



BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH-II

I.A. (IB) No. 1054/KB/2020
IN
TP(IBC)/1/(KB)/2023
(C.P. (IB) No. 771/(KB)/2020)

In the matter of:

Raiyan Hotels and Resorts Pvt. Ltd.

... Applicant

-versus-

Unrivalled Projects Private Limited

... Respondent

Date of hearing: 26/04/2022
Order Reserved on : 01/05/2023
Order pronounced on: 08/05/2023

Coram:

Mrs. Bidisha Banerjee, Member (Judicial)

Counsels appeared through physically/ Video Conference:

Mr. Dhruva Mukherjee, Sr. Adv.] For the Applicant
Mr.Kumar Anurag Singh,Adv.]
Mr.Prateek Gupta,Adv.]
Mr.Manju Nagrath, Adv.]
Mr.A Badar,Adv.]
Mr.Zain A Khan, Adv.]

Mr.Abhrajit Mitra,Sr.Adv.] For the Respondent
Mr.Shaunak Mitra,Adv.]
Mr.Bishwajit Kumar, Adv.]
Mr.Debayan Sen,Adv.]

ORDER

Per: **Bidisha Banerjee, Member (Judicial)**

1. On being referred to by the Hon'ble President NCLT in exercise of powers under section 419(5) of the Companies Act, the Ld. Senior Counsel/Counsels for both sides were heard *in extenso* by the present Third Member on account of and in order to



resolve the difference of opinion of the Hon'ble Members who dealt with matter in the Division Bench.

2. The summation and summarisation of the claim of Raiyan Hotels and Resorts Pvt. Ltd. (“**Applicant**”) is that it is a Financial Creditor of Unrivalled Projects Pvt. Ltd. (“**UPPL**” the respondents herein). The alleged claim in the section 7 application (“**the Application**”) is on account of alleged unpaid consideration for purchase of an immovable property at 5A, Royd Street (“**the property**”) by UPPL from the Applicant.
3. The Hon'ble Judicial Member while dealing with the matter noted the following, which is extracted hereunder with supplied emphasis for clarity:

“ Arguments of Mr. Dhruva Mukherjee, learned Senior Counsel for the Financial Creditor.

- i. *The Case of the Financial Creditor is that the Corporate Debtor approached the Financial Creditor to purchase rights, title and interest of the premises no. 5A, Royd Street, Kolkata-700016 admeasuring about 30 cottahs 15 chittacks and 7 square feet together with building/structures. An indenture (sale agreement was entered into between the Financial Creditor and the Corporate Debtor dated 27.09.2014 for a total consideration of Rs.21,60,000/-. It is submitted that the Corporate Debtor made a payment of Rs.8,21,00,00, 000/-, thereafter the Corporate Debtor defaulted in making payments as per the schedule in the sale agreement.*
- ii. *Ld. Senior Counsel for the Financial Creditor submits that the financial debt claimed as on 01/05/2020 is Rs.13,24,14,700/- (Rupees Thirteen Crore Twenty-Four Lakh Sixteen Thousand and Seven Hundred only). It is further submitted that the date of default is Rs.28.12.2017, which is the date of acknowledgement of liability and payment of Rs.1,00,000/- to the Financial Creditor.*
- iii. *The Financial Creditor has proposed the name of Mr.Ajay Goyal, Regn. No.IBBI/IPA-001/IP-P01083/2017-18/11783 as the Interim Resolution Professional of the Corporate Debtor”.*



4. It is evident from the order extracted supra that the issues raised by the applicant were the following :

- i. Raiyan Hotels & Resorts Pvt. Ltd., the applicant is the alleged financial creditor.
- ii. The matter relates to sale of a property i.e. purchase of rights, title and interest of the premises no.5A, Royd Street, Kolkata-700016 admeasuring about 30 cottahs 15 chittacks and 7 square feet together with building/ strictures, for which an indenture (sale agreement) was entered into between the applicant and the respondent on 27.09.2014 for a total consideration of Rs.21,60,00,000/- to be paid in tranches in 2015.
- iii. Matter relates to a “financial debt”, claimed as on 01.05.2020, of Rs.13,24,16,700/-
- iv. The date of default is 28.12.2017 which is the date of acknowledgement of liability upon payment of Rs.1,00,000/- by the respondent to the Financial Creditor (the applicant)

5. The order further records “Arguments of Mr. Abhrajit Mitra, Learned Senior Counsel for the Corporate Debtor” as under; (extracted with supplied emphasis for clarity)

- i. *“ The Learned Senior Counsel for the Corporate Debtor submitted that the petitioner is not a Financial Creditor and the debt does not under the definition of financial debt as provided under section 5(8) of the Code. It is submitted that the basic condition under section 5(8) of the Code is that a financial debt must be a debt which is disbursed. It is further submitted that in the present matter, no money has been disbursed by the Financial Creditor. Reliance has been on **Nikhil Mehta & Sons vs. AMR Infrastructure Ltd.***
- ii. *It is submitted that the alleged claim related to the sale of a property for a consideration of Rs.21,60 Crore out of which Rs.8.21 Crore was paid as reflected in the sale agreement. Thereafter, the entire balance amount has been paid by the Corporate Debtor through RTGS transactions to the Financial Creditor. The learned Senior Counsel for the Corporate Debtor submits that due to the internal disputes in the management of the financial creditor hence the last and final tranche of payment could be made on 30.12.2015 after the disputes were settled.*



