NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS) No. 95 of 2021

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

Against the Order dated 30.03.2021 in IBA/13/KOB/2020 passed by the Adjudicating Authority, (National Company Law Tribunal, Kochi Bench)

In the matter of:

Sree Bhadra Parks and Resorts Ltd.

27/480 (1), Museum Road,

Chembukkavu, Thrissur,

Kerala- 680 020,

Represented by its Managing Director

Mr. K. N. Namboothiripad **…Appellant/Respondent/Corporate Debtor**

V

Sri Ramani Resorts and hotels Pvt. Ltd

8/42 Maharaja Surya Road,

Alwarpet, Chennai- 600 018. **…Respondent/Petitioner/Applicant**

Present:

For Appellant : Mr. Anil D Nair, Advocate

For Respondent : Mr. P. H. Arvindh Pandian, Sr. Counsel
For Mrs. Jayanthi K Shah, Advocate

ORDER

(VIRTUAL MODE)

Justice M. Venugopal

Preface:

The 'Appellant'/Respondent/Corporate Debtor has focussed the present Com App (AT)(CH) (Ins) No.95/2021 being aggrieved against the order dated 30.03.2021 in IBA/13/KOB/2020 (filed by the Respondent/Petitioner/Financial Creditor under section 7 of the I & B Code r/w Rule 4 of the IBC (AAA) Rules, 2016) passed by the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala).

2. The 'Adjudicating Authority' while passing the impugned order in IBA/13/KOB/2020 on 30.03.2021 at paragraph 7 to 10 had observed the following:

> "7. After restoration of the matter into file, this Tribunal heard the arguments advanced by the learned senior counsel for the Financial Creditor and the learned counsel for the Corporate Debtor. At this point it may be noted that after considering all the contentions raised in the IBA by the Corporate Debtor, this Tribunal admitted the Application and ordered Corporate Insolvency Resolution Process.
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> 8. During arguments the learned counsel for the Corporate Debtor raised the objection which he took while arguing IA/02/KOB/2021 regarding the disqualification of the Directors. Since the issue regarding the disqualification has been settled vide the judgement of the Hon'ble High Court in WPC No. 18641 of 2020 and WMP Nos. 23123, 23125, 23127 and 23129 of 2020 and that the matter was once admitted, considering all contentions raised by the Corporate Debtor, in my opinion this contention has no legs to stand at present.
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> 9. In this case the existence of debt is reasonably evidenced in the consent terms that were also made part of the order of this Tribunal dated 24.09.2020 as well as the averments made by the Corporate Debtor themselves regarding the amount of debt outstanding to the Financial Creditor, admitting the existence of a debt. The Applicant having proved the existence of a debt as well as existence of default, as elaborately discussed in the order dated 25.08.2020 admitting the Application, the only course to be adopted here is to admit this application and order Corporate Insolvency Resolution Process against the Corporate Debtor.

10. The I & B Code allows the Applicants to withdraw their Application under Sections 7, 9 and 10 of the Code at any time; a) one before the constitution of the CoC b) after constitution of the CoC but before the invitation of EoI or c) after the invitation of the EoI in exceptional cases, on application made by the applicant. The present Application has been settled after admission before making the Public Announcement as per Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The I & B Code does not bar the Tribunal to Admit a matter which was settled after Admission"

and ultimately, admitted the Application filed by the Respondent/Petitioner/Financial Creditor as per the section 7 of the I & B Code for initiation of 'CIRP'.

Appellant's Submission:

3. Assailing the validity, legality and correctness of the impugned order dated 30.03.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Kochi Bench, Kerala) in IBA/13/KOB/2020, the Learned Counsel for the Appellant/Respondent/Corporate Debtor submits that the 'Adjudicating Authority' had failed to appreciate that it has no jurisdiction to adjudicate the matter under the I & B Code since the Respondent/Applicant is neither a 'Financial Creditor' nor an 'Operational Creditor'.

4. It is the contention of the Learned Counsel for the Appellant that the 'Adjudicating Authority' had failed to appreciate that there is no debt in terms of the I & B Code, which entitles an 'applicant' to file the application. It is represented on behalf of the 'Appellant' that the 'Adjudicating Authority' proceeded on wrong footing that there is a 'default' with regard a 'debt' due and payable by the 'Appellant' to the Respondent as per 'agreement' entered into between the parties.

5. An argument is advanced on behalf of the 'Appellant' that there is no provision for 'return of money' together with interest under the 'Share Purchase Agreement' between the parties and therefore, the Respondent is not a 'Financial Creditor' viz-a-viz the 'Appellant'.

6. The Learned Counsel for the Appellant puts forward a submission that in the notice the Respondent/Applicant classifies itself as an ‘operational creditor’ but in the Application filed under section 7 of the Code, he claims to be a ‘Financial Creditor’.

7. The other line of attack of the Appellant is that the Adjudicating Authority’ had committed an error in determining the application filed by the Respondent/Applicant/‘Financial Debt’ as per section 7 of the Code, when there was neither repayment nor time value of money as consideration for the money advanced contemplated in the arrangement between the parties.

