IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-IV

CP (IB) No.1167/MB-IV/2020

Under Section 7 of the I&B Code, 2016

In the matter of:

Magnate Industries LLP

[LLPIN(AAN-0823)]

…Financial Creditor/Petitioner

V/s

Safal Developers Private Limited

[CIN: U45200MH1992PTC065526]

...Corporate Debtor/Respondent

Order Dated: 06.10.2021

Coram:

Mr. Rajesh Sharma
Hon'ble Member (Technical)

Mrs. Suchitra Kanuparthi
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner : Mr. Rohaan Cama, Advocate

For the Respondent : Mr. Mayur Khandeparkar Advocate

ORDER

Per: Rajesh Sharma, Member (Technical)

1. This is an application being C.P.(IB) No.1167/MB/C-IV/2020 filed by Magnate Industries LLP, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Safal Developers Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

2. The Application is filed by Ms. Seema Mehta, authorised signatory of Financial Creditor vide its Resolution dated 17.06.2020, claiming total default of Rs.29,68,04,589/- (Rupees twenty-nine crore sixty-eight lakh four thousand five hundred eighty-nine only) which includes:

   a) Pending Refundable Security Deposit of Rs.25,00,00,000/- (Rupees twenty-five crore only) and

   b) Pending Interest Amount of Rs.4,68,04,589/- (Rupees four crore sixty-eight lakh four thousand five hundred eighty-nine only)

3. The Date of Default as mentioned in the Part IV (2) of Form 1 of the Petition is 07.08.2019.

4. The case of the Financial Creditor is as under:

   (i) A Memorandum of Understanding ('MOU') [Pg. 32/Petition] was executed between the Petitioner (referred therein as "the Joint Developer"), the Respondent is referred as SDPL and the Respondent and Harmony Developers Private Limited are collectively referred as "the Developers". Under the MOU, it was agreed that the Petitioner was to arrange third party capital required by the Respondent and Harmony to meet certain costs of a redevelopment project. It was agreed between the parties that pending finalisation of definitive documents the Petitioner would advance to the Respondent a sum of Rs.25 crore as "Refundable Security Deposit" on the terms and conditions set out in the MOU. This is borne out in the Recitals of the MOU and Clauses D, E & F a/w Clause 3 to 5 thereof, which read as under:

D. In this regard, the Developers and the Joint Developer after deliberations and discussions have mutually decided to develop/ re-develop the said Property and execute the Project based on Joint Developer's (i) several years of experience and expertise in developing real estate projects of large magnitude, (ii) financial and technical resources, expertise and experience.

E. The Joint Developer has agreed that the Joint Developer shall cause to arrange third party capital ("Third Party Capital") to discharge existing liabilities of the Developer to an extent of Rs.609,76,82,720/- (Rupees six hundred nine crore seventy-six lakh eighty-two thousand seven hundred twenty only) ("Existing Liabilities") and further amounts as required to meet the Project Cost.

F. Pending the finalization of the Definitive Documents (as defined below), the Parties agreed that the Joint Developer shall pay an amount of Rs.25,00,00,000/- (Rupees twenty-five crore only) as and by way of refundable security deposit ("the Refundable Security Deposit") to the Developers in the manner and on the terms and conditions as set out herein.

3. Pending the Joint Developer arranging the said Loan Amount, the Joint Developer shall provide to SDPL an amount of Rs.25,00,00,000/- (Rupees twenty-five crore only) as and by way of refundable security deposit i.e. the Refundable Security Deposit. The Refundable Security Deposit shall be utilized by SDPL to partly repay Skylark Buildcon Private Limited towards its outstanding loan of Rs.210,91,01,074/- (Rupees two hundred and ten crore ninety-one lakh one thousand and seventy-four only) given to SDPL. To this effect, a receipt from Skylark

Buildcon Private Limited Rs.25,00,00,000/- (Rupees twenty-five crore only) shall be provided to Joint Developer on payment thereof.