- iii. *It is further submitted that an agreement for Assignment of Tenancy was executed on 27/09/2014 and the Corporate Debtor made a payment of Rs.79,00,000/- (Rupees Seventy-Nine Lakh) to the tenant which was to be adjusted out of the Consideration to be paid to the financial creditor.*
- iv. *It is averred that the Company Petition is barred by limitation as the last payment was made in 2015 and no payment has been made on 12.12.2017.It is further submitted that the Financial Creditor has suppressed several facts and has not come with clean hands. It is further submitted that the payment of Rs.1,00,000/- on the basis of which this Company Petition has been filed was not made to the Financial Creditor but the said payment was made to Partha Sarathi Dey and hence the Company Petition is ex-facie barred by limitation.*
- v. *The Learned Senior Counsel asserts that the Company Petition is not complete as per the Code. The Board Resolution filed along with the Company Petition is not proper, it is further asserted that the Director, Partha Sarathi Dey who has filed the Company Petition is not eligible to file the Company Petition as he is a disqualified director. Mr. Mitra relied on the master data of the Financial Creditor in support of his contention that Mr. Partha Sarathi Dey was not a Director of the Financial Creditor at the relevant time. It is further submitted that Form 2 has not filed along with the Company Petition.*
- vi. *It is further stated that the Financial Creditor has suppressed the facts that payments have been made in the account of the Financial Creditor maintained with the HDFC Bank. The Financial Creditor has bank accounts in three Banks, i.e. HDFC Bank, Indian Bank and Indian Overseas Bank, but the Financial Creditor now claims that the Financial Creditor has only two Bank accounts and is misleading the Adjudicating Authority.*

6. The above extract from the order further demonstrates that the respondents had categorically contested the claim on the following grounds that :

- i. The petitioner is not a Financial Creditor.



- ii. The debt does not come under the definition of “financial debt” under section 5(8) of the Code, as no money has been disbursed by the petitioner.
- iii. The alleged claim related to the sale of a property for a consideration of Rs.21.60 Crore out of which Rs.8.21 Crore was paid as reflected in the sale agreement. The balance payments were to be made in tranches within 30.02.2015 and entire payment has been made by 30.12.2015 and therefore no payment is due.
- iv. The company petition preferred in the year 2020 is barred by limitation as the last payment was made in 2015 and no payment has been made on 12.12.2017 as alleged.
- v. The Company Petition is not complete as per the Code, for want of proper authorization of Partha Sarathi Dey (disqualified Director) and want of Form 2.
- vi. The Financial Creditor has suppressed the facts that payments have been made in the account of the Financial Creditor maintained with the HDFC Bank.
- vii. The Board resolution dated 20.07.2020 authorizing Mr. Partha Sarathi Dey to file the Company Petition has not been certified. It has been signed by Mr. Partha Sarathi Dey and not by other Directors and hence it is invalid.

7. The Analysis and Findings by the Hon’ble Judicial Member is as follows:

- i. *It is paramount that the maintainability of the Company Petition is considered before considering the merits of the Company Petition. The Corporate Debtor alleges that Partha Sarathi Dey has committed perjury and has filed the Company Petition despite the fact that he was disqualified as a Director by the RoC with respect to the India Reforms Infrastructure Limited. The Hon’ble High Court at Delhi in **Mukut Pathak &Ors. v. Union of India and Anr.** has settled this proposition and C.P. (IB) No. 771/KB/2020 Page 9 of 13 and held that on a plain reading of section 164(2) of the Companies Act, 2013, it is clear that the disqualification under section 164(2) does not affect the functioning as a director in companies, in which he held office before the date of*



disqualification. It is seen that the Writ Petition (Civil) No.10876 of 2020 filed by Partha Sarathi Dey was disposed after considering Mukut Pathak &Ors. (supra). **Considering the above we are satisfied that the Partha Sarathi Dey can function and perform his duties as a director of the Financial Creditor.** Therefore, the contention of the Corporate Debtor, that Partha Sarathi Dey had no locus to file the Company Petition is not sustainable in law and hence, the I.A. filed by the Corporate Debtor is dismissed.

- ii. Secondly, on bare perusal of the Company Petition and Board Resolution dated 20.07.2020, it is observed that the signatures in the Board Resolution and the Company Petition have not been scribed directly but have been pasted on a later date. Further the affidavit verifying the Company Petition has been affirmed on 16.08.2020, which has not been notarised, whereas as per records the Company Petition was filed before this Bench on 11.08.2020. Further, the Affidavit in support of the Application has been verified in Delhi but the address of the Deponent is that of Kolkata and no alternate or temporary address has been provided in the said affidavit. 24. The Financial Creditor had filed an application seeking extension of time for filing written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy [Application to Adjudicating Authority] Rules, 2016 along with a copy of registration due to the restrictions imposed by the Government of West Bengal but the same has not been filed in the record till date, therefore the Company Application is not complete in terms of section 7 of the Code.
- iii. The proviso to section 7(5) provides that the Adjudicating Authority shall give notice to the Applicant (Financial Creditor) to rectify the defect in the Company Petition and the Financial Creditor is bound to rectify the same within seven days of receipt of the said notice. The observations mentioned above can be rectified, but it is imperative on the part of the Counsel or Authorised Representative to be more vigilant so that these mistakes do not arise in the near future.
- iv. The Petition was heard and reserved for order on 09.07.2021 but on perusal of the records the above mentioned observations were made.