8. The Learned Counsel for the Appellant submits that the Adjudicating Authority’ in the impugned order had not considered any of the contentions raised in the counter filed, but relied on the order dated 24.09.2020 to arrive at the findings. In fact, the order dated 24.09.2020 ceases to exist and therefore, placing reliance on the same is not correct.

9. The Learned Counsel for the Appellant adverts to the judgment of the Tribunal in Comp App (AT) (Ins) Nos.521 and 643 of 2019 dated 09.01.2019 wherein, the issue ‘whether an advance paid towards ‘Share Purchase Agreement’ can be characterised as a financial debt or not has been answered, whereby and whereunder it was observed that by virtue of there existing a clause for rate of return in the agreement, the same would constitute a ‘Financial Debt’.

10. Advancing his argument, the Learned Counsel for the Appellant contends that the parties to the agreement never contemplated a contingency of return of advance money(s) and therefore, there was no understanding as to the time value of money’. Therefore, it is pointed out that there is no ‘Financial Debt’ under the Code and the ‘Adjudicating Authority’ has no jurisdiction to entertain the ‘application’ and the ‘application’ should have been dismissed as ‘not maintainable in law’.

11. The Learned Counsel for the Appellant submits that the ‘Demand Notice’ is for recovery of ‘Operational Debt’ and that the issue as to whether transactions of similar nature could be an ‘Operational Debt’ was settled by the judgments of this

Tribunal in (1) Comp App (AT)(Ins) No.394/2018 dated 26.07.2018 (2) Comp App (AT)(Ins) No. 545-546 of 2018 (3) Comp App (AT)(Ins) No. 223/2019 dated 22.04.2019 and Comp Ap (AT) (Ins) 1454/2019 dated 16.12.2019 and Comp App (AT) (ins) No. 752/2019 dated 20.08.2020 and hence, the issuance of 'Demand Notice' is unenforceable in law.

12. The Learned Counsel for the Appellant comes out with a plea that an agreement to settle the amount between the parties cannot confer jurisdiction on the 'Adjudicating Authority' to determine the proceedings. Moreover, the parties to the proceedings cannot by 'Acquiescence' or 'waiver' shower jurisdiction to the Adjudicating Authority under the I & B Code.

13. The Learned Counsel for the 'Appellant' contends that an advance of Rs.1 Crore was paid by the Respondent under the 'Share Purchase Agreement' dated 21.11.2012 red with 'Addendum' dated 21.11.2012 which forms an integral part of the said 'Agreement'. Also, that the clauses of the 'Share Purchase Agreement' dated 21.11.2012 do not contemplated refund of the advance paid and resultantly, there was no understanding as to interest payable on refund thereof or any other form of 'time value of money' being consideration.

14. The Learned Counsel for the 'Appellant' refers to the Judgment of the Hon'ble Supreme Court in Anuj Jain, Interim Resolution professional for Jaypee Infratech Ltd. v Axis Bank Ltd. reported in (2020) 8 SCC at page 401 wherein at paragraph 46 it is observed as under:

> 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. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of disbursement against the consideration for the time value of money could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said clauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be trace to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money."

15. In effect, the submission of the Learned Counsel for the 'Appellant' is that an advance of Rs.1,00,00,000/- which was paid by the 'Respondent' in terms of the 'Share Purchase Agreement' was not disbursed against the consideration for 'time value of money' and was merely an advance for purchase of Shares.

16. The Learned Counsel for the 'Appellant' points out the Judgment of this 'Tribunal' dated 29.01.2019 in the matter of Pushpa Shah and Ors v. I.L. & F.S. Financial Services Ltd. & Ors. (vide Comp. App. (AT)(INS) 521 and 643 of 2018) wherein at paragraph 18 it is observed as under:

> 18. "On careful reading of the agreement such as 'SPA' and 'La-Fin LoU', we find that the 'IL & FS Financial Services Limited', (financial creditor) has disbursed the amount and the 'Corporate Debtor' has raised the amount with an object of having economic gain or commercial effect of borrowing. The clauses of 'SPA' if read along with the 'LoU', we find that the terms of transaction involved not only the purchase of shares but it shows the date by which the amount of transaction was to be repaid by the 'Corporate Debtor' which had fallen due on 19th August, 2012. There was an element of 'time value of money', particularly, when one of the conditions related to 'internal

rate of return of 15%' on the transaction, therefore, the time value of money having already shown, we hold that the amount disbursed by 'IL & FS Financial Services Limited'- (financial creditor) and the 'Corporate Debtor' had agreed to reverse the transaction by purchasing the shares within a specified time along with the payment of 15% accrual on 20th August, 2009. We hold that the amount if disbursed by 'IL & FS Financial Services Limited' – (financial creditor) comes within the meaning of 'financial debt' therefore, the 'IL & FS Financial Services Limited'- (financial creditor) has been rightly claimed to be a 'financial creditor' and filed Form-1 under Section 7 of the 'I&B Code'.

17. The Learned Counsel for the 'Appellant' emphatically points out that what is significant for the purpose of Section 5(8) of the Code, is the 'nature of debt' at the time of 'disbursal' and as such, placing reliance by the Respondent, upon the 'subsequent communications' between the parties whereby the 'Appellant' had purportedly agreed to refund the money with interest is a misplaced one.

