NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1109 of 2022

(Arising out of Orders dated 28.06.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad (Court No.II) in I.A Nos.257, 423 and 427 of 2021 in CP (IB) No. 418/AHM/2018)

IN THE MATTER OF:

Nikhil Gandhi
Keshav Bungalow, C.S. No.218, ND
Marg, Mumbai 400006. .... Appellant

Vs

Sudip Bhattacharya
Resolution Professional of
Reliance Naval and Engineering Ltd.
Project Office, Duff and Phelps India Pvt. Ltd.
14th Floor, Raheja Towers,
Bandra Kurla Complex, Bandra East,
Mumbai 400051. .... Respondent

Present:

For Appellant:	**Mr. Shikhil Suri, Ms. Madhu Suri, Ms. Jyoti Suri, Ms. Mahima Aggarwal, Advocates**
For Respondent:	**Ms. Prachi Johri, Advocate Advocate Dhrupad Vaghani**

Company Appeal (AT) (Insolvency) No. 1112 of 2022

(Arising out of Orders dated 28.06.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad (Court No.II) in I.A Nos.257, 423 and 427 of 2021 in CP (IB) No. 418/AHM/2018)

IN THE MATTER OF:

SKIL Infrastructure Limited
SKIL House, 209,
Bank Street, Cross Lane, Fort,
Mumbai 400 023. .... Appellant

Vs

Sudip Bhattacharya
Resolution Professional of
Reliance Naval and Engineering Ltd.
Project Office, Duff and Phelps India Pvt. Ltd.
14th Floor, Raheja Towers,
Bandra Kurla Complex, Bandra East,
Mumbai 400051. .... Respondent

Present:

For Appellant: **Mr. Shikhil Suri, Ms. Madhu Suri, Ms. Jyoti Suri, Ms. Mahima Aggarwal, Advocates**

For Respondent: **Ms. Prachi Johri, Advocate Advocate Dhrupad Vaghani**

Company Appeal (AT) (Insolvency) No. 1155 of 2022

(Arising out of Orders dated 28.06.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad (Court No.II) in I.A Nos.257, 423 and 427 of 2021 in CP (IB) No. 418/AHM/2018)

IN THE MATTER OF:

Bhavesh Gandhi
New Breach Candy CHS Ltd.,
D-4, 4th Floor, 70-C Bhalubhai Desai Road,
Mumbai 400 026. .... Appellant

Vs

Sudip Bhattacharya
Resolution Professional of
Reliance Naval and Engineering Ltd.
Project Office, Duff and Phelps India Pvt. Ltd.
14th Floor, Raheja Towers,
Bandra Kurla Complex, Bandra East,
Mumbai 400051. .... Respondent

Present:

For Appellant: **Mr. Shikhil Suri, Mrs. Madhu Suri, Ms. Jyoti Suri, Ms. Nikita Thapar, Ms. Komal Gupta, Ms. Mahima Aggarwal, Advocates.**

For Respondent: **Ms. Prachi Johri, Advocate.**

J U D G M E N T

ASHOK BHUSHAN, J.

These three Appeal(s) have been filed against common judgment dated 28.06.2022 rejecting I.A Nos.257, 423 and 427 of 2021 filed by the Appellant(s) respectively in CP(IB)418/AHM/2018. By the impugned order, the Adjudicating Authority has rejected the claim of the Appellant(s) to be declared as Financial Creditors of the Corporate Debtor.

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

(i) The Corporate Debtor – Reliance Naval Engineering Ltd. (Earlier known as Pipavav Defence and Offshore Engineering Limited) is a company engaged in business of defence and commercial shipbuilding, ship repair, offshore engineering activities and operating dry docks in India etc. The Appellant(s) in these Appeal(s) were the Promoters of the Corporate Debtor. The Corporate Debtor was extended various facilities by several Banks and Financial Institutions with regard to which Nikhil Gandhi and Bhavesh Gandhi had given Personal Guarantee, whereas Appellant SKIL Infrastructure Ltd. had given Corporate Guarantee.

(ii) In 2014, due to strain on the operations of the Corporate Debtor, caused by several reasons, discussion for implementation of Corporate Debt Restructuring ("**CDR**") Scheme took place. The Promoters of the group, i.e.,

Appellant(s) started exploring the option of introducing another group of Promoters to take over the management and ownership of the Corporate Debtor. A Purchase Agreement dated 04.03.2015 was executed amongst the Pipavav Defence and Offshore Engineering Limited, Reliance Defense Systems Ltd. and Reliance Infrastructure Ltd. According to which, Reliance Group agreed to acquire, control and management of the Corporate Debtor and its subsidiaries.

(iii) On 30.03.2015, Master Restructuring Agreement ("**MRA**") was executed between Consortium Lenders and the SKIL Group in its capacity as Promoter of the Corporate Debtor (Appellant before us). The securities were furnished to the Consortium Lenders by executing Personal Guarantee by Nikhil Gandhi and Bhavesh Gandhi on 31.03.2015. A Corporate Guarantee was executed by SKIL Infrastructure Ltd. on 30.03.2015 to secure the credit facilities of Rs.10979 crores. The SKIL Infrastructure has also Pledged its Shares by Share Pledge Agreement dated 20.04.2015. After takeover by the Reliance Group, the name of Company was changed into Reliance Naval and Engineering Ltd.