Hence, clarification was sought by this Adjudicating Authority on 10.08.2021 with regard to the above points and the Financial Creditor have filed an affidavit affirmed on 16,08,2021 wherein the Financial Creditor has submitted that the Petition was filed during the period when restrictions were imposed by the Government due to the Covid-19 pandemic hence, the Form 2 could not be submitted initially. The Financial Creditor has filed a Form 2, along which is annexed with the affidavit. It is further submitted that there had been an error in the calculation of the total amount of debt due to the Petitioner, hence, the amounts are different in the Petition filed on 21.08.2020.

- v. It is further submitted that the Petition under section 7 of the Code was initially filed by Mr. Deep Ghosh who was authorised by the Financial Creditor. However, after certain defects were pointed out by the registry, an affidavit was filed by Mr. Partha Sarathi Dey who also filed the Petition and it is submitted that the defective pages of the affidavit were replaced and the affidavit was sworn by Mr. Partha Sarathi Dey on 21.08.2020.
- vi. The explanation given, though not satisfactory can be accepted, but it is also to be noted that initially in Part III of the Form, the name of Mr. Ajay Goyal was proposed as the Interim Resolution Professional and without any permission or application for change in the name of the proposed Interim Resolution Professional, the Petitioner has proposed the name of Ms. Sonu Jain in affidavit affirmed on 16.08.2021. No explanation has been given by the Petitioner explaining the reason for change in the name of the proposed Interim Resolution Professional. This casual behaviour on the part of the Petitioner towards filing the present Petition is rather appalling.
- vii. Going into the merits of the case, the fact that the Corporate Debtor purchased the right, title, and interest of 5A, Royd Street, Kolkata700016 admeasuring about 30 cottahs 15 chittacks and 7 square feet together with building/structures is not in dispute.
- viii. The Corporate Debtor contends that the entire consideration amount has been paid and the Financial Creditor disputes the same, but no proper documents have been filed by the Corporate Debtor in corroboration of



its contention that the entire payment has been made hence, we are not able to verify the same.

- ix. *The Financial Creditor has relied on the payment of Rs.1,00,000/- made on 12.12.2017 as the last date of default, and on perusal of the records of the Financial Creditor, it is pertinent to note that the payment has been made in the account of Partha Sarathi Dey maintained with the Axis Bank10, hence the question that piques our mind is that if all the debts were paid as contented by the Corporate Debtor then why would the Corporate Debtor transfer an amount to Partha Sarathi Dey.*
- x. *This, therefore, is a pointer towards acknowledgement of liability, though paid to the wrong account, hence the petition has been filed within limitation and there is a debt and a default”.*

(emphasis added for clarity)

8. While Hon’ble Member (Technical) has opined as under:

- i. *During arguments, the learned Counsel had raised the issue of six Cheques dated 30 September 2015 and had submitted that the entire balance dues had been paid.*
- ii. *With regard to the Petition, the board resolution appended with the petition does not carry the stamp of the Financial Creditor and is not even on the letter head of the company. In such circumstances, the petition should not be considered due to lack of proper authorization.*
- iii. *Further, in order to extend the limitation under section 18 of the Limitation Act, 1963, the acknowledgement has to be made in writing by the Corporate Debtor, whereas in the instant case the money has been deposited not in the account of the Financial Creditor but in the account of one of the directors of the Financial Creditor. No written acceptance is available on record which could be regarded as an acceptance of liability which then can be used to extend the limitation.*
- iv. *However, the assertion that the said pittance of Rs.1,00,000/- was deposited by the Corporate Debtor, which “coincidentally” is timed so as to extend the limitation period, is too much of a coincidence. This deposit makes it look as if the petition is collusive and is filed so as to avoid returning the loan of ICICI by the Financial Creditor. Anyhow the question that fogs our mind is whether a payment made in some other*



account can be taken as an acceptance of the liability by the Corporate Debtor. (emphasis added)


9. The order records the difference of opinion as under:

“38. There is a difference of opinion between the Members of the Bench for the following points:

- a. Whether the Petition made by the Financial Creditor is complete in all aspects?*
- b. Whether the deposit of Rs.1,00,000/- in the account of the Director can be considered as acknowledgement of debt or not?”*

10. The extract from the order above would exemplify and demonstrate that the Hon’ble Judicial Member had already noted the following defects in the CP:

- a. “Signatures in the Board Resolution and the Company Petition have not been scribed directly but have been pasted on a later date.”*
- b. “The affidavit verifying the Company Petition has been affirmed on 16.08.2020 which has not been notarized”, whereas “ the affidavit verifying the Company Petition was filed before this Bench on 11.08.2020”, which demonstrates that it was filed on 11/08/2020 before any affirmation which alone would have resulted in rejection of the application.*
- c. It is further records, “the Affidavit in support of the Application has been verified in Delhi but the address of the Deponent is that of Kolkata” and “no alternate or temporary address has been provided in the said affidavit”.*
- d. “The Financial Creditor had filed an application seeking extension of time for filing written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy [Application to Adjudicating Authority] Rules, 2016. The same has not been filed in the record till date, therefore the Company Application is not complete in terms of section 7 of the Code”.*
- e. “There had been an error in the calculation of the total amount of debt due to the Petitioner; hence, the amounts are different in the Petition filed on 21.08.2020”.*
- f. “The Petition under section 7 of the Code was initially filed by Mr. Deep Ghosh who was authorised by the Financial Creditor. However after certain defects was pointed out by the Registry, an affidavit was filed by Mr.*



Partha Sarathi Dey who also filed the Petition and it is submitted that the defective pages of the affidavit were replaced and the affidavit was sworn by Mr. Partha Sarathi Dey on 21.08.2020.

That apart the following lapses are also noticed:

- i. The affixing on stamp paper is dated 16/08/2020, which clearly shows that the petition was filed on 11/08/2020 without any valid affirmation as stamp paper was purchased subsequently on 16/08/2020. This defect ought not to have been allowed to be rectified;
- ii. The daily order dated 10/08/2021 reveals that, the defects as above on being noted were allowed to be rectified and a supplementary affidavit was called for on 10.08.2021.
- iii. With full knowledge that the petition was filed on 11/08/2020 without affirmation, no form 2 was filed despite opportunities, there were errors in figures, the matter was heard out.
- iv. There is no finding of fact that the payment made on 12/12/2017 to the personal account of Partha Sarathi Dey, for whatever reasons, was a payment made in acknowledgement of liability towards the Applicant company that would extend the period of limitation;
- v. There is no conclusive finding whether Partha Sarathi Dey (the disqualified Director) as on 21.08.2020 could represent the Applicant Company as an authorized representative in absence of a valid board resolution authorizing him as such, particularly when his disqualification order was in force as on 21.08.2020.
- vi. The order also misses that the Members were fully satisfied that the defects have been rectified subsequently and, therefore, the petition was complete.

Yet the Hon'ble Judicial Member opines "*it is filed within limitation and there is a debt and default*".

11. The Hon'ble Technical Member on the other hand having noted the defects has opined as under:



- i. *“ During arguments, the learned Counsel had raised the issue of six Cheques dated 30 September 2015 and had submitted that the entire balance dues had been paid”.*
- ii. *The board resolution appended with the petition does not carry the stamp of the Financial Creditor and is not even on the letter head of the company. In such circumstances, the petition should not be considered due to lack of proper authorization”.*
- iii. *“ Anyhow the question that fogs our mind is whether a payment made in some other account can be taken as an acceptance of the liability by the Corporate Debtor”.*

12. It is evident therefore that the Hon’ble Technical Member had expressed his hesitation to agree with the analysis and findings given by the Hon’ble Judicial Member on the following:

- i. Existence of any debt, that is due;
- ii. Lack of proper authorization was a curable defect and that it was cured;
- iii. Acknowledgment of any liability with the pittance of Rs. 1,00,000/- on 12.12.2017 which would to cure the delay in approaching this Forum;

Before an order admitting or rejecting the petition could be made the Hon’ble Member differed in their opinion.

13. It is further evident that both the Hon’ble Members delved into each and every contention raised by the applicant and objections ventilated by the respondents, barring the sole contention that the transaction in question or the alleged claim of the applicant does not come within the definition of “financial debt”

Section 5(8) of the IBC defines a financial debt as –

“a debt along with 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 de-materialised 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.*
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 meaning 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, bond, documentary letter of credit or any other instrument issued by a bank or financial institution.*
- (i) *The amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;*

Ld. Senior Counsel Mr. Abhrajit Mitra appearing for the respondent while placing the above position, would vociferously argue that under no circumstances can the alleged claim of the Applicant be termed as a “financial debt” within the meaning of section 5(8) of the Code.

14. The Ld. Sr. Counsel would articulate as under:

- (i) That the definition in section 5(8) is an exhaustive definition and the opening words are:-



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

...”


- (ii) Thus, the basic condition under section 5(8) of the Code is that it must be a debt “which is disbursed”. In the present case, there is no money disbursed by the Applicant.
- (iii) The Applicant is simply claiming alleged balance / unpaid sale consideration for immovable property from UPPL. The transaction is a simpliciter conveyance of immovable property and nothing more, which cannot by any stretch of imagination be termed as a “financial debt”.
- (iv) Further, in the Application, section 5(8)(f) of the Code as is relied on by the Applicant, is of no assistance. In terms of Sub-clause (f) of section 5(8) of the Code provides for financial debt and includes the following:-

“(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);]

- v. Ld. Counsel would contend that in the present case, no “amount raised” and no transaction “having the commercial effect of a borrowing” is evident. Reference is made to *Nikhil Mehta & Sons Vs. AMR Infrastructure Ltd.* MANU/NL/0041/2017.
- vi. It is contended that in a completely *malafide* manner, without any pleadings, oral argument has been advanced from the Bar on behalf of the Applicant that there are “allottees” in the property. Without prejudice to the fact that this is a baseless assertion without a shred of evidence, it is stated that in



any event, the said assertion cannot improve the case of the applicant on the aspect of any alleged financial debt being due.