18. The Learned Counsel for the 'Appellant' contends that the subsequent arrangements between the parties at the time of exploring a commercial settlement after the 'Share Purchase Agreement' failed to fructify does not close the monies advanced under the 'Share Purchase Agreement' with the characteristic of a 'financial debt'. Therefore, an argument is projected on the side of the 'Appellant' that placing reliance upon the communications dated 05.09.2014, 17.03.2014, email dated 28.11.2018, etc. do not heighten the case of the Respondent in any manner.

19. The Learned Counsel for the 'Appellant' submits that the order dated 25.08.2020 passed by the 'Adjudicating Authority' was recalled and that the main application was disposed off on 24.09.2020 and in fact, the 'Authority' on 24.09.2020 had disposed off the 'Insolvency Proceedings' initiated as regards the 'Appellant' (vide order dated 25.08.2020), by virtue of the 'Settlement' between the parties and had reserved the right of the Respondent to file 'fresh application' in the event of non-compliance with the terms of the 'Settlement'. Therefore, it is the stand of the 'Appellant' that in view of the order dated 24.09.2020 of the 'Adjudicating

Authority' and in view of the recall order dated 25.08.2020, nothing survives in the order dated 25.08.2020.

20. The Learned Counsel for the 'Appellant' comes out with the legal plea that the reliance placed by the 'Respondent' in respect of the judgment of the Hon'ble Supreme court in Premier Tyres Ltd. v Kerala State Road Transportation reported in AIR 1993 SC Page 1202 on the aspect of Res judicata is misplaced, since the same deals with the question of non-filing of an 'Appeal' in the connected suit, which is not the case of the 'Appellant' herein.

21. The Learned Counsel for the 'Appellant' relies on the Judgment of the Hon'ble Supreme Court dated 26.07.2021 reported in M/s.Orator Marketing Pvt. Ltd. v M/s. Santex Desinz Pvt. Ltd. (vide Civil Appeal No.2231 of 2021) wherein at Paragraphs 28 to 31 it is observed as under:

> 28. "In a recent judgment of this Court in Anuj Jain, Interim Resolution Professional for JaypeeInfratech Ltd. V. Axis Bank Ltd.8, this court, speaking through Maheswari, J. referred to various precedents on restrictive and expansive interpretation of words and phrases used in a statute, particularly, the words means and includes and held:-
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> 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. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of disbursement against the

consideration for the time value of money could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any 8 (2020) 8 SCC 401 of the transactions stated in the said clauses (a) to (i) of Section 5(8) would be falling within the ambit of financial debt only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as financial debt within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money.

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 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.

48. It is also evident that what is being dealt with and described in Section 5(7) and in Section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code.

49. Expounding yet further, in our view, the peculiar elements of these expressions financial creditor and financial debt, as occurring in Sections 5(7) and 5(8), when visualised and compared with the generic expressions creditor and debt respectively, as occurring in Sections 3(10) and 3(11) of the Code, the scheme of things envisaged by the Code becomes clearer. The generic term creditor is defined to mean any person to whom the debt is owed and then, it has also been made clear that it includes a financial creditor, a secured creditor, an unsecured creditor, an operational creditor, and a decree-holder. Similarly, a debt means a liability or obligation in

respect of a claim which is due from any person and this expression has also been given an extended meaning to include a financial debt and an operational debt.

49.1. The use of the expression means and includes in these clauses, on the very same principles of interpretation as indicated above, makes it clear that for a person to become a creditor, there has to be a debt, i.e., a liability or obligation in respect of a claim which may be due from any person. A secured creditor in terms of Section 3(30) means a creditor in whose favour a security interest is created; and security interest, in terms of Section 3(31), means a right, title or interest or claim of property created in favour of or provided for a secured creditor by a transaction which secures payment for the purpose of an obligation and it includes, amongst others, a mortgage. Thus, any mortgage created in favour of a creditor leads to a security interest being created and thereby, the creditor becomes a secured creditor. However, when all the defining clauses are read together and harmoniously, it is clear that the legislature has maintained a distinction amongst the expressions financial creditor, operational creditor, secured creditor and unsecured creditor. Every secured creditor would be a creditor; and every financial creditor would also be a creditor but every secured creditor may not be a financial creditor. As noticed, the expressions financial debt and financial creditor, having their specific and distinct connotations and roles in insolvency and liquidation process of corporate persons, have only been defined in Part II whereas the expressions secured creditor and security interest are defined in Part I.

50. A conjoint reading of the statutory provisions with the enunciation of this Court in SwissRibbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] , leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression financial creditor is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders, namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to

ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor.

29. In Jaypee Infratech Ltd. (supra), the debts in question were in the form of third-party security, given by the Corporate Debtor to secure loans and advances obtained a third party from the Respondent Lender and, therefore, held not to be a financial debt within the meaning of Section 5(8) of the IBC. There was no occasion for this Court to consider the status of a term loan advanced to meet the working capital requirements of the Corporate Debtor, which did not carry interest. Having regard to the Aims, Objects and Scheme of the IBC, there is no discernible reason, why a term loan to meet the financial requirements of a Corporate Debtor for its operation, which obviously has the commercial effect of borrowing, should be excluded from the purview of a financial debt.