(iv) The Corporate Debtor and subsidiaries begun defaulting in their repayment obligation. The Reliance Group failed to release the Securities furnished by SKIL Group (Appellant herein) as was contemplated in Purchase Agreement dated

04.03.2015. The Lenders of the Corporate Debtor enforced the Securities furnished by the Appellant(s) through Security Trustee. By letter dated 17.03.2018 addressed to Appellant(s) herein, Corporate and Personal Guarantees were invoked and the Appellant(s) were called upon to make payment of aggregate amount of Rs.9147.88 crores as on 20.03.2018. Notice of sale of Pledge Shares was also issued on 21.03.2018 by the Security Trustee. Proceedings were also initiated against the Corporate Debtor and the Appellant herein, before Debts Recovery Tribunal, Ahmedabad by the Lenders led by IDBI Bank Limited.

(v) An Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") was filed against the Corporate Debtor, which was admitted by Adjudicating Authority vide order dated 15.01.2020. Public announcement was made by IRP on 20.01.2020, in pursuance of which, all the Appellant(s) filed their claims in Form-C dated 27/28.02.2020. The Appellant Nikhil Gandhi in Appeal No.1109 of 2022 filed its Form-C for a total amount of claim of Rs.9182,60,85,077.46/-; Appellant SKIL Infrastructure Ltd., Appellant in Appeal No.1122 of 2022 filed its Form-C for a total claim of Rs.9625,83,61,954/- and Appellant Mr. Bhavesh Gandhi in Appeal No.1155 of 2022 filed its claim in Form-C dated 28.02.2022 for an amount of Rs.9182,60,85,077.46.

(vi) The Resolution Professional after receiving the claims by the Appellant(s) vide email dated 12.03.2022 and 23.05.2020 sought information and documents in order to verify the claims. The Appellant(s) replied the email vide their emails dated 27.05.2022 and 29.07.2020. The Resolution Professional vide email dated 28.01.2021 intimated the Appellant(s) that their claims filed in Form-C as Financial Creditors cannot be accepted. The Appellant(s) aggrieved by the rejection of their claims as Financial Creditors filed I.A Nos.257, 423 and 427 of 2021 before the Adjudicating Authority, respectively.

3. The averments made in above three IAs filed by the Appellant(s) before the Adjudicating Authority were more or less similar. It shall be sufficient to notice the pleadings in Company Appeal (AT) (Insolvency) No.1109 of 2022 for deciding all these Appeal(s).

4. In IA No.423 of 2021, following are the reliefs, which were sought by the Applicant:

> *"4. Reliefs sought:*
>
> *The Applicant respectfully prays that:*
>
> *(a) This Hon'ble Tribunal be pleased to quash and set aside the said impugned email dated 28th January, 2021 issued by the Respondent to the Applicant rejecting the Applicant's claim of 'financial debt' under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate*

Persons) Regulations, 2016 in the corporate insolvency resolution process of the Corporate Debtor;

(b) This Hon'ble Tribunal be pleased to allow and admit the Applicant's claim of 'Financial Debt' as submitted by the Applicant under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 in the corporate insolvency resolution process of the Corporate Debtor;

(c) That in pursuance of (b) above, this Hon'ble Tribunal be pleased to order and direct the Respondent to reconstitute the Committee of Creditors of the Corporate Debtor and grant the Applicant voting share proportionate to the said claim together with all consequential benefits arising therefrom;

(d) In the alternative to prayer clause (b) and/ or (c), this Court be pleased to order and direct the terms of resolution finalized by the Committee of Creditors should mandate that the Corporate Debtor shall always be due and liable to pay the Applicants every amount recovered from the Applicants by the lenders under the Guarantees executed by them.

(e) This Hon'ble Tribunal be pleased to order and direct that Article 137 of the Articles of Association of the Corporate Debtor be not altered, amended in any manner whatsoever until the entire liability under the Applicant's

Guarantee is marked satisfied by the beneficiaries.

(f) That pending the hearing and final disposal of the present Application, this Hon'ble Tribunal be pleased to order and restrain the Respondent from conducting any further meetings of the Committee of Creditors of the Corporate Debtor, for any purpose whatsoever;

(g) For such further and other reliefs as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case."

5. Aggrieved by the impugned order dated 28.06.2022, rejecting the claim filed by the Appellant(s), these Appeal(s) have been filed.

6. We have heard Shri Shikhil Suri, learned Counsel appearing for the Appellant(s) and Ms. Prachi Johri, learned Counsel appearing for Resolution Professional.