15. By way of written arguments Ld. Counsel for the applicant would allege that;
- a. The grounds relied upon by the Applicant/ Corporate Debtor are misconceived, based on forged documents/ unidentified documents and are liable to be rejected at the outset.
 - b. The Respondent-Corporate Debtor cannot take plea that the sum of Rs.1,00,000/- was paid in the account of one Mr.Partha Sarathi Dey, Director (who is a third Party).The Respondent has already taken a plea that towards debt a sum of Rs.79,00,000/- (Rupees Seventy Nine Lakhs only) was paid to the tenant on 24.01.2015 (a third party) on the instruction of Mr. Partha Sarathi Dey (Page 108@ Pge 111 of the Reply to main petition).Thus, it is clear that as part payment of Debt, apart from direct payment in the Account of the Financial Creditor, the Respondent-Corporate Debtor also paid in account of third parties on the instruction of the Director of the Financial Creditor- Mr. Partha Sarathi Dey.
 - c. The Hon'ble Supreme Court in "**Innoventive Industries Ltd.**).While dealing with Section 7, held:

“28.... It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that **the Corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact.** The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete.
 - d. Loan Account of Corporate Debtor [pg. 103 of Reply Affidavit of Corporate Debtor), ICICI Bank has shown that on 30.09.2015 a sum of Rs.8 Cr. was disbursed in Loan Account of the Corporate Debtor. The Account further shows that on the same date, i.e. 30.09.2015, 8 cheques [Chq. Nos. – 700819, 700198,701194,701193,700191,701195, 791196, 701197] were issued by Corporate Debtor, and a total sum of Rs.7,93,21,130/- was debited on the same date i.e.30.09.2015. In the Bank Account Statement of the Financial Creditor, as



enclosed with the Sur-Rejoinder amounts have been shown to be deposited by Pay orders on the following given dates:-

Date	Details	Amount
10.12.2015	Pay Order No.701193	Rs.55,00,000/-
16.12.2015	Pay Order No.701194	Rs.1,25,00,000/-
24.12.2015	Pay Order No.701195	Rs.1,25,00,000/-
30.12.2015	Pay Order No.701197	Rs. 56,00,000/-
30.12.2025	Pay Order No. 701196	Rs.2,00,00,000/-

There is no entry for the alleged payment of Rs.1,00,00,000/- dated 14.10.2015

16. As against the above, Ld. Counsel for the Respondent would argue that the Applicant has wrongfully alleged that part payment of Rs.1 lac was made by UPPL to the Applicant on 12th December,2017. Whereas, records would show that such payment was totally an unrelated one and was made not to the Applicant but to Partha Sarathi Dey in his personal capacity and in his personal account. That in fact, in the application at page 80 where particulars of payments received by the applicant from UPPL have been detailed such payment of Rs.1 lac on 12th December,2017 is not even reflected. Further that, Despite this being specifically pointed out in the reply, the applicant has failed to deal with it in the Rejoinder.

17. Ld. Sr. Counsel for the Respondent in addition to the oral arguments would put forth his written submission to defend his stand to submit that;

- i. In a shocking attempt to obfuscate and mislead a false allegation has been made in page 6 of the written submissions handed up by the Advocates for the applicants in course of the hearing before this Adjudicating Authority on 16th February, 2023 that *“There is no entry for the alleged payment of Rs. 1,00,00,000/- dated 14.10.2015, in page Nos. 14 to 17, as shown in Annexure ‘N’ of the reply affidavit filed by the respondent.”*

Whereas the payment of Rs.1,00,00,000/- by cheque no. 7000191 dated 14th October, 2015 was made into the HDFC Bank account at page 45 of the Company petition. This evidences the utterly fraudulent stand taken by the applicant.



ii. Knowing full well that he had ceased to be a director by virtue of disqualification under section 164(2) of the Companies Act, 2013, Partha Sarathi Dey has affirmed the application as a director on 21.08.2020.

The applicant has relied upon orders of the Hon'ble Delhi High Court dated 04.11.2019 and 22.12.2020 to show that Partha Sarathi Dey's disqualification has been set aside by the Hon'ble Delhi High Court, which proves that the applicant was along well aware of the fact that Partha Sarathi Dey was not a director at the time when he affirmed the application, as such on 21.08.2020. Which calls for a penalty under section 165 of the IBC.

iii. In Aggravation of offence in stead of contrition and retraction in the Rejoinder, in order to justify the false statements in the application, Partha Sarathi Dey as director has falsely stated that the applicant had only two bank accounts at the relevant point of time, one with HDFC Bank and another with Indian Overseas Bank i.e. no account with Indian Bank, whereas payments have been made to that account.

iv. That Deliberate false statement on oath is an act of perjury. Reference is made to *In Re:- Suo Moto Proceedings Against R. Kruppan, Advocate* (2001) 5 SCC 289 paragraphs 15 and 16 and (ii) *Sanjiv Kumar Mittal v. State* 2011 (121) DRJ 328 paragraphs 8–10.]