30. In Prabhudas Damodar Kotecha Vs. Manhabala Jeram Damodar, this Court interpreting Section 41(1) of the Presidency Small Cause Courts Act, 1882, as amended by the Maharashtra Act XIX of 1976, observed that the golden rule is that the words of a statute must prima facie be given their ordinary meaning when the language or phraseology employed by the legislature is precise and plain'. Since Section 41(1) does not specifically exclude a gratuitous licensee or make a distinction between a licensee with material consideration or 9 (2013) 15 SCC 358 without material consideration, the expression licensee in Section 41(1) was held to also include a gratuitous licensee.

31. At the cost of repetition, it is reiterated that the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor. Default means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of debt is also expansive and the same includes inter alia financial debt. The definition of Financial Debt in Section 5(8) of IBC does not expressly exclude an interest free loan. Financial Debt

would have to be construed to include interest free loans advanced to finance the business operations of a corporate body."

Respondent's Contentions:

22. The Learned Counsel for the Respondent/Petitioner contends that the 'Appellant had entered into 'Share Purchase Agreement' with the respondent for purchase of 100% shares of M/s. Bhadra Parks & Resorts Ltd. for a total consideration of Rs.33,08,00,000/-.

23. The Learned Counsel for the Respondent submits that the Respondent paid an advance of Rs.1,00,00,000/- on 21.11.2012 and at the time of entering into the aforesaid 'Agreement', the 'Corporate Debtor' intimated the Respondent that the properties and assets are encumbrance free and upon investigation, the 'Financial Creditor' had found that there are numerous encumbrances and both parties entered into 'Addendum' on 21.11.2012, wherein the 'Appellant'/ 'Corporate Debtor had instructed the Respondent/Petitioner to pay the part of consideration to its other Creditors' directly as stated in the 'Agreement'.

24. It is represented on behalf of the Respondent that the other creditors of Corporate Debtor had not accepted the settlement of the Corporate Debtor and refused to take any payments from the Respondent on behalf of the 'Corporate Debtor' and consequently, the Agreement had not fructified and that the 'Corporate Debtor' promised to pay back the 'advance' paid by the Respondent.

25. The Learned Counsel for the 'Respondent' points out that the 'unpaid Financial Debt' became due as per Agreement dated 21.11.2012 and that the debt' is acknowledged by the 'Corporate Debtor' from time to time and promised to pay with interest as per Letter dated 05.09.2014, 17.03.2015, email dated 28.11.2018 and Reply Notice dated 31.01.2018 whereby and whereunder the liability was not denied.

26. The Learned Counsel for the 'Respondent' proceeds to point out that the 'Respondent' had issued Form-3 dated 14.01.2019 and that the 'Appellant' had

replied to the said notice as per Notice dated 31.01.2019. As a matter of fact, the 'Appellant' in the notice dated 31.01.2019 had replied that the amount is 'due' and not denied its liability, but stated that it is not an 'operational debt'. Indeed, the Respondent issued a notice dated 20.02.2019 for proceeding as a 'Financial Creditor'.

27. It is projected on the side of the 'Respondent' that the 'Respondent'/'Financial Creditor' filed an application IBA/13/KOB/2020 before the 'Adjudicating Authority'(National Company Law Tribunal, Kochi Bench) and the said application was admitted on 25.08.2020 and in fact, the 'Adjudicating Authority' had observed the following:

i. "That the application filed under 7(4) of the IBC Code on 20.01.2020 is not barred by Limitation.
ii. That the validity of share purchase agreement due to non-registration is not under Hon'ble Tribunal's jurisdiction.
iii. That the scope of IBC is limited to see whether there is debt due to non-payment and if any default has occurred, hence the application is filed by Respondent for alleged breach of share purchase agreement dated 21.11.2012 and Corporate Debtor failed to honour the share purchase agreement and no payment was made.
iv. That the debt arises out of the share purchase agreement dated 21.11.2012, the said amount is a debt disbursed against the consideration for advance payment as per the agreement hence is covered under the definition of Financial debt and the Respondent will be treated as Financial Creditor."

and declared 'Moratorium'.

28. On behalf of the 'Respondent' it is brought to the Notice of this 'Tribunal' that prior to the 'Paper Publication' being effected, the 'Corporate Debtor' had expressed its willingness to settle the matter for a sum of Rs.2,25,00,000/- and paid a sum of Rs.1,00,000/-on 26.08.2020 and Rs.10,00,000/- on 10.09.2020 and issued a cheque dated 30.11.2020 for a sum of Rs.2,14,00,000/-.

29. Be it noted, that the 'Corporate Debtor' filed an application as per Rule 11 of the National Company Law Tribunal Rules, 2016 seeking permission to settle the

matter and that the 'Respondent'/Applicant filed Form FA with a liberty to file 'fresh application', in the event of the 'failure of settlement'. The 'Adjudicating Authority' passed an order on 24.09.2020 granting liberty to the 'Respondent/Applicant'.