7. The learned Counsel for the Appellant(s) challenging the impugned order submits that Appellant(s) being Financial Creditors, their claim deserve admission by the Resolution Professional. The learned Counsel for the Appellant(s) relying on Clause 5.10 of the Purchase Agreement dated 04.03.2015 submits that both Acquirer (Reliance Group) and the Corporate Debtor has undertaken to indemnify the Promoter Guarantor (Appellant(s) herein) for any loss suffered by Founder Promoters on account of enforcement of any Disclosed Founder Promoter Guarantees given by the Appellant(s) dated 31.03.2015 and 30.03.2015 having been invoked by Security Trustee by letter dated 17.03.2018. The Appellant(s) have suffered

loss, with regard to which claim was submitted before the Resolution Professional. It is submitted that proceeding before Debts Recovery Tribunal has already been initiated on the basis of invocation of the Guarantee and Pledge Shares, hence, the liability is imminent and claim for the said amount was a Financial Claim within the meaning of Section 5(8)(h) of the Code. It is submitted that claim need not be matured and even if a claim is not matured, the creditor is entitled to file claim. The mere fact that no payment has been made by the Appellant(s) (Promoter Guarantors) towards invocation of Securities cannot be a ground for rejection of the claim. It is submitted that the Adjudicating Authority also committed error in rejecting the claim on the ground that no disbursement has been made by the Appellant(s) to the Corporate Debtor, hence, there claim cannot be accepted a Financial Creditors. The Contract of Indemnity is a separate and an independent Contract and under Section 125 of the Contract Act, 1972, the Appellant(s) were entitled to recover from the Promisor all damages which he may be compelled to pay in any suit or any proceedings. It is submitted that in the facts of the present case, there was counter indemnity obligation on the Corporate Debtor by virtue of Clause 5.10 of the Purchase Agreement and the Adjudicating Authority has not correctly appreciated the merit of Clause 5.10. Right of Guarantor as against Principal Debtor as contained in Section 145 are independent of the Contract of Guarantee. Under Section 3(11) of the Code, a debt means not only a liability but also an obligation in respect of a claim, which is due from any person. The IRP/RP was only entitled to collate all the claims.

8. The learned Counsel for the Resolution Professional refuting the submissions for counsel for the Appellant(s) submits that the Appellant(s) were Promotors of the Corporate Debtor and had executed Deed of Personal Guarantee dated 31.03.2015 to secure the Financial Facilities extended under the Master Restructuring Agreement dated 30.03.2015. the Appellant(s) can by no stretch of imagination be Financial Creditors of the Corporate Debtor. They were Guarantors, who guaranteed the repayment of the Financial Facilities extended to the Corporate Debtor by CDR Lenders. Neither any debt is owed or due to the Appellant(s) nor any amount has been disbursed by the Appellant(s) to the Corporate Debtor that can be construed as 'Financial Debt'. In order to be 'Financial Creditor', there has to be a debt due or debt owed to the Appellant(s) by the Corporate Debtor. Under the Personal Guarantee, there is a specific clause that until all the monies due to the Finance Parties under the Restructured Facilities are fully repaid/ paid in accordance with the Personal Guarantee, Personal Guarantors are not entitled for any benefit of subrogation vis-a-vis securities or otherwise. No amount has been disbursed by the Appellant(s) to the Corporate Debtor. Rejection of claim is due to insufficient document to corroborate the claim of the Appellant(s). Even as per Clause 5.10 relied by the Appellant(s) of the Purchase Agreement, any claim can be made by the Appellant(s) only when loss is suffered by them. It is an admitted case of the Appellant(s) that no payments have yet been made by the Appellant(s) towards invocation of the Guarantee. Hence, there is no question of accepting that the Appellant(s) are 'Financial Creditors'.

9. The learned Counsel for both the parties have relied on various judgments of Hon'ble Supreme Court, this Tribunal and High Court, which shall be considered while considering the submission.

10. We need to first recapitulate the nature of transactions, which were entered with the Appellant(s) to find out the nature of the claim. The Appellant(s) before us were the Personal Guarantor/ Corporate Guarantor of the Financial Facilities extended to the Corporate Debtor by Consortium Lenders. A Purchase Agreement dated 04.03.2015 was entered between Pipavav Defence and Offshore Engineering Limited with Reliance Defense Systems Ltd. and Reliance Infrastructure Ltd. wherein the Reliance Group (Acquirer) entered into Agreement of Purchase of sale of shares. Reliance has been placed on Clause 5.10 by the Appellant(s), which provides as follows:

> *"5.10 The Acquirer recognizes that the Found Promoters or any other guarantors as Disclosed to the Acquirer should be discharged from all the guarantees, undertakings and/ or security provided by them in relation to any existing loan and/ or facility availed by the Company and the Subsidiaries. The Acquirer shall make best endeavours to release such guarantees, undertakings and/ or security of the Founder Promoters to the extent Disclosed to the Acquirer (the "Disclosed Founder Promoter Guarantees") as soon as reasonably practicable and not later than 3 (three) months from the Completion Date. In the interim, the Acquirer and the Company agree to promptly reimburse and indemnify on demand the*

Founder Promoters for any loss suffered by the Founder Promoters on account of enforcement of any Disclosed Founder Promoter Guarantees or any other guarantors as Disclosed to the Acquirer provided by them to the Lenders (in respect of a loan/ facility in favour of the Company and/ or its subsidiaries).

In the event any lender to any of the Subsidiaries recovers its dues, either partially or fully, by way of enforcement of pledged/ mortgaged security/ securities of the Founder Promoters or the guarantors (as disclosed in the documents entered into by the respective Subsidiary with their respective lender) against the loan due to such lender provided to the Subsidiaries, anytime after the date of the execution of this Agreement, the respective Subsidiary shall pay to the Found Promoter, to the extent of actual reduction of liability of the respective Subsidiary as reflected in the financial statement of the respective Subsidiary, simultaneously upon Completion, the said recovered dues by the lenders to the Founder Promoters, based on the confirmation in writing by the lenders and the Founder Promoters that the lender have recovered such amount of dues by way of enforcement of the security/ securities."