It is argued that in exercise of powers under Section 340 of The Code Of Criminal Procedure, 1973 sanction be accorded to prosecute the applicant's director Partha Sarathi Dey and penalty under Section 65 of the Code be imposed as to deter future similar applications by unscrupulous applicants.

18. At hearing Ld.Counsel for the applicant was asked to satisfy that the alleged claim was a "financial debt" under section 5(8) of IBC and that the same was due. Neither by way of oral arguments nor with the help of his written submissions, Ld. Counsel has been able to convince this Bench that the alleged claim is in fact a 'financial debt' under section 5(8) or section 5(8)(f) of the IBC or that any amount was due. Simply Reference was made to the order prepared by the Hon'ble Judicial Member where the applicant has been



addressed as a “Financial Creditor” and the respondent as a “Corporate Debtor” to contend that the issue stands settled, that the applicant is a Financial Creditor and therefore the alleged unpaid balance is a financial debt which argument, in my considered opinion is quite fallacious.

There is nothing on record to satisfy this Bench that the alleged pittance of Rs.1,00,000/- to Partha Sarathi Dey on 12/12/2007 was in acknowledgement of liability towards the Company and therefore a fresh period would run from the date of such acknowledgement under Section 18 of the Limitation Act.

19. At hearing, Ld. Senior Counsel for the respondent would further contend that, a **Third Member is completely free to resolve the differences between the parties** and pronounce a final order, and to substantiate that reference is made to a judgment of the Hon’ble National Company Law Appellate Tribunal in Company Appeal (AT) No.67 of 2022 at page 116 that –“ it is primordial duty of the ‘ Hon’ble Third Member/Third Judge’ to whom the matter is referred to consider ‘all points involved’ revolving around the controversies, not confined to the point formulated by the ‘Hon’ble Members of the Tribunal’ dated 11.02.2022, prior to the deliverance of his ‘opinion/decision’, of course with utmost ‘care’ ‘caution’, ‘circumspection’, and with a view to prevent an ‘aberration of justice’ and to secure the ‘ends of justice’”, and that Even otherwise and without prejudice to the aforesaid, the first point of difference as framed in the order dated 30th June, 2022, is wide enough to cover all aspects, including maintainability of the petition under section 7 of the Code.
20. On the contrary, Ld. Counsel for the applicant vehemently opposing the stand would contend that this Special Bench cannot adjudicate upon an issue which is not the question. He would refer to the following decisions :-
 - i. *Kesho Nath Khurana Versus Union Of India &Ors reported in 1981 (Supp) SCC 38*
 - ii. *Kerala State Science & Technology Museum Versus Rambal Co. And Others reported in(2006) (6) SCC 258*
21. The rival contentions have been noted. The implications of the decisions cited would be discussed hereunder.



22. To deal with the decisions cited by the Ld. Counsel for the applicant a little peek into, an extract from the Judgment of Kerala State Science & Technology Museum Vs. Rambal Company & Ors [2006] Insc 467 (Supra) would be necessary. It reads “ *It is fairly well settled that when reference is made on a specific issue either by a learned Single Judge or Division Bench to a larger Bench may be, the Larger Bench cannot adjudicate upon an issue which is not the question referred. (See. Kesho Nath Khurana V. Union of India and others [1981 (supp.) SCC 38], Samaresh Chandra Bose v. The District Magistrate, Burdwan and Others [1972 (2) SCC 476] and K.C.P.Ltd. v. State Trading Corporation of India and Another [1995 Supp. (3) SCC 466”.*

23. **Task of Third Judge**

It is explicit that the cited decisions like *Kesho Nath Khurana* etc. refer to the power of a “Larger Bench” and therefore, would have no applicability to the present situation as this one, where a reference is made to a third member.

Be that as it may, in *Amarendra Arya vs. State of Bihar & others*, LPA No.1469 of 1995, decided on 25th Sep. 2019, the full bench of Patna High Court observed,

“60. In view of the aforesaid, it is very much clear that in the event of difference of opinion between the members of the Division Bench, the Division Bench will record its difference of opinion and on the discretion of the Chief Justice the matter will be referred to the third Judge, either Single or Division Bench and the third Judge will confine his opinion on the point which has been referred and will not embark on the point or points not referred, but in a situation if the third Judge gives an opinion apart from the point referred, I am of the opinion that when the matter again goes to the Division Bench for final pronouncement, the majority of the opinion will be the basis for judgment on the point which was referred. But, it is also made clear that on consideration of judgment of different High Courts, it can safely be recorded that when a single issue or several issues have been raised and on few issues the Division Bench agreed and on certain issues they have differed, that issues on which there is difference, will be referred to the third Judge and the third Judge would give his opinion on the point referred, but will not have a jurisdiction to finally pronounce the judgment between the parties, but the referee Judge has only to record his opinion and remit back the same to the Division Bench and the Division Bench will



formally declare the majority opinion and then the Division Bench will not start a de novo hearing on the issue which has already been concluded. The majority opinion is to be culled out and final verdict could be pronounced, as it will be a matter of declaration of final verdict, but if on any point, apart from the reference, the referee Judge gives his opinion on such point, the parties will have a liberty to address the Division Bench on new point which was not subject matter of consideration and the Division Bench will decide the new point and give the final decision on that point”.

