereinafter referred to as “BPPL”). The Appellant has claimed that the Committee of Creditors was constituted by the Respondent No.1, i.e. the Resolution Professional, in pursuance to the order of admission dated 5.8.2019 passed on the Section 7 application filed by the Appellant against the Corporate Debtor BPPL, and the first meeting of the Committee of Creditors (hereinafter called the “COC”) was held on 4.9 2019. The Appellant has claimed that in the first meeting of the COC, the Resolution Professional determined the voting percentage of each member of the COC as follows: –

9M Corporation (Appellant)	6.11%
STCI Finance Limited (Respondent No. 2)	75.90%
Phosphate India Private Limited (Respondent No.3)	17.99%

The Appellant has further stated that the claim filed by STCI Finance Limited was based on debtor-creditor relationship, which is the result of guarantee given by the Corporate Debtor BPPL for a loan of Rupees 24 crores sanctioned by STCI Finance Ltd. to Bohra Industries Limited (hereinafter referred to as “BIL”), which is a group concern of the Corporate Debtor BPPL.

3. It is claimed by the Appellant that BPPL has furnished a Company Appeal (AT) (Insolvency) No. 45 of 2021

collateral security to Respondent No. 2 STCI Finance Limited and thus STCI Finance Ltd. is not a financial creditor as defined in Section 5(7) and Section 5(8) of the IBC since the fundamental requirement of a financial debt is “disbursal against the consideration for the time value of money”.

4. Finally, the Appellant has claimed that the Adjudicating Authority has not considered this important distinction between ‘debt’ and ‘financial debt’, and has considered the debt advanced by STCI Finance Ltd. (Respondent No. 2) to be a financial debt. The Appellant has, therefore, prayed in the appeal for setting aside the Impugned Order and directing Respondent No.1 to reconstitute the COC of the Corporate Debtor in accordance with Section 21 of the IBC.

5. All the parties in the appeal stated that since this appeal involves a question of law, they would not be filing any pleadings. Instead they filed written submissions in support of their respective contentions. In addition, Learned Counsels of all the parties presented oral arguments. we have gone through the written submissions and oral arguments put forth in the case by all the parties.

6. The Learned Counsel for Appellant has stated that the Adjudicating Authority has erroneously placed reliance on the judgment dated 15.10.2020 in the matter of **Ascot Realty Private Limited versus Ajay Kumar Agarwal and Others (Company Appeal AT (Ins) No. 658 of 2020)** claiming that this judgment of the Hon'ble NCLAT does not apply to the present case. He has urged that the judgment of Hon'ble Supreme Court in **Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited versus Axis Bank Limited, Civil Appeal Nos. 8512-8527 of 2019 [(2020) 8 Supreme Court Cases 401]** applies in the present case.

7. The Ld. Counsel for Appellant has further argued that if the Corporate Debtor has given its property in mortgage to secure the debt of a third-party, it would fall within the definition of "debt under section 3(11) of the IBC but such an amount would remain a debt only and cannot take the form of "financial debt" within the meaning of section 5(8) of the IBC. She has pointed out that there is no disbursal of any amount against the consideration for time value of money by Respondent No. 2 to the Corporate Debtor, and therefore such a debt cannot take the form of a financial debt. She has further argued that the root requirement for a creditor to become a financial creditor for the purpose of Part II of IBC is that there should be a financial debt owed to the financial creditor. In

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the instant case Respondent No. 2 has advanced facility to a third party, namely Bohra Industries Limited (BIL) and taken a security towards the loan advanced to BIL from the Corporate Debtor Bohra Pratisthan Private Limited (BPPL).

8. The Learned Counsel for Appellant has also cited the judgment of this tribunal in **Amrit Kumar Agarwal versus Tempo Alliances Private Limited, Company Appeal AT (Insolvency) No. 1005 of 2020** to emphasize that mere obligation to pay dues does not bring liability within the ambit of section 5(8) of the IBC to make such debt a financial debt. She has urged that in the present matter there may be remedies available for the secured creditor for recovery of his loan amount but this remedy is not through triggering CIRP.

9. The Ld. Counsel for Appellant has claimed that Respondent No.1, the Resolution Professional, has not constituted the Committee of Creditors in accordance with the provision of Section 21 of IBC since STCI Finance Ltd. is not a financial creditor whereas it has been considered as one.