11. It is the Appellants' case that Consortium Lenders were discussing to restructure the corporate debt and implementation of CDR Scheme in relation to original loan transaction. A Master Restructuring Agreement was entered on 30.03.2015 for restructuring the debt to secure the

payment under the Master Restructuring Agreement and securities were executed. The Appellant – Nikhil Gandhi and Bhavesh Gandhi, the Promoters of the Corporate Debtor executed Deed of Personal Guarantee in favour of a Security Trustee (IL&FS Trust Company Limited). We need to notice certain clauses of Deed of Personal Guarantee. Under Clause 31. It was provided as follows:

> *"3.1 The Guarantor acknowledges that this Guarantee shall be a continuing guarantee in favour of Security Trustee till the full and final discharge of the Outstandings by the Guarantor (to the satisfaction of the Security Trustee) and the full discharge of all obligations of the Guarantors and the Borrower under CDR Documents and shall not be determined by the Guarantor, except in the manner provided therein."*

Clause 4.2 and 4.5 are also relevant, which is to the following effect:

> *"4.2. To give effect to this Guarantee, the Security Trustee may act as though the Guarantor were the principal debtor. Accordingly, the Guarantor shall not be discharged no shall their liability be affected by any set or things or means whatsoever by which their said liability would have been discharged or affected if he had not been principal debtor.*
>
> *4.5. The Guarantor's liability under this Guarantee shall not be discharged until and unless the Outstandings have been paid or discharged. For the avoidance of doubt, notwithstanding that the Guarantor may have paid all amounts due under*

this Guarantee, the Guarantor shall remain liable to the Security Trustee if, as a result of applicability of provisions of Applicable Laws, the Security Trustee is obligated to refund all or part of the payments made by the Guarantor and consequently the Outstandings under this Guarantee are still outstanding.

Another clause, which needs to be noticed is Clause 4.6, under which Guarantor waives in favour of the Security Trustee their rights, which is to the following effect:

> *"4.6. Without prejudice to any provision of the CDR Documents, this Guarantee and any Applicable Law for the time being in force, the Guarantor, hereby, waives in favour of the Security Trustee their rights against the Security Trustee and/ or any of their officers, agents, trustees or representatives, as may be necessary, to give effect to any of the provisions of this Guarantee. The Guarantor, hereby, waives in favour of the Security trustee all the suretyship and other rights which the Guarantors might otherwise be entitled to enforce, including but not limited to those arising under Sections 133, 134, 135, 139 and 141 of the Indian Contract Act, 1872."*

12. The letter of invocation dated 17.03.2018 provides:

> "*Reference is made to Deed of Personal Guarantee dated March 31, 2015 (the "Guarantee") executed by the Guarantor in favour of the Security Trustee, in respect of*

the Master Restructuring Agreement dated March 30, 2015.

We, hereby, demand that you pay an amount of Rs.9147.88 crores under the Guarantee to the following account within three (3) days from the date of this Certificate:

Capitalised terms used herein shall have the meaning given to them in the Guarantee."

13. Similarly, notice of Sale of Pledge Share was also issued on 21.03.2018 by Security Trustee.

14. The claim was filed in Form-C by the Appellant(s) relying on the aforesaid documents. The copy of the Deed of Personal Guarantee, Purchase Agreement and relevant letters were all part of the Claim Form. It is also relevant to notice that email dated 28.01.2021 by which the claim of the Appellant(s) as Financial Creditors has been rejected, which is to the following effect:

"Dear Mr. Gandhi,

This is with reference the captioned subject.

At the outset, we reiterate contents of my email dated 23rd June 2020.

Upon perusal of your letter dated 29th July 2020, we understand that in your letter you have acknowledged that no payment has been made by you with respect to the guarantee given for the borrowings of the Corporate Debtor and certain lenders have initiated against you before the Debts Recovery Tribunal, Ahmedabad to recover the debt of the Corporate Debtor/ invoked the guarantee furnished by you and have called upon to make payment of the debt owed to the Corporate Debtor.

In light of the above, please note that as per Clause 4.2 of the Guarantee dated 31st March 2015 ("Deed of Guarantee"), you have agreed that you shall neither be discharged nor shall your liability be affected by any act or thing or means whatsoever by which your said liability would have been discharged or affected if you had not been principal debtor.

Further as per Clause 13 of the Deed of Guarantee, the said guarantee shall remain in force and effect until the discharge in full of the Outstandings.

In light of the above, since (i) your liability under the Deed of Guarantee is of principal debtor, (ii) the Deed of Guarantee being co-extensive and co-terminus; (iii) you not being entitled to the benefit of subrogation vis-à-vis securities or otherwise until all the monies due to the Finance Parties under the restructured Facilities are fully repaid/ paid in accordance with Clause 3.6 of the Deed of Guarantee; and (iv) in the absence of any financial statements provided to us to show that any payments have been made by you pursuant to any order from the competent court directing you to pay the amount under the guarantee, we reiterate that we are unable to ascertain that <u>any debt is owed or due to you by the Corporate Debtor</u> and unable to ascertain from the records of the Corporate Debtor or financial statements provided to us that <u>you have disbursed any amount to the Corporate Debtor</u> which can be construed as a financial debt owed by the Corporate Debtor on the basis of the following.