24. Further, the Hon’ble NCLAT in Company Appeal (AT) 67 of 2022 noted the following:

103. It is significantly pointed out by this ‘Tribunal’ that where the conflicting ‘opinion of two Hon’ble Members, are placed before the ‘Hon’ble Third Member or Judge’, he would consider the ‘two opinions’ and ‘render’ his ‘opinion’. No wonder the ‘Third Judge’ is completely free in resolving the ‘difference’ as he thinks fit as per the decision of the Hon’ble Supreme Court in Babu and Three Ors. V State of Uttar Pradesh, reported in AIR 1965 SC 1467, wherein it is held as under:

(i) "Section 429 of the Criminal Procedure Code contemplates that it is for the third Judge to decide on what points he shall hear arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit."

Hon’ble NCLAT noted that

Hon’ble Supreme Court in Hethubha Alias Jithuba Madhuba Vs. The State of Gujarat, reported in AIR 1970 SC 1266”, has observed as under.

“ In appeal to this Court ‘ it was contended (i) that the third learned Judge under Section 429 Cr. P.C. could only, deal with the differences between the two learned Judges and not with the whole case; and (ii) that there was no committee intend on within the meaning of supp I.P.C. on the part of the three appellants to kill A as he was attacked by, mistake.

Hon’ble Apex Court has “HELD : Dismissing the appeal.



(i) *That when the judges comprising the Court of Appeal are equally divided in opinion the case with their opinion thereon shall be laid before another Judge of the same Court and such Judge, after hearing, if any, as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such before another Judge, and, secondly, the Judgment and order will follow the, opinion of the third learned Judge. It is, therefore, manifest that the third learned Judge can or will deal with the whole case.*

(i) *"That when the judges comprising the Court of Appeal are equally divided in opinion the case with their opinion thereon shall be laid before another Judge of the same Court and such Judge, after hearing, if any, as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such before another Judge, and, secondly, the Judgment and order will follow the, opinion of the third learned Judge. It is, therefore, manifest that the third learned Judge can or will deal with the whole case. [35 D-F]"*

Hon'ble NCLAT having noted as above held that:

"105. It cannot be lost sight of that although the 'third opinion' is rendered after considering the 'earlier opinion', the 'third opinion' cannot be equated to an 'Appeal', in the considered opinion of this 'Tribunal'. In reality, the 'Third Member'/'Third Judge' based on strong grounds can 'differ' from the 'Referring Judges' on a 'point' which both the 'Members'/'Judges' had agreed. The opinion of Hon'ble Third Judge is held to be a decision of a 'Case', as per decision AIR 1968 Cal 220. As a matter of fact, the 'Hon'ble Third Member' is to exercise discretion informed by legal traditions, arranging in an orderly and systematic manner, of course, disciplined by the 'Judicial System'. Besides these, where the Judges of the Division Bench do not agree about the true effect of opinion of the Third Judge, it is open to them to obtain a clarification from the Third Judge as to what exactly he intended to convey his opinion as per decision AIR 1956 All Pg : 529)".

Section 419 (5) of the Companies Act explicitly lays down the following:

" If the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which



they differ, and the case shall be referred by the President for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it”.

The brief points that can be culled out from the discussions above are the following:

- i. A Third Member/ Judge is not limited only to answering the reference;
- ii. It can also differ from the referring Members/Judges, on a “point”
- iii. But it shall not pronounce the judgment between the parties.

Financial Debt

25. This Bench notes that applicant is claiming an alleged balance as unpaid sale consideration for an immovable property from the respondent. Whether such transaction could be termed as a “financial debt” and applicant a “financial creditor” would get clarified from the following extract in ***Phoenix Are (P.)Ltd. Vs. Ketulbhai Ramubhai Patel*** where Apex Court noted the Paragraphs 46 to 50.2 of ***Anuj Jain Vs. Axis Bank***, which expounds the essentials of “financial debt” and “financial creditor” in the following manner:

‘ 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 disbursement 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 sub-clauses (a) to (f) of section 5(8); it may also include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-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 sub-clauses (a) to (h) of section 5(8); and it may or indemnity for any of the items referred to in sub-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 sub-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 for 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 Sub-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.

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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 financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person.

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49. Expounding yet further, in our view, the petitioner elements of these expressions “financial creditor” and “financial debt”, as occurring in sections 5(7) and 5(8), when visualized 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”, 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., liability or obligation in respect of a claim which may be due from any persons.

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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.

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50. A conjoint reading of the statutory provisions with the enunciation of this court in *Swiss Ribbons*(supra), 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 reorganization 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 o the corporate debtor, akin to that of a guardian”. (emphasis added)

25.1. The Hon’ble NCLAT in the case of **“Nikhil Mehta and Sons”** noticed *sub-section (8) of Section 5 of the “I & B Code has clarified that”* In order to understand the expression ‘Financial Creditor, the requirements of expression ‘financial debt’ have to be satisfied which is defined in Section 5(8) of the IBC a debt along with interest which is disbursed against the consideration for the time value of money and it may include any of the events enumerated in sub-clauses (a) to (i).