30. The Learned Counsel for the 'Respondent' points out that after the said terms arrived at, the 'Corporate Debtor' had not come forward to make the payment towards settlement, which was due as on 30.11.2020 and prayed for time to make payment as per mail dated 27.11.2020, 11.12.2020 and through numerous whats app messages. Even after extension of time, the 'Appellant' had failed to pay has committed before the Adjudicating Authority' and that the Respondent filed 'Contempt Petition' IA No.1 of 2021 in IBA/13/KOB/2020 to restore and revive the petition IA No.2 of 2021 in IBA/13/KOB/2020 and that the said application was restored as per Order dated 28.01.2020.

31. The Appellant filed Company Appeal (AT)(CH)(INS) No.06/2021 challenging the order of the 'Adjudicating Authority' dated 28.01.2021 and that the 'Appeal' was dismissed by the 'Appellate Tribunal'. In the present 'Company Appeal' AT CH INS No.95/2021 the Appellant is assailing the order of the 'Adjudicating Authority' dated 30.03.2021.

32. The prime contention advanced on behalf of the Respondent is that the 'Appellant' had not questioned the order dated 25.08.2020 passed by the 'Adjudicating Authority' and in fact, the 'Appellant' has suppressed the fact that the 'debt' acknowledged by the 'Corporate Debtor' from time to time and promised to pay with interest as per letter dated 05.09.2014, 17.03.2015, email dated 28.11.2018 and reply notice dated 31.01.2019 wherein the liability was not denied.

33. The Learned Counsel for the 'Respondent' puts forward a submission that the 'Appellant' has accepted the Respondent as 'Financial Creditor' and approached for a settlement and after arriving at the settlement made a part payment, to an extent of Rs.11,00,000/- and the order dated 25.08.2020 of the 'Adjudicating Authority' is not challenged by the 'Appellant'. Moreover, the present 'debt' arises out of the Share Purchase agreement dated 24.11.2012, the said amount is a 'debt' disbursed against

the consideration for advance payment as per the Agreement and that the 'Appellant' promised to refund along with interest. Therefore, it is the fervent plea of the Respondent that the 'debt in question' is covered under the definition of 'Financial Debt' and that the Respondent is treated as 'Financial Creditor'.

34. The Learned Counsel for the 'Respondent' points out that a 'debt' may not be due if it is not payable in law or in fact. Also, that it is the stand of the 'Respondent' that it is of no matter that the 'debt' is disputed so long as the 'debt' is due i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future debt.

35. The Learned Counsel for the 'Respondent' contends that as per Section 7 of the I&B Code, the Respondent is required to prove the existence of 'debt' and that the 'Adjudicating Authority' is to satisfy itself that a 'default' has occurred and the ambit of enquiry is confined to the records exhibited by the 'Financial Creditor'.

36. The Learned Counsel for the 'Respondent' cites the Judgment of the Hon'ble Supreme Court in Neelima Srivastava v The State of Uttar Pradesh and Ors. (Civil Appeal No.4840 of 2021 dated 17.08.2021) wherein at paragraph 30 it is observed as under:

> "It becomes absolutely clear from the above clarification that earlier decisions running counter to the principles settled in the decision of Umadevi (3) will not be treated as precedents. It cannot mean that the judgment of a competent Court delivered prior to the decision in Umadevi (3) and which has attained finality and is binding inter se between the parties need not be implemented. Mere over-ruling of the principles, on which the earlier judgment was passed, by a subsequent judgment of higher forum will not have the effect of uprooting the final adjudication between the parties and set it at naught. There is a distinction between over-ruling a principle and reversal of the judgment. The judgment in question itself has to be assailed and got rid of in a manner known to or recognized by law. Mere over-ruling of the principles by a subsequent judgment will not dilute the binding effect of the decision on inter-parties."

Admission and Acknowledgement:

37. To put it precisely, an 'admission' is a material piece of evidence and undoubtedly, is a 'waiver of proof'. No wonder, an 'admission' must be a comprehensive and unequivocal one. Moreover, an acknowledgement of a person, must be conscious of his liability and the commitment should be made towards that liability.

Principle of Waiver:

38. Be it noted, that the 'Principle of waiver' or approbation and reprobation lies at the origin of conduct productive of change of activation like that of the rule of constructive res judicata as per Explanation-4 to Section 11 of Civil Procedure Code.

Estoppel by Election

39. The principle of 'estoppel election' is undoubtedly a rule of 'Equity' and in fact, a person is prevented by way of his conduct or action or silence when it is his prime duty to avail the opportunity of claiming or asserting his right which he would otherwise had.

Discussions:

40. At the outset this 'Tribunal' points out that the Respondent/Applicant had entered into a 'Share Purchase Agreement' with the 'Corporate Debtor' on 21.11.2012 to purchase 100% shares of the 'Corporate Debtor' for a consideration of Rs.33,08,00,000/-. It is not in dispute that the Respondent/Applicant had paid an advance of Rs.1,00,00,000/- to the 'Corporate Debtor', which was duly acknowledged by the 'Corporate Debtor' as per various letters dated 05.09.2014, 17.03.2015, 28.11.2018.