As per Section 5(7) of the Code (Definitions), wherein the financial creditor means any person to whom a financial

debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

As per Section 3(10) of the Code (Definitions), wherein the creditor means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder.

As per Section 3(11) of the Code (Definition), a 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.

Further, as per Section 5(8) of the Code (Definition), a financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money. Please also note that as per Section 3(12) of the Code (Definition), default means 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 corporate debtor.

Also, we reiterate that you have not provided any financial statements showing that either the debt has been disbursed by you or any debt that has not been paid by the Corporate Debtor in accordance with Regulation 8(2)(iii) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Therefore, in light of the above, we are unable to admit your claim filed on 27th February 2020 for INR 91,826,085.077.46."

15. From the sequence of events as noted above, it is clear that Appellant(s) were Promoters of the Corporate Debtor, who had entered into

Purchase Agreement with Reliance Group, where Reliance Group had undertaken to discharge on the security of the Appellant(s), which admittedly had not yet taken place. After the loan restructuring, a Personal Guarantee dated 31.03.2015 was executed by Nikhil Gandhi, Bhavesh Gandhi and Corporate Guarantee has been issued by SKIL Infrastructure Ltd. along with Share Pledge Agreement dated 20.04.2015. To answer the issue as to whether the claim of the Appellant(s) was a claim of Financial Creditor, we need to look into relevant provisions of the Code. Section 3(6) defines the 'claim' and Section 3(10) defines the 'creditor', which are to the following effect.

> *"**3(6) "claim"** means –*
>
> *(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;*
>
> *(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;*
>
> ***(10) "creditor"** means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;"*

16. 'Financial Creditor' is defined in Section 5, sub-section (7) in following words:

*"**5(7)** "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;"*

17. Section 5(8) defines 'financial debt', which is to the following effect:

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

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialized equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

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

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

(i) any amount raised from an allottee under a real estate project shall be deemed to be an

amount having the commercial effect of a borrowing; and

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

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

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

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

18. The learned Counsel for the Appellant(s) has relied on Section 5(8)(h) of the Code to support the claim of the Appellant(s) as a 'Financial Creditor'. The learned Counsel for the Appellant(s) has also placed reliance on two judgments of the Hon'ble Supreme Court to support his submission of 'Financial Creditor', i.e., ***(2019) 8 SCC 416 – Pioneer Urban Land and Infrastructure Limited and Anr. vs. Union of India and Ors.***, wherein in paragraph 68, following has been laid down:

*"**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. The learned counsel for the petitioners relied upon the judgment in Union of India v. Raman Iron Foundry [Union of India v. Raman Iron Foundry, (1974) 2 SCC 231], and, in particular relied strongly upon the sentence reading : (SCC p. 243, para 11)

> *"11. … Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority.""*

19. The above was a case where various Writ Petitions were filed challenging the amendments made in the Insolvency and Bankruptcy Code, 2016 pursuant to a Report prepared by the Insolvency Law Committee dated 26.03.2018, by which amendments in respect of allottees of real estate were treated as "Financial Creditors". In the above context, above observations were made in paragraph 68 as noted above. Paragraph 66 of the judgment is also relevant, which is as follows:

> *"**66.** Section 5(8)(f) of the Code has been set out in the beginning of this judgment. What has been argued by the learned counsel on behalf of the petitioners is that Section 5(8)(f), as it originally stood, is an exhaustive provision which must be read noscitur a sociis, and if so*

read, sub-clause (f) must take colour from the other clauses of the provision, all of which show that the sine qua non of a "financial debt" is a loan of money made with or without interest, which must then be returned as money. This, according to the learned counsel for the petitioners, is clear from even a cursory reading of Section 5(8). Secondly, according to the learned counsel for the petitioners, by no stretch of imagination, could an allottee under a real estate project fall within Section 5(8)(f), as it originally stood and the Explanation must then be read prospectively i.e. only on and from the date of the Amendment Act. Several sub-arguments were made on the effect of deeming fictions generally and on the functions of an explanation to a section. Let us address all of these arguments."

20. The next judgment, which is relied by Appellant(s) is judgment of Hon'ble Supreme Court is ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. vs. Axis Bank Ltd. – (2020) 8 SCC 401***. The above was a case where Corporate Insolvency Resolution Process ("**CIRP**") was commenced against the Corporate Debtor namely Jaypee Infratech Limited (JIL). Another holding Company namely – Jaiprakash Associates Ltd. (JAL) filed its claim as a 'Financial Creditor' on the strength of the mortgaged created by the Corporate Debtor as collateral security of the debt of its holding company JAL. In the above case, the Hon'ble Supreme Court had occasion to consider the ingredients and conditions to be fulfilled for declaring a creditor as 'Financial Creditor'. The Hon'ble Supreme Court in para 33.1 noted the issue as to whether the lenders of JAL could be

categorized as Financial Creditors of JIL for the purpose of IBC. In the above context, after examining the facts of the case as well as earlier judgments of the Hon'ble Supreme Court in ***Pioneer Urban Land*** in paragraph 46, following was laid down with regard to essentials for 'Financial Debt' and 'Financial Creditors':

> *"**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 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."