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“ The legislature has included such financial transactions in the definition of ‘financial debt’ which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black’s Law Dictionary (9th edition) the expression ‘Time Value’ has been defined to mean ‘the price associated with the length of time that an investor must wait until an investment matures or the related income is earned.’ In both the cases, the inflows and outflows are distanced by time and there is a compensation for time value of money.

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“ forward sale or purchase as a financial transaction. A forward contract to sell product at the end of a specified period is not a financial contract. It is essentially a contract for sale of specified goods. It is true that some time financial transactions seemingly restructured as sale and repurchase. Any repurchase and reverse repo transaction are sometimes used as devices for raising money. In a transaction of this nature any entity may require liquidity against an asset and the financier in return sell it back by way of a forward contract. The difference between the two prices would imply the rate of return to the financier. (See Taxman’s Law Relating to IBC,2016 by Vinod Kothari & Sikha Bansal”.

- 25.2 Further it is discernible that the **Hon’ble NCLAT in Dr. D.V.S. Lakshmi (2019 SCC Online NCLAT 531)** has held *“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 along with interest, if any, which has been disbursed and (ii) such disbursement has been made against the ‘consideration for the time value of money’. 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 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'".

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" In the present case, the Appellant has failed to bring on record any evidence to suggest that the 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 money. In the 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".

"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.

In view of aforesaid findings, we hold that the Adjudicating Authority rightly held that the Appellant is not a 'Financial Creditor'.

25.3 In **Kaveri Sahakri Awas Samiti Limited v. Sanjay Gupta**, Interim Resolution Professional of Horizen Buildcon Private Limited and Ors in Company Appeal (AT) (Ins.) 949/2022, Hon'ble NCLAT relied upon its judgment in **Namdeo Ramchandra Patil v. Vishal Ghisulal Jain**, and held that a landowner cannot claim to be a financial creditor on the basis of its area share entitlement under the development agreement in absence of any disbursement for time value of money.

It held " *when both the developer and the appellant have specified share as per the clause and there is no incident of any disbursement for time value of money, the Adjudicating Authority has rightly come to the conclusion that there is no financial debt within the meaning of Section 5 sub Section 8 of the Code*".



Therefore, as envisaged under section 5(7), Section 5(8) read with section 7 of the Code, a debt falling within the ambit of a 'Financial Debt' needs to satisfy the following essential conditions:

- i. Disbursement of loan/sum;
- ii. Disbursement has been made for a consideration for time value of money; and
- iii. The debt, wholly or partly, which has become due and payable and is not paid by the Corporate Debtor, means it has committed a default.

26. In the aforesaid backdrop it is discernible that the applicant who claims an alleged balance of a sale consideration has miserably failed to establish that it is a "financial creditor" of the respondent or that balance/ unpaid sale consideration for immovable property is a "financial debt". Here I seek to differ from the Hon'ble Members that this Section 7 application concerns a "financial debt" and as such it is entertainable.

27. **The discernible facts:**

The applicant has thus failed to establish in regard to the following:

- i. **That it is a Financial Creditor of the respondent, under section 5(7) of the Code;**
- ii. **Existence of any 'financial debt' under Section 5(8) of the Code, that is due and outstanding (as evident from the account statements annexed to the reply affidavit);**
- iii. **The application is filed within the prescribed period of limitation (as last payment was seemingly by made by 30th December, 2015 the Company Petition has been filed in 2020 i.e. beyond three years.**
- iv. **The alleged pittance of Rs.1,00,000/- made to Partha Sarathi Dey on 12.12.2017 (and not to the account of the Applicant Company) could be treated "as payment made to the alleged "Financial Creditor" but paid to a "wrong account".**
- v. **That, there is an acknowledgement of liability on 12.12.2017 which will go to extend limitation under Section 18 of the Limitation Act.**



- vi. **The defects in the CP filed on 11/08/2020 were satisfactorily rectified later on 21/08/2020 by an authorized representative of the applicant company.**

28. **My inferences:**

- i. The application for initiation of against the respondent was defective and incomplete from its inception, and subsequently the defects have not been rectified satisfactorily;
- ii. The applicant is not a “financial creditor” in relation to the respondent, under section 5(7) of the Code;
- iii. The alleged claim projected as a “debt” is not a “financial debt” under section 5(8) of the IBC and hence the petition under Section 7 of the IBC is not maintainable;
- iv. The application TP (IBC)/1/(KB)/2023 [CP(IB) 771/KB/2020] is also barred by limitation.

29. In view of the enumerations above, this Bench while agreeing with the overall view of the Hon’ble Technical Member answers the reference as under:

- i. The petition made by the Financial Creditor is not complete in all aspects;
- ii. Deposit of Rs.1,00,000/- in the account of Director cannot be considered as an acknowledgement of debt;

30. This order be placed before the Hon’ble President NCLT for further course of action.

31. Urgent Certified copy of this order, if applied for be issued upon compliance with all requisite formalities.

**Bidisha Banerjee,
(Member Judicial)**

Order signed on this, the 8th day of May, 2023

PJ