10. The Learned Counsel for Appellant has said that in **Anuj Jain (supra)**, in Para 54, the issue of guarantee obligation falling
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within the ambit of financial debt under Section 5(8) of the IBC has been considered wherein the Hon'ble Apex Court dealt extensively with the judgment of **SBI vs Kusum Ballabhdas Thakkar (1991 SCC online GUJ 14)** and considered the provisions of Sections 126, 127 and 128 of the Contract Act. The Hon'ble Apex Court had, after due consideration, refused to stretch the issue of guarantee obligation with respect to definition of financial debt under section 5(8) of the IBC, holding that to fall within the definition of financial creditor the lead element is 'disbursement against the consideration for the time value of money.'

11. In his arguments and written submission, the Ld. Counsel for Respondent No. 2 has maintained that the claim submitted by Respondent No. 2 to the Resolution Professional after the initiation of CIRP is based on the liability of the Corporate Debtor under a guarantee given in the Loan Agreement dated 21.12.2017 entered between the Corporate Debtor in favour of Respondent No.2 (page 469 of Appeal Paperbook, Column No. 6 of Form C). Such a guarantee is sufficient for conferring the status of financial creditor to STCI Finance Ltd. In support he has referred to Section 5(8)(i) read with Section 5(8)(a) of the IBC.

12. The Learned Counsel for Respondent No.2 has clarified that
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ratio of the judgment in **Anuj Jain (supra)** is not applicable in the instant case, because in this judgment the Hon'ble Apex Court has examined the issue whether solely on the basis of security interest like mortgage created by the Corporate Debtor, a creditor will fall within the definition of financial creditor. He has pointed out that in the matter of **Ascot Realty (supra)**, the NCLAT upheld the inclusion of claims based on corporate guarantees. He has further added that there is no dispute that disbursement has been made by Respondent No.2 to BIL, the principal borrower, and the requirement of disbursement has been fully complied with. Applied to the context of the instant case, the Learned Counsel has urged that under the Loan Agreement dated 21.12.2017 and the guarantee given therein, the Corporate Debtor has irrevocably and unconditionally guaranteed and undertaken to pay to Respondent No.2, without demur and merely upon demand by Respondent No.2, all and every sum of money owed by BIL to STCI Finance Limited in respect of the said loan facility, as between the guarantor (Corporate Debtor) and STCI Finance Limited (creditor) and the Corporate Debtor shall be deemed to be the principal debtor for all the monies in respect of the loan (refer pp. 443 and 446, of the Appeal Paperbook, Annexure IV).

13. The Learned Counsel for Respondent No.1 BPPL (Corporate Company Appeal (AT) (Insolvency) No. 45 of 2021

Debtor), through the Resolution Professional, has argued that the definition of "financial debt" is an inclusive definition and it includes those amounts too, for which guarantee or indemnity has been given for the amount of any liability under section 5 (8)(i) of the IBC. He has further added that in the instant case, both conditions of the definition of financial debt are present, i.e. there is disbursement of debt to BIL and the Corporate Debtor BPPL has given a corporate guarantee to STCI Finance Limited to the effect that in case of non-payment of debt by BIL, the amount can be recovered from the Corporate Debtor.

14. In his arguments, the Learned Counsel for Respondent No.3 has stated that his client has a 17.99% voting right in the Committee of Creditors. He has emphasized that while he is supporting the case of the Appellant, his arguments are different from the arguments put forth by the Learned Counsel of the Appellant. He has urged that a "financial creditor" is a creditor who is supposed to be involved with the business of the Corporate Debtor in the sense that the monies advanced/loaned by him go into the growth, rejuvenation and the overall functioning of the corporate debtor.

15. Hence, the Ld. Counsel for Respondent No. 3 has argued, in
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the instant case, by virtue of the fact that BPPL has provided guarantee in the loan provided by STCI Finance Ltd. to BIL, STCI Finance Ltd. assumes the status of Financial Creditor of the Corporate Debtor BPPL. The Learned Counsel for Respondent No. 3 has also pointed out to para 12 of the Ascot Realty judgment (Diary No. 25004 dated 27.1.2021) to point out that **Anuj Jain (supra)** lays down that there should be disbursement against consideration for the time value of money which is the root ingredient for a debt to become a financial debt, and a secure debt would not qualify to be a financial debt unless there is disbursement against the consideration of time value of money.

16. We have perused the replies of Respondents and the written submissions submitted by all the parties and also considered the oral arguments put forth by learned Counsels of all the parties in support of their respective cases.

17. The Appellant has maintained that giving the status of financial creditor to STCI Finance Ltd, is against the judgment of Hon'ble Supreme Court in the matter of **Anuj Jain (supra)** wherein it has been held that security extended by the Corporate Debtor towards third-party debt would stand outside the purview of financial debt and the creditors would not qualify as financial

creditors within meaning of Section 5(8) of the IBC. If such a position is accepted, Respondent No.2 STCI Finance Limited should be deleted from the list of members of the COC since it is not a financial creditor of the Corporate Debtor BPPL.