21. It was categorically held that disbursal against the consideration for time value of money remains an essential part even in respect of any of the transactions referred to in Section 5(8), sub-sections (a) to (h).

22. Reverting to the facts of the present case, it is clear that the disbursal was made by CDR Lenders to the Corporate Debtor and the Appellant(s) before us were Personal Guarantors/ Corporate Guarantors to guarantee the repayment of Financial Facilities extended to the Corporate Debtor. We fail to see as to how the Guarantors will become a 'Financial Creditor' of the Corporate Debtor. The Appellant(s) who were Promoters of the Corporate Debtor had given guarantee for repayment of the debt and the relevant clauses of the Personal Guarantee we have already noticed above. Coming back to Section 5(8)(h), which is the sheet anchor of submission of Appellant(s) to be covered under Clause (h), the requirement is "*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" etc. The learned Counsel for the Appellant during his submission has categorically relied on Clause 5.10 of Purchase Agreement and submitted that Clause 5.10 contain counter-indemnity obligation of the Acquirer and the Corporate Debtor. The learned Counsel for the Appellant(s) has relied on following sentence in the Clause 5.10 – *"In the interim, the Acquirer and the Company agree to promptly reimburse and indemnify on demand the Founder Promoters for any loss suffered by the Founder Promoters on account of enforcement of any Disclosed Founder Promoter Guarantees or any other guarantors as Disclosed to the Acquirer provided by them to the Lenders (in respect of a loan/ facility in favour of the Company and/ or its subsidiaries)".*

23. When we look into Section 5(8)(h), the counter-indemnity obligation has to be in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument. The financial claim has been filed by the Appellant(s) for invocation of guarantee dated 31.03.2015 and 30.03.2015, which is specifically mentioned in Form-C. Clause 5.10 in the Purchase Agreement dated 04.03.2015 cannot be read to be any counter-indemnity obligation in respect to guarantee dated 31.03.2015 and 30.03.2015. Since the Guarantee was not even existent when Purchase Agreement dated 04.03.2015 was executed. Thus, pre-condition for applicability of Section 5(8)(h) is not fulfilled in the facts of the present case. When the specific case of the Appellant is on the basis of invocation of the guarantee dated 31.03.2015 and 30.03.2015, the Appellant(s) cannot rely on Clause 5.10

to satisfy the condition of existence of any counter-indemnity obligation in respect of a guarantee. We, thus, are clearly of the opinion that Clause 5(8)(h) is not attracted in the facts of the present case. It is further to be noted that even if we look into Clause 5.10, the obligation of the Acquirer and the Company agree to promptly reimburse and indemnify on demand the Founder Promoter was "for any loss suffered by the Founder Promoter on account enforcement of any other guarantors as disclosed to the Acquirer provided by them to the Lenders". The Resolution Professional has clearly noticed that Appellant(s) has admitted by sending an email stating that till date they have not made any payments towards invocation of the Guarantee. Thus, even Clause 5.10 could not have been relied by the Appellant(s), since they have not suffered any loss, since no payments have been made by them till date.

24. The learned Counsel for the Appellant(s) has relied on judgment of this Tribunal in ***(2017) SCC OnLine NCLAT 531 – Dr. B.V.S. Lakshmi vs. Geometrix Laser Solutions Private Limited***. In the above case, the Appellant has come up with a case that it had advanced to the Respondent an amount of Rs.91,47,864/-. This Tribunal considered the definition of 'Financial Debt' and has upheld the finding of the Adjudicating Authority that Appellant was not 'Financial Creditor'. In paragraphs 29, 30 and 31 following has been observed:

> *"**29.** For 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 alongwith interest, if any, which has been disbursed and*

(ii) such disbursement has been made against the 'consideration for the time value of money'. Thereby, if the Claimant claims to be 'Financial Creditor' he will have to show that debt is due which he has disbursed against the 'consideration for the time value of money' and that the borrower has raised the amount directly or through other modes like credit facility or its de-materialised equivalent, note purchase facility or the issue of bonds, notes, debentures, loan stock or any other similar instrument. 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 can also be referred to by the Creditor to claim that there is a 'financial debt' due to him which has been disbursed against the 'consideration for the time value of money'.

To show that there is a debt due which was disbursed against the 'consideration for the time value of money', it is not necessary to show that an amount has been disbursed to the 'Corporate Debtor'. A person can show that the disbursement has been made against the 'consideration for the time value of money' through any instrument. For example, for 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 for which only the market value of such transaction shall be taken into account, it is not necessary to show that amount has been disbursed. The disbursement against the 'consideration for the time value of money' is the main factor.