4. *If the joint developer does not arrange the said Loan Amount within period of 60 (sixty) days from the date hereof, the Parties will not proceed with the transaction contemplated herein. In such a case, SDPL shall be obliged to repay or cause Skylark Buildcon Private Limited to repay to the Joint Developer, the Refundable Security Deposit along with interest thereon at the rate of 14% per annum, compounded monthly ("the said Interest"), from the date of the payment of the Refundable Security Deposit till the repayment thereof. Such repayment to the Joint Developer shall be made within a period of 90 (ninety) days from the date hereof.*

5. *If the Joint Developer arranges the said Loan Amount within the aforesaid period of 60 (sixty) days from the date hereof, then the Joint Developer shall be repaid, by SDPL, the Refundable Security Deposit along with the said Interest, from the said Loan Amount arranged by the Joint Developer."*

(ii) It was agreed between the parties that in the event, if the Petitioner unable to arrange the loan amount within 60 days, then the Respondent would be liable to refund the sum of Rs.25 crore together with interest thereon @ 14% p.a. compounded monthly from the date of payment until repayment. A time frame of 90 days from the date of MOU was given to make the payment.

(iii) It was further agreed that even though the loan amount was arranged within 60 days, the said sum of Rs.25 crore together with the said interest was to be repaid by the Respondent, but in this case, the only difference being it would be repaid from the loan amount arranged.

(iv) It is irrespective of the loan was arranged or the transaction did not go through, the sum of Rs.25 crore advanced was to be refunded by the Respondent together with interest at the rate stipulated in the MOU. The time period for making repayment was also clearly specified.

(v) On May 9, 2019, the sum of Rs.25 crore was paid by the Petitioner through its parent company, Sunteck Realty Ltd. to the Respondent and was duly received by the Respondent. The proof of payment is borne out from the Axis Bank statement placed on record by the Petitioner [Pg.43/Petition]. Thus, the starting point for the repayment i.e. the 60/90 days' period referred to in Clauses 4 and 5 of the MOU commenced with effect from May 9, 2019.

(vi) As the parties were unable to conclude the definitive documents, the transaction came to a close and the same came to be mutually terminated and the Respondent became obligated to refund to the Petitioner the aforesaid sum of Rs.25 crore together with interest thereon as provided in the MOU with effect from August 7, 2019 i.e. within 90 days from the payment made to the Respondent coterminous with execution of the MOU as pleaded in the Petition [Pg.14/Petition].

(vii) Towards repayment of the above amount together with interest thereon until that date, the Respondent issued two cheques, the first dated November 30, 2019 for a sum of Rs.1,74,57,534/- towards interest and the second dated December 31, 2019 for the principal sum of Rs.25,00,00,000/-. The cheques were deposited by the Petitioner and came to be dishonoured on January 4, 2020 for the

reason "Funds Insufficient", as evident from the dishonour memos annexed to the Petition [Pgs. 22, 23 and 45 / Petition].

(viii) The Petitioner has subsequently obtained the certificate of the information utility National E-Governance Services Limited ('NeSL'), wherein the default by the Respondent is accepted and authenticated [Pgs.25 to 31/Petition and particularly Pgs. 25, 27, 28 and 30/Petition].

(ix) On account of the continued non-payments of the above sums, the Petitioner was constrained to file the Petition on August 7, 2020.

5. The Corporate Debtor/Respondent has submitted in the reply as under:

1. The Respondent submitted that there is no 'debt', as defined in the Insolvency and Bankruptcy Code, 2016, presently due from the Respondent to the Petitioner, leave alone any 'financial debt'. The Petitioner has not controverted the facts set out in the said Affidavit by choosing to not file any rejoinder to the said Affidavit. The Petitioner made mere oral submissions without denying the same on record by filing an affidavit as required under law. The Respondent submits that in light of the same, the facts as set out in the said Affidavit are deemed to be admitted by the Petitioner. On this ground alone, the captioned Petition ought to be dismissed in limine. The Supreme court has in the judgment made in the matter of M. Venkataramana Hebbar (dead) by LR's Vs. M. Rajagopal Hebbar and Others [(2007) 6 SCC 401] held as follows

"Thus, if a plea which was relevant for the purpose of maintaining a suit had not been specifically traversed, the court was entitled to draw an inference that the same had been

admitted. A fact admitted in terms of Section 58 of the Evidence Act need not be proved."

2. The Respondent has further submitted stating that these facts were supressed by the Petitioner:

2.1 The Respondent is undertaking/is in the process of undertaking development of property at Kings Circle, Sion, Mumbai – 400 022 ("the said Property") as per the applicable provisions of law ("the Project").