18. It is an admitted position, that there is disbursement of debt against the consideration for the time value of money by the creditor STCI Finance Limited to the Borrower BIL and the Corporate Debtor BPPL vide Letter of Intent dated 15.11.2017 and the Terms and Conditions for the Sanction of Corporate Term Loan of Rupees 24 crores (pp 138-149 of Appeal Paperbook). The True Copy of the Resolution passed by the Executive Committee of BIL (the Borrower) on 8.12.2017 is attached at pp. 150-152 of the Appeal Paperbook. The Loan Agreement executed by and between BIL (The Borrower) and STCI Finance Ltd. (the Lender) is attached at pp. 154-200 of the Appeal Paperbook) and Loan Summary Schedule, Schedule I is attached at pp. 233-239. The Security and Guarantees offered on behalf of the Borrower is at Schedule I on pp. 235-236 of Appeal Paperbook, Vol. II. We reproduce the sections relating to 'Security' and 'Guarantees' from Loan Summary Schedule (Schedule I) attached at pp. 235-236 on Appeal Paperbook, Vol. II for appreciation of the properties/assets offered therein:-

Security	a. Residential plot situated in Plot No.3-A and 53-B, Ambamata Scheme, Ayurvedic College Chouraha to Mahakaleshwar Road, Udaipur, Rajasthan admeasuring 15120 sq.ft. belonging to Mr. Hemant Bohra & Mrs. Beena Bohra. b. Office No. 301, Anand Plaza, Block (A), Third Floor, University Road, Udaipur, Rajasthan admeasuring 564.25 sq.ft. belonging to M/s. Bohra Pratisthan Pvt. Ltd. c. Office No. 314-315, Anand Plaza, Block (A), Third Floor, University Road, Udaipur, Rajasthan admeasuring 456.82sq.ft. belonging to M/s. Bohra Pratisthan Pvt. Ltd. d. Office No. 336, Anand Plaza, Block (B), Third Floor, University Road, Udaipur, Rajasthan admeasuring 4054.77sq.ft. belonging to M/s. Bohra Pratisthan Pvt. Ltd. e. Industrial property situate in Plot No. 4897 to 4903 Jhamar Kotra Road, Tahsil Girwa, Village Umarda admeasuring 11300 sq. mtr. belonging to M/s. Bohra Pratisthan Pvt. Ltd. f. Industrial property situated in Plot No. 311, 312, 313, 314, Dhol Ki Pati Village, Udaipur-Banswara Road, Tahsil Girwa, Udaipur district admeasuring 5773 sq.mtr. belonging to M/s. Bohra Pratisthan
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	<i>Pvt. Ltd.”</i> <u><i>Additional Security: Pledge of 4,00,000 Equity Shares of M/s BIL Ltd. by Mr. Hemant Kumar Bohra (pledger)</i></u>
<i>Guarant ees</i>	<i>1. Irrevocable and unconditional Personal Guarantee of Mr. Hemant Kumar Bohra.</i> <i>2. Irrevocable and unconditional Personal Guarantee of Mrs. Beena Bohra to the extent of the value pf the property owned by Mrs. Beena Bohra which is offered as security to STCI.</i> <i>3. 3. Corporate Guarantee of M/s Bohra Pratisthan Pvt. Ltd.</i>

19. A Deed of Guarantee was executed by BPPL (the Guarantor) and BIL (the borrower) on 21.12.2017 (attached at pp. 441-452, Appeal Paperbook, Vol.III) wherein Clause ‘B’ and para 2 an unconditional and irrevocable corporate guarantee of the Guarantor is included explicitly. This corporate guarantee is in relation to the loan provided by STCI Finance Ltd. to BIL which is stated in Clause ‘A’ of the Deed of Guarantee.

20. The Loan Agreement entered into between the STCI Finance

Ltd. and Bohra Industries Ltd. on 21.12.2017 and the Schedule I therein (Schedule I, attached at pp. 233-240 of the Appeal Paperbook, Vol. II) and the Deed of Guarantee (pp 441-452 Appeal Paperbook, Vol.III) have been filed by the Appellant as part of Appeal Memo and none of the parties have disputed these documents. It is clear from the reading of Schedule I of the Loan Agreement that Bohra Pratisthan Private Ltd. is the corporate guarantor for the loan provided by STCI Finance Ltd. and Bohra Industries Ltd.