> ***30.*** *In the present case, the Appellant has failed to bring on record any evidence to suggest that she disbursed the money has been made against 'consideration for the time value of money'. There is nothing on the record to suggest that the Respondents borrowed the money. In absence of such evidence, the Appellant cannot claim that the loan if any given by the Appellant comes within the meaning of 'financial debt' in terms of sub-section (8)(a) of Section 5 of the 'I&B Code'.*
>
> ***31.*** *The Appellant has also failed to show that the amount has been raised by Respondent under any other transactions, such as sale or purchase agreement, having commercial effect of borrowing. In absence of any such evidence, the Appellant cannot claim that loan amount, if any given to the Respondent comes within the meaning of 'financial debt', as defined under sub-section (8)(f) of Section 5 of the 'I&B Code'.*

25. We fail to see as to how the above case support the contention of the Appellant(s) in any manner. The next judgment which has been relied by the Appellant(s) is judgment of this Tribunal in ***(2018) SCC OnLine NCLAT 465 – Export Import Bank of India vs. Resolution Professional of JEKPL Private Limited***. In the above case, the Adjudicating Authority considered the Appeals filed by Export Import Bank of India as well as Axis Bank Limited. The Export Import Bank of India had filed their claim as 'Financial Creditor' in the CIRP of one JEKPL Ltd. The claim was rejected by the Adjudicating Authority against which Appeals were filed. Axis Bank had filed their claim in the CIRP of Corporate Debtor – Edu Smart Services Private Limited. We may first notice the case of the Axis Bank. The Axis

Bank had filed claim in Form-C on the basis of Corporate Guarantee executed by Edu Smart Services Private Limited in favour of the Security Trustee. The Corporate Guarantee was invoked and claim was filed. In the above case, both Export Import Bank of India and Axis Bank had disbursed the amount and to secure the amount, the Corporate Guarantee was given, which was invoked. It was Financial Creditor who has filed their claim, which was accepted by this Tribunal holding it to be 'Financial Debt'. The learned Counsel for the Appellant(s) referred to paragraphs 53 to 56, where this Tribunal laid down following:

> *"**53.** Duties of Interim Resolution Professional have been prescribed under Section 18 and as per clause (b) therein the Interim Resolution Professional is required to receive and collate all the claims submitted by creditors to him pursuant to the public announcement made under Section 13 r/w Section 15. The claim of the parties should be as on the date of initiation of the Corporate Insolvency Resolution Process (date of order of admission and moratorium). Any person who has right to claim payment, as defined under Section 3(6), is supposed to file the claim whether matured or unmatured. The question as to whether there is a default or not is not to be seen.*
>
> ***54.** Therefore, stand taken by the respondents that the claim has not been matured cannot be ground to reject the claim.*
>
> ***55.** Section 25 provides the duties of Resolution Professional. As per Section 25(2)(e), the Resolution Professional is required to maintain an updated list of all the claims. Aforesaid fact also suggests that the maturity of a claim or default of debt are not the guiding factors to be*

noticed for collating or updating the claims. The matter can be looked from another angle. It is only in case of 'debt' and 'default', a 'Financial Creditor' or 'Operational Creditor', may file applications under Section 7 or 9. The 'Corporate Applicant' has also right to file application under Section 10 for initiation of Corporate Insolvency Resolution Process against itself, if it has defaulted to pay the 'debt'. It does not mean that the persons whose debt has not been matured cannot file claim. The 'Financial Creditors' or 'Operational Creditors' or 'secured or unsecured creditors' all are entitled to file claim.

56. *Therefore, we hold that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of claim pursuant to public announcement made under Section 13(1)(b) r/w Section 15(1)(c) or for collating the claim under Section 18(1)(b) or for updating claim under Section 25(2)(e). For the purpose of collating information relating to assets, finances and operations of Corporate Debtor or financial position of the Corporate Debtor, including the liabilities as on the date of initiation of the Resolution Process as per Section 18(1), it is the duty of the Resolution Professional to collate all the claims and to verify the same from the records of assets and liabilities maintained by the Corporate Debtor."*

26. The learned Counsel for the Appellant(s) on the basis of the aforesaid judgment of this Tribunal submits that it is not necessary that claim may be matured on the date when claim is filed. The claim can be filed even if it is unmatured claim. In the facts of the present case, the Personal Guarantee and the Corporate Guarantee both were invoked and in the

present case, the claim was founded by the Appellant(s) on the basis of Clause 5.10, which specifically provided for indemnification by Acquirer of the Corporate Debtor in event of suffering loss by Guarantor. Hence, on the facts of the case, it is clear that no loss has been suffered by the Appellant(s), since no payments have been made. Thus, it was rightly held by Adjudicating Authority that under Clause 5.10 also, the case is not covered. The judgment of this Tribunal in above case, was not a case where Guarantors have filed any claim as a 'Financial Creditor'. Rather, in the above case, Financial Institutions, who had disbursed the amount had filed the claim on the basis of Guarantee against CIRP of the Guarantor. Thus, in the facts of that case, this Tribunal held that both Export Import Bank of India and Axis Bank were 'Financial Creditors'. Whereas, present is a case, which is not filed by Financial Institutions as Financial Creditor, rather it is Promoters of the Corporate Debtor, who have extended the Personal Guarantee and the Corporate Guarantee who have filed their claims, which has rightly been rejected.

27. Another judgment which is relied by the learned Counsel for the Appellant of this Tribunal is ***Andhra Bank vs. M/s Hammerle Textile Ltd. (2018) SCC OnLine NCLAT 883***, where again this Tribunal held that it is not necessary that all the claims submitted by the creditor should be a claim matured on the date of initiation of Resolution Process. There can be no quarrel with the proposition laid by this Tribunal in the above case, however, in the facts of the present case, we have held that the ingredients as required under Section 5(8) for declaring a Claimant as 'Financial

Creditor' are not satisfied. The claim of the Appellant(s) is not a financial claim.

28. The learned Counsel for the Appellant(s) as well as Respondent have placed reliance on a judgment of Justice Chagla in ***(1942) Indian Law Reports 670 – Ganjanan Moreshwar Parelkar vs. Moreshwar Madan Mantri*** (Bombay High Court). The Bombay High Court in the above case had occasion to consider Section 124 and 125 of the Indian Contract Act, 1872. It has been held that such broad proposition of law that in no case can an indemnity-holder maintain an action against an indemnifier unless he has suffered actual loss can be accepted. Before the High Court an earlier judgment of the Bombay High Court in ***Shankar Nimbaji vs. Laxman Sapdu*** was cited. In the earlier judgment, the Bombay High Court had held that under a contract of indemnity the cause of action arises when the damage which the indemnity is intended to cover is suffered. It is useful to notice following observations of Justice Chagla while referring to earlier judgment in Shankar Nimbaji vs. Laxman Sapdu:

> *"Mr. Tendulkar has further relied on two decisions, one of our Court and the other of the High Court of Calcutta. In Shankar Nimbaji v. Laxman Supdu [(1939) 42 Bom. L.R. 175.] an appellate bench of this Court held that under a contract of indemnity the cause of action arises when the damage which the indemnity is intended to cover is suffered, and a suit brought before actual loss accrues is premature. The proposition of law stated in these wide terms undoubtedly supports the arguments of Mr. Tendulkar. But if one examines the facts of that case, the decision there did not require the enunciation of the law in*

these very extensive terms, and I am not prepared to extend the principle of that case beyond the facts proved there and for the decision of which it was necessary. The facts of that case were that one Supdu used to deposit monies with defendant No. 2. After the death of Supdu, defendant No. 2 withdrew Rs. 5,000 from Supdu's khata and lent them to defendant No. 1 on a mortgage bond in his own favour. The plaintiffs, who were the sons of Supdu, protested against this and after some correspondence, defendant No. 2 passed a promissory note for Rs. 5,000 in favour of the plaintiffs. The plaintiffs then filed a suit to recover Rs. 5,000 and interest from defendant No. 1 by sale of the mortgaged property and in case of deficit prayed for a decree against the estate of defendant No. 2 which was in the hands of his sons, defendant No. 2 having died during the pendency of the suit. On these facts the Court held that the plaintiffs could not sue the defendants in anticipation that the proceeds realised by the sale of the mortgaged property would be insufficient and there would be some deficit left. The Court construed the promissory note as an indemnity given by defendant No. 2 to the plaintiffs in case any loss was caused to them by his unauthorised meddling with their money. As pointed out in the judgment, it was open to the plaintiffs to repudiate the mortgage transaction altogether and claim the whole of the amount from defendant No. 2, leaving him to file a suit against defendant No. 1 to recover the mortgage amount; but the plaintiffs chose to accept that mortgage transaction and to treat defendant No. 2 as their benamidar and, therefore, all that they claimed to recover from defendant No. 2 was the loss, if any, that they might suffer in consequence of the mortgage transaction. It is, therefore, clear that if the plaintiffs

recovered their full claim from the mortgaged property, defendant No. 2 would not be liable at all and, therefore, till the mortgaged property was sold and the deficit, if any, ascertained it was impossible to say whether the plaintiffs had suffered any loss which defendant No. 2 could be called upon to indemnify. Therefore, on the peculiar facts of that case it was necessary that the plaintiffs should suffer actual loss before they could maintain their action on the indemnity. But I am not prepared to read this judgment to mean that in no case can an indemnity-holder maintain an action against an indemnifier unless he has suffered actual loss."

29. From what has been laid down by the Bombay High Court in the above case, it is clear that in facts of a particular case action can be held to be premature till damages are suffered. The present is a case where the specific Clause 5.10 on the basis of which a claim has been founded by the Appellant, specifically contemplate "....*promptly reimburse and indemnify on demand the Founder Promoters for any loss suffered by the Founder Promoters on account of enforcement of any Disclosed Founder Promoter....*". When we look into the above Clause 5.10, the Adjudicating Authority is right in its conclusion that since the Appellant has not suffered any loss, they cannot maintain any claim. The judgment of Justice Chagla does support the submission of learned Counsel for the Respondent that in facts of a particular case, claim cannot be filed unless the loss is suffered.

30. We have already noticed one of the clauses in the Personal Guarantee, i.e. Clause 4.6 under which Guarantor waives in favour of the Security Trustee all the suretyship and other rights, which the Guarantors

might otherwise be entitled to enforce, including but not limited to those arising under Sections 133, 134, 135, 139 and 141 of the Indian Contract Act, 1872. It was not open for the Appellant(s) to file any claim in view of the specific Clause 4.6. Hence, the claim was liable to be rejected on this ground also.

31. We are, thus, satisfied that condition for declaring the Appellant(s) as 'Financial Creditor' are not satisfied in the claims submitted by the Appellant(s) and both Resolution Professional and Adjudicating Authority have rightly rejected their claims as 'Financial Creditor' for valid reasons. No grounds have been made out to interfere with the impugned judgment. All the Appeal(s) are dismissed. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

14th October, 2022

Ashwani