2.2 In or around January 2019, the Petitioner approached the Respondent for joint development of the said Property. The Petitioner informed the Respondent that it has necessary financial resources, technical know-how capability to undertake the joint development of the said Property.

2.3 One of the terms for the appointment of the Petitioner as the joint developer by the Respondent for development of the said Property, was that the Petitioner shall cause to arrange third party capital ("Third Party Capital"), inter alia, to discharge existing liabilities of the Respondent to an extent of Rs.609,76,82,720/- (Rupees six hundred nine crore seventy six lakh eighty two thousand seven hundred twenty only) ("Existing Liabilities") and further amounts as required to meet the project cost.

2.4 The Respondent in-principally agreed to appoint the Petitioner as the joint developer of the said Property, subject to (i) finalization of the transaction documents, and (ii) the Petitioner arranging third party capital of an amount of Rs.400,00,00,000/- (Rupees four hundred crore only) for the

Project on an immediate basis for discharging part of the Existing Liabilities.

2.5 The Petitioner offered to pay a security deposit of Rs.25,00,00,000/-(Rupees twenty-five crore only) ("Security Deposit") for securing the due performance of obligation of arranging third party capital of an amount of Rs.400,00,00,000/- (Rupees four hundred crore only) for the Project.

2.6 As the Petitioner was in the process of arranging Third Party Capital of Rs.400,00,00,000/-(Rupees four hundred crore only), the Petitioner sent a draft of a Memorandum of Understanding to the Respondent in relation to the aforesaid proposed transaction. The draft Memorandum of Understanding was signed by the Respondent and sent to the Petitioner ("the said MOU").

2.7 Thereafter sometime in October 2019, the Petitioner informed the Respondent that the Petitioner has been unable to arrange any Third-Party Capital. The Respondent has informed the Petitioner that it will refund the Security Deposit once it enters into any transaction with any third party and the Respondent agreed to the same. However, at that stage the Petitioner requested the Corporate Debtor to issue postdated cheques for securing the repayment.

2.8 Further, the Respondent, though not obliged to pay any additional amounts to the Petitioner, agreed to pay to the Petitioner as a lumpsum compensation and not as interest an amount of Rs.1,93,97,260/- (Rupees one crore ninety-three lakh ninety-seven thousand two hundred and sixty only) in

full and final settlement, once it enters into transaction with any third party, as stated above ("the said Compensation"). It is pertinent to note that the said Compensation is a lumpsum compensation and not the purported interest calculated as per the said MOU as alleged by the Petitioner.

2.9 Pursuant to the aforesaid, the Respondent agreed to hand over two postdated cheques in favour of the Petitioner, drawn on the Union Bank of India, Vile Parle (West), Mumbai- 400049 i.e. cheque no. 495512 dated 31st December 2019 for Rs.25,00,00,000/- (Rupees twenty-five crore only) towards the repayment of the Security Deposit and cheque no. 495513 dated 30th November 2019 for Rs.1,74,57,534/- (Rupees one crore seventy-four lakh fifty-seven thousand five hundred and thirty-four only) towards the said Compensation and not as interest ("said cheques") to be retained as security till the Respondent arranges for the funds by undertaking a transaction with a third party.

2.10 The cheques were handed over with a clear understanding, that the Petitioner would deposit the said Cheques only after the Corporate Debtor would obtain payment from third party. However, the Petitioner maliciously deposited the said Cheques in or around 3rd January 2020, in complete contravention of the understanding between the Petitioner and the Respondent.

2.11 To the shock and surprise of the Respondent, the Respondent received the captioned Petition filed by the Petitioner.

2.12 At the cost of repetition, the Respondent submits that it is pertinent to note that none of the aforesaid facts set out by the

Respondent has been controverted by the Petitioner by filing any affidavit. Hence, the same are deemed to be admitted.