41. It is represented on behalf of the Respondent/Applicant that the liability of the 'Corporate Debtor' was not denied in the Reply Notice dated 31.01.2018 and that an amount of Rs.4,25,32,016,405 along with interest at 24% per annum was due and payable. As a matter of fact, the 'Adjudicating Authority' on 25.08.2020 had admitted the 'Application' in IBA/13/KOB/2020 (filed under Section 7 of the Code) against the Respondent and appointed the 'Interim Resolution Professional'.

42. It is to be pointed out that an 'addendum' to the 'Share Purchase Agreement' dated 21.11.2012 came to be executed whereby the Respondent/Applicant had agreed to make payment to the 'Creditors' of the 'Corporate Debtor'. In reality, the 'Corporate Debtor' on 27.11.2012 had issued a letter requesting the 'Respondent/Applicant' to handover an advance sum of Rs.1,00,00,000/- to Dr.J.J.R. Justin and that on 05.09.2014 and 17.03.2015 the Respondent/Applicant issued a letter agreeing to refund the advance sum.

43. It must be borne in mind that the 'Corporate Debtor' had issued a letter on 28.11.2018 to the 'Respondent'/'Financial Creditor' inter alia stating that they were in the verge of selling their property in order to settle their liabilities and further that they are trying their level best to find the buyer and to refund its advance amount and assured the refund as soon as possible. In fact, before the 'Paper Publication' was effected, the 'Corporate Debtor' had expressed its willingness to settle the matter for a sum of Rs.2,25,00,000/- and paid a sum of Rs.1,00,00,000/- on 26.08.2020 and Rs.10,00,000/- on 10.09.2020 and issued a cheque dated 30.11.2020 for a sum of Rs.2,14,00,000/-.

44. The grievance of the 'Respondent'/'Applicant' is that the 'Corporate Debtor' despite the terms of settlement being arrived at between the parties had failed to make the payment which was due on 30.11.2020 and prayed for time to make the payment as per mail dated 27.11.2020, 11.12.2020 and through numerous 'Whatsapp messages'.

45. It may not be out of place for this 'Tribunal' to make a relevant mention that the 'Respondent'/'Applicant' was per forced to project a Contempt Petition IA No.1 of 2021 in IBA/13/KOB/2020 seeking to restore and revive Petition as per IA No.2 of 2021 in IBA/13/KOB/2020 and that the 'Adjudicating Authority' was pleased to pass an order of 'Restoration' on 28.01.2021.

46. A glance of the contents of 'Share Purchase Agreement' dated 21.11.2012 indicates that the 'Appellant'/'Seller' and the 'Respondent'/'Buyer' had entered into an 'Agreement' in writing mentioning that the 'Appellant'/'Corporate Debtor

is desirous of selling 100% of his shares and the 'Respondent'/'Applicant' was desirous of buying the same. Also, the Agreement Clause 3 'Terms of Payment' (d) mentions that the 'seller has some personal borrowings of Rs.1,00,00,000/-, the buyer agrees to buy the same.

47. Clause (e) of the 'Share Purchase Agreement' dated 21.11.2012 enjoins that 'the seller has to pay a sum of Rs.1,50,00,000/- to the 'contractor' which the 'buyer' agrees to pay on behalf of the 'seller', etc. Clause (g) of the 'Share Purchase Agreement' envisages 'the Buyer agrees to pay the balance of consideration after settling the above items for the Share Capital Advance, within 90 days from the date of this Agreement directly to the shareholders.

48. Clause 3.2 of the 'Share Purchase Agreement' proceeds to the effect that 'if the Residential customers (in clause b) demand for interest, then the Buyer agrees to pay such interest, but only up to a maximum of Rs.2,40,00,000/- (Rupees Two Crores and Forty Lakhs only). The Buyer shall pay the interest only if the residential customers so demands. The Buyer shall not pay the interest exceeding the above said sum. This will be in addition to the purchase consideration.'

49. The 'Addendum' to the share purchase agreement dated 21.11.2012 entered into between the parties points out that the Respondent/Applicant had agreed to make the payment to the following parties on behalf of the 'Appellant' which was accepted by the 'Appellant' and acknowledged (i)To pressing creditors/contractors, (ii)to statutory payments, (iii)Fixed deposit holders/Federal Bank dues. (iv)Baywatch residency owners (v)Share capital of the First Party (vi)Interest payment to Baywatch residency owners.

50. It is useful to point out that the Managing Director' of the 'Respondent/' 'Applicant' had addressed a letter dated 05.09.2014 to the 'Appellant' wherein it was among other things mentioned that…… 'till now the business was not handed over to us due to the problems and issues. Therefore, as per our final discussion dated 05.09.2014, you agreed to refund the said amount of Rs.1,00,00,000/- with an interest @ 24% per annum from 12.11.2012 to till date which amounts to

Rs.44,00,000/- on or before 30.09.2014 or if you fail to repay the said amount, then it would amount to the acceptance of the said MOU dated 12.11.2012 and we will proceed with that MOU.

51. It comes to be known that as pe the letter dated 17.03.2015 of the 'Managing Director' of the 'Respondent'/'Applicant' addressed to the 'Appellant' it is inter alia mentioned that …… Therefore, as per our final discussion dated 17.03.2015, you agreed to refund the said amount of Rs.1,00,00,000/- with an interest at the rate of 24% p.a. from 12.11.2012 to till date including interest which amounts to Rs.1,74,10,242/- on or before 15th April or if you fail to repay the said amount then it would amount to the acceptance of the said MOU dated 12.11.2012 and we will proceed with that MOU."