21. The relevant section 3(11) and section 5(8) of the IBC, which define 'debt' and 'financial debt' are relevant to the discussion here. They are extracted hereunder: -

“Section 3(11): - *‘debt’ means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.”*

“Section 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*

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acceptance credit facility nor its de-materialized 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-clauses (a) to (h) of this clause.”*

22. Thus liability arising out of guarantee for any of the items referred in sub-clause (a) to (h) is Financial Debt. The requirement for a debt to be a financial debt and such a creditor to be a financial creditor has been explained very succinctly by Hon'ble Apex Court in **Anuj Jain (supra)**. The relevant paragraphs are Company Appeal (AT) (Insolvency) No. 45 of 2021

extracted below:-

“46. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become “financial debt” for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/ dealings stated in clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein.

47. *As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He*

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may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.”

23. Later, in the same judgment **Anuj Jain (supra), in Para 50.1** a distinction is made very categorically and logically between a creditor who is having security interest over the assets of the Corporate Debtor as against a financial creditor who has stake in the Corporate Debtor's growth, and why inclusion of creditors who only hold security interest over the assets of the corporate debtor as financial creditor would be detrimental to the financial health of the corporate debtor. This paragraph 50.1 is extracted below-

“50.1 *Keeping the objectives of the Code in view, the position and role of a person having only security interest over the assets of the corporate debtor could easily be contrasted with the role of a financial creditor because the former shall have only the interest of realizing the value of its security (there being no other stakes involved and least any stake in the corporate debtor’s growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in*

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rejuvenation, revival and growth of the corporate debtor. Thus understood, it is clear that if the former i.e. a person having only security interest over the assets of the corporate debtor is also included as a financial creditor and thereby the growth and revival of the corporate debtor may be the casualty. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution.”

24. In order to differentiate between the nature and purpose of ‘mortgage’ and ‘guarantee’ with respect to a loan, the Hon’ble Apex Court proceeds to clarify in **Anuj Jain (supra)** by holding that a mortgagee as a creditor shall be a ‘secured creditor’ but not a ‘financial creditor’:-

“50.2 *Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third party security), even if falling within the description of ‘secured creditor’ by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of ‘financial creditors’ as per the definition contained in sub-section (7) and (8) of Section Company Appeal (AT) (Insolvency) No. 45 of 2021*

5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of "debt" under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a 'financial debt' within the meaning of Section 5(8) of the Code.

The respondent mortgagees are not the financial creditors of corporate debtor JIL."

25. The Appellant's reliance on **Anuj Jain (supra)** in support of his claim is, therefore, found to be out-of-context from the facts of the instant case. We may look at the **Ascot Realty (supra)** judgment of this tribunal, which in Para 25 deals with this issue very comprehensively and cogently:-

***"25.** Before us, the learned counsel for the Appellant has tried to read Para 43 of the judgment in the matter of Anuj Jain (supra) to insist that Hon'ble Supreme Court has held that the requirement of disbursement against consideration of time value of money is essential ingredient and this should be read in the context of a guarantee also. At the same time, it has*

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also been argued that Section 5(8)(i) is not a standalone provision. We refer to observations made by Hon'ble Supreme Court in this very judgment of Anuj Jain (supra) in Para 44.1.5 which reads as follows:-

***“44.1.5.** For taking into comprehension the ratio of Pioneer Urban (supra) and for its application to the question at hand, appropriate it would be to recount the basic principles expounded and explained by a three-judge bench in the case of Haryana Financial Corporation and Anr. V. Jagdamba Oil Mills and Anr. MANU/SC/0056/2002 : (2002) 3 SCC 496 that the observations of the Court in a judgment are always required to be read in the context in which they appear. This Court has said, -*

“19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's Theorems nor as provisions of the statute.

These observations must be read in the context in
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which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark upon lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton : 1951 AC 737 (at p. 761) Lord McDermot observed: (All ER p. 14C-D)

The matter cannot, of course, be settled merely by treating the ipsissima verba of Wiles, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge.”

26. We also find that **SBI vs KusumBallabhdas Thakkar (supra)** supports the contention of the Respondent No. 2 in the instant case.

27. Looking to the detailed exposition of Anuj Jain (supra) and Ascot Realty (supra) in the aforementioned paragraphs and the facts of the present case, we are of very clear and unambiguous view that on the basis of Corporate Guarantee given by BPPL for the loan provided by STCI Finance Ltd. (Respondent No. 2) to BIL; STCI Finance Ltd. is a financial creditor in the Corporate Insolvency Resolution Process of the Corporate Debtor BPPL. Finding no error in the Impugned Order we dismiss the Appeal.

28. There is no order as to costs.

(Justice A I S Cheema)
The Officiating Chairperson

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
13th July, 2021

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