2.13 In the aforesaid factual background, it is submitted that the Petitioner has failed to make out a case for admission of the captioned Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 ("said Code") and the captioned Petition deserves to be dismissed, inter alia, on the following grounds and those set out above, each of which are in the alternative and without prejudice to each other:

3. The said MOU is unstamped and therefore cannot be acted upon, registered or authenticated:

3.1 The entire claim of the Petitioner in the present Petition arises out of the said MOU and a bare perusal of the said MOU reflects that the value of the transaction under the said MOU is of an amount of more than Rs.10,00,000/- (Rupees ten lakh only). Therefore, as per Article 5(h)(A)(iv) of the Maharashtra Stamp Act, 1958, the said MOU ought to have been stamped at the rate of 0.2% of the value of the Agreement. Admittedly, no stamp duty has been paid on the said MOU. The Respondent submits that since the said MOU is unstamped, the same ought to be impounded and in any event, cannot be acted upon, registered or authenticated. As per the Petitioner's own admission, the Petitioner undertook an obligation of arranging an amount of Rs.400,00,00,000/- (Rupees four hundred crore only) for the Project under the said MOU, hence the Petitioner ought to pay an amount of at least Rs.80,00,000/- (Rupees eighty lakh only) as and by way of stamp duty. Without prejudice to the generality of the above

and in the alternative, the Petitioner is liable to pay applicable stamp duty at least on the amount of Rs.25,00,00,000/- (Rupees twenty-five crore only) claimed to be given by the Petitioner under the said MOU.

3.2 Since the said MOU is unstamped, this Tribunal cannot consider, 'act upon', 'authenticate' or give effect to such an unstamped document as evidence of any transactions alleged by the Petitioner. In this regard, Section 34 and Article 5(h)(A)(iv) of the Maharashtra Stamp Act, 1958 is as follows:
Section 34:

"*No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped or if the instrument is written on sheet of paper with impressed stamp such stamp paper is purchased in the name of one of the parties to the instrument.*"

Article 5"…

(h) …

(a) If relating to:

(iv) creation of any obligation, right or interest and having monetary value, but not covered under any other article—

Description of Instrument	*Proper Stamp Duty*
if the amount agreed does not exceed rupees ten lakh	*0.1 per cent. of the amount agreed in the contract subject to minimum of rupees 100.*

in any other case	*0.2 per cent. of the amount agreed in the contract."*

3.3 On the aspect of a claim made basis an unstamped document the following judgements are relevant-

(i) The NCLT, Ahmedabad Bench had in its judgement dated 8th March 2019 reported at 2019 SCC Online NCLT 750 ("Essar Judgment") observed as follows:

"*8. We carefully examined that issue and perused the material available on record including the documents in question, which shows that the applicants' claims have not been admitted by the RP due to non-payment of requisite stamp duty and for non-completing the statutory formalities for not without furnishing the proof of making payment of requisite stamp duty as per the Indian Stamp Act. Hence, such agreement cannot be looked into as evidence, nor it can be treated as valid claim. Therefore, in our view the RP cannot be found fault with due to non-admission of such claims of the applicants for want of proper stamp duty. Further, this being a disputed issue whether such agreements in question (i.e inter-corporate deposit letters) has been properly stamped or otherwise at the time of producing it before the RP for consideration or not can only be looked into by the RP or by competent authority for registering claim. Hence, in our view, this can be adjudicated only by a competent Civil Court, having necessary jurisdiction and this Adjudicating Authority cannot be expected to deal the relevant provisions of Indian Stamp Act or to make a declaration about documents in question are properly stamped or otherwise, because it*

is the subject matter of scrutiny by the office of Collector of Stamps and is in the domain of a competent Civil Court.

9. In the light of above discussion, we feel that I.As. 482 and 483 of 2018 lack of substance and cannot succeed to. Even if I.As. No. 125 of 2019 are allowed in the interest of justice by restoring the above stated I.As., it would not serve the purpose."

(ii) The aforesaid findings of the NCLT have been confirmed by the Supreme Court in the matter of *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others* [(2020) 8 SCC 531] ("Essar SC Judgment") wherein it has observed as follows:

"152. So far as Civil Appeal No.7266 of 2019 and Civil Appeal No. 7260 of 2019 are concerned, the resolution professional has rejected the claim of the Appellants on the ground of non-availability of duly stamped agreements in support of their claim and the failure to furnish proof of making payment of requisite stamp duty as per the Indian Stamp Act despite repeated reminders having been sent by the resolution professional. The application filed by the Appellants before the NCLT came to be dismissed by an order dated 14.02.2019 on the ground of non-prosecution. The subsequent restoration application filed by the appellants then came to be rejected by the NCLT through judgment dated 08.03.2019 on two grounds: one, that the applications could not be entertained at such a belated stage; and two, that notwithstanding the aforementioned reason, the claim had no merit in view of the failure to produce duly stamped agreements. The impugned NCLAT judgment, at paragraphs 93 and 94, upheld the finding of the NCLT and the resolution professional. In view of these

concurrent findings, the claim of the Appellants therefore requires no interference. Further, the submission of the Appellants that they have now paid the requisite stamp duty, after the impugned NCLAT judgment, would not assist the case of the Appellants at this belated stage. These appeals are therefore dismissed."

(iii) Further, the NCLT, Chandigarh Bench has in the matter of Edelweiss Asset Reconstruction Company Versus Winsome Yarns Limited [CP (IB) No. 291/CHD/2018] held as follows:

"*…. the Hon'ble Supreme Court of India while holding that an insufficiently stamped instrument cannot be relied upon for any purpose, however, observed that the concerned court has to follow the procedure provided under the Indian Stamp Act, 1899 for impounding the instrument before permitting a party to enforce the said insufficiently stamped instrument.*

29. However, this Adjudicating Authority under the summary procedure provided under the Code cannot adopt such a procedure applicable to regular courts of law. Once the respondent-corporate debtor by placing reliance on the orders of the relevant Revenue Authorities able to show that the Annexure P-1 Assignment Agreement dated 10.12.2015 is unenforceable and when the petitioner not disputed the existence of said orders and not able to produce any stay order thereof, this Adjudicating Authority has no other option except to reject the CP.

(iv) Further, NCLT Kolkata Bench has in the matter of *Srikanta Sarda Vs. Tansway Marketing Private Limited* [CP (IB) 400/KB/2017] held as follows:

21…. Bear in mind the above-said proposition no doubt the relief based on unstamped promissory note also cannot be entertained by this Tribunal."

(v) Further, the Supreme Court has in *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v. Bhaskar Raju & Bros*. [(2020) 4 SCC 612] ("Dharmaratnakar"), held as follows:

"18. It can thus clearly be seen, that this Court has in unequivocal terms held, that when a lease deed or any other instrument is relied upon as containing the arbitration agreement, the court is required to consider at the outset, whether the document is properly stamped or not. It has been held, that even when an objection in that behalf is not raised, it is the duty of the court to consider the issue. It has further been held, that if the court comes to the conclusion that, the instrument is not properly stamped, it should be impounded and dealt with, in the manner specified in Section 38 of the Stamp Act, 1899. It has also been held, that the court cannot act upon such a document or the arbitration clause therein. However, if the deficit duty and penalty is paid in the manner set out in Section 35 or Section 40 of the Stamp Act, 1899, the document can be acted upon or admitted in evidence. It is needless to state, that the provisions that fell for consideration before this Court are analogous with the provisions of Sections 33 and 34 of the Karnataka Stamp Act, 1957. In this view of the matter, we are of the considered view, that in view of the law laid down in SMS Tea Estates (P) Ltd. [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] , that the lease deed containing the arbitration

clause which is required to be duly stamped, was not sufficiently stamped and though the Registrar (Judicial) had directed Respondents 1 and 2 to pay deficit stamp duty and penalty of Rs 1,01,56,388 (Rupees one crore one lakh fifty-six thousand three hundred and eighty-eight only), the respondents failed to do so, the High Court has erred in relying on the said lease dated 12-3-1997."

It is pertinent to note that in NN Global Mercantile Private Limited vs. Indo Unique Flame Limited and Others (Civil Appeal Nos. 3802-3803 of 2020) ("NN Global") the Supreme Court has merely referred the question of severability of an arbitration agreement from an unstamped document in a proceeding under Section 11 of the Arbitration and Conciliation Act, 1996. However, on the issue of any other agreement (not being an arbitration agreement), the law is clear, as set out in Garware and Dharmaratnakar, that an unstamped document cannot be 'acted upon'.

3.4 At the time of final hearing of the captioned matter, it was brought to the notice of the learned Counsel of the Respondent the view taken by this Tribunal in the judgement and order passed by this Tribunal in the matter of Mangalam Vanijya Private Limited