52. To be noted, that the 'Appellant' had addressed a communication dated 28.11.2018 to the 'Managing Director' of the 'Respondent'/'Applicant' inter alia stating that they were trying their level best to find a 'buyer' and to refund the Respondent's advance amount, etc. That apart, it is useful for this 'Tribunal' to point out that the 'Appellant' through its 'Director' had addressed a letter dated 27.11.2020 to the 'Director' of the 'Respondent' stating that they are taking all efforts to raise funds either by inducting new investors and forming a venture or through financial institutions or by sale of assets of the company, etc. and ultimately had requested to hold the cheque and not to present the same for clearance, etc.

53. It transpires that the 'Appellant' filed an application under Rule 11 of the NCLT Rules, 2016 to recall the order of the 'Adjudicating Authority' dated 25.08.2020 and permit them to settle the matter. The 'Appellant' along with the 'Application' Form-FA for withdrawal of 'CIRP' had duly filed the same in IBA/13/KOB/2020 stating that a settlement was arrived at for a sum of Rs.2,25,00,000/- as 'Full and Final Settlement' of the entire claim between the parties subject to the following terms:

‘(b) Cheque dated 10.9.2020 bearing No.214323 for Rs.10,00,000/- was given. However, returning the said cheque M/s Sree Bhadra Parks and Resorts Limited has made an electronic transfer through RTGS of Rs.10,00,000/- to the account of M/s Sri Ramani Resorts and Hotels Pvt. Limited on 10.09.2020.

(c) A cheque dated 30.11.2020 bearing No.214322 for Rs.2,14,00,000/- drawn on South Indian Bank Limited, Kaniyakumari Main Branch is yet to be encashed and can be done only on 30.11.2020.”

54. Added further, it was stated that the ‘balance amount of settlement’ of Rs.2,14,00,000/- arrived at between the parties is only for this ‘Settlement’ and if the ‘Corporate Debtor’ fails to pay the said sum on or before 30.11.2020 then M/s. Sri Ramani Resorts and Hotels Pvt. Ltd. shall be at liberty to file fresh application with actual amount i.e. Rs.4,25,32,016.405 along with 24% interest per annum standing due as on date.

55. Section 3(6)(a) of the I & B Code, 2016 defines ‘Claim’ meaning ‘a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured; Section 3(6)(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment fixed, matured, unmatured, disputed, undisputed, secured or unsecured.

56. Section 3(7) of the I & B Code, 2016 defines ‘Corporate Person’ means a company as defined in clause (20)of Section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider.

57. Section 3(8) of the I & B Code, 2016 defines ‘Corporate Debtor’ means a corporate person who owes a debt to any person.

58. Section 3(10) of the Code deals with ‘creditor’ meaning ‘any person to whom a debt is owed and includes a financial creditor, etc.

59. Section 3(11) of the I & B Code defines ‘Debt’ referring to a liability or obligation in respect of a claim which is due from any person. This visualises the existence of a ‘contractual’ or other relationship which gives rights to a liability or an obligation between the parties in Law.

60. ‘Section 3(12) of the Code concerns with ‘default’ meaning ‘non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor; as the case may be.’

61. Section 5(7) of the Code pertains to ‘financial creditor’ meaning ‘any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to’.

62. Section 5(8) of the I & B Code defines ‘financial debt’ meaning ‘any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to’.

63. The essence of any ‘debt’ to be described as ‘financial debt’ is the ‘time value of money’ as ‘Borrowing’ is a name for ‘money transaction’. The word ‘debt’ is applicable to a sum of money which has been promised at a future day as against a sum nor due and payable. In fact, a sum of money which is certainly and in all events payable is a ‘debt’, in regard to the fact whether it is payable now or at a future date.

64. Under the I&B Code, 2016 the shift is from ‘inability to pay’ to an ‘existence of default’. No doubt, the ‘Adjudicating Authority’ is not required to decide the amount of ‘default’. Even if a ‘debt’ is disputed, if the same is more than Rs.1,00,000/- then the application filed under Section 7 of the Code is maintainable in Law.

65. It is to be pointed out that the plea of disqualification of ‘Directors’ of the Respondent/Applicant was quashed by the Hon’ble High Court in W.P. No.18641 of 2020 as per order dated 27.01.2020.

66. As far as the present case is concerned, the 'actuality of debt' was proven by virtue of the concerned terms which formed part of the order of the 'Adjudicating Authority' dated 24.09.2020. When a 'Settlement' was arrived at between the parties, it is the pre-module duty of the 'Corporate Debtor' to effect payments proposed by virtue of the 'Settlement' after committing 'default', the 'Appellant' cannot take altogether different stand, especially when the tenor and spirit of 'Share Purchase Agreement' was not adhered to. To put it precisely, when the 'Appellant' had promised to repay the advanced sum paid by the 'Respondent'/'Applicant' to it, then there is not only a violation of the 'Share Purchase Agreement' dated 21.11.2012 but also the non-payment of amounts comes squarely under definition of Section 5(8) of the I&B Code pertaining to 'Financial Debt'.

67. In the present case, the 'Adjudicating Authority' in the 'Impugned Order' dated 30.03.2021 in IBA/13/KOB/2020 had clearly at paragraph 6 had observed as under:

'the Corporate Debtor did not come forward to make the payment as per the consent terms in the settlement which was due as on 30.11.2020 and that they sought time to make payment for several times. But without making payments they proceeded to sell the assets of the Corporate Debtor, which is a clear case of fraud and cheating'

and ultimately passed an order allowing IA/02/KOB/2021 and restored IBA/13/KOB/2020 to its file.

68. Besides the above, the 'Adjudicating Authority' at paragraph 6(5) of the 'Impugned Order' dated 30.03.2021 in IBA/13/KOB/2020 had among other things observed that…… 'The question is only the date of removal of disqualification, which have no much relevance in this matter, as the question here is only whether the Corporate Debtor has complied with the conditions stipulated in the settlement agreement produced before this Tribunal. It is true that the IBA has been disposed of on the basis of settlement arrived between the parties stating

that they have settled the matter stating that on 26.08.2020 settlement has been arrived for a total sum of Rs.2,25,00,000/- (Rupees two crores twenty five lakhs only) as full and final settlement of the entire claim between the Corporate Debtor M/s. Sree Bhadra Parks and Resorts Limited on the terms mentioned in the settlement agreement. When a settlement has been arrived between the parties, it is duty bound by the Corporate Debtor to make good the payments proposed in that settlement. They cannot go back making various allegations including maintainability of the IBA after making default in the payment agreed to between the parties. The contention regarding the application is not maintainable as the order stipulates for filing a fresh application cannot be accepted because merely on technicalities the Corporate Debtor cannot wash away their hands from complying with the conditions stipulated in the final order passed by this 'Tribunal. Hence, the application IA/02/KOB/2021 is to be allowed."

69. In the instant case, it is quite clear that the order dated 25.08.2020 in IBA/13/KOB/2020 admitting the application under Section 7 of the Code, filed by the 'Respondent'/'Applicant' has not been assailed by the 'Appellant'. In fact, in the 'Impugned Order' dated 30.03.2021 passed by the 'Adjudicating Authority' in IBA/13/KOB/2020 whereby and whereunder the application filed by the 'Respondent'/'Applicant' was admitted, the said 'Adjudicating Authority' came to the conclusion that the 'Respondent'/'Applicant' had proved the existence of a 'debt' as well as existence of 'default' and had discussed in detail about the same in the order dated 25.08.2020, which speaks for itself.

70. That apart, the 'Adjudicating Authority' in the 'Impugned Order' dated 30.03.2021 had opined that 'the present application has been settled after Admission before making the public announcement as per Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The I&B Code does not bar the 'Tribunal' to admit the matter which was settled after Admission.

71. Be that as it may, considering the entire conspectus of the facts and circumstances of the case, taking into account of the fact that when the 'Respondent'/'Applicant' paid an advance of Rs.1,00,00,000/-on 21.11.2012 and because of the numerous encumbrances found out later, in regard to the properties and assets of the 'Corporate Debtor' which culminated into an 'Addendum' dated 27.11.2012 being entered into between the parties to the 'Agreement', in and by which the 'Corporate Debtor' had instructed the 'Respondent'/'Applicant' to pay the part consideration to its other 'Creditors' directly as made mention of in the 'Agreement' and in view of the fact that the 'instant debt' arises out of the 'Share Purchase Agreement' dated 21.11.2012, coupled with an 'Addendum' to the said 'Agreement' dated 27.11.2012, the said sum is a 'debt' disbursed against the consideration for 'Advance Payment' in terms of the 'Agreement' and further that in the present 'Appeal' before this 'Tribunal', it is brought forth that the 'Appellant' had promised to repay/refund the amount paid by the 'Respondent'/'Applicant' together with interest, and therefore, this 'Tribunal' comes to an inevitable and inescapable cocksure conclusion that the aforesaid promise comes squarely within the ambit of definition of 'Financial Debt' and that the 'Respondent'/'Applicant' is without any haziness is a 'Financial Creditor' in the eye of Law.

72. Suffice it for this 'Tribunal' to pertinently point out that the 'Appellant'/'Corporate Debtor' had not adhered to its 'commitment' in respect of 'Share Purchase Agreement' dated 21.11.2012 and had not paid the amount admittedly, especially in the teeth of the fact that the 'debt' due arises out of the said 'Share Purchase Agreement'. Viewed in that perspective, the 'Impugned Order' dated 30.03.2021 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala) in admitting the Application IBA/13/KOB/2020 does not suffer from any material irregularity or patent illegality in the eye of law. Consequently, the 'Appeal' fails.

Conclusion:

73. In fine, the Company Appeal (AT)(CH)(INS) No. 95 of 2021 is dismissed. No costs. IA/166/2021 (Stay Application) is closed.

This Judgment is pronounced as per Rule 92 of NCLAT Rules, 2016.

[Justice M. Venugopal]
Member (Judicial)

[V.P. Singh]
Member (Technical)

06.09.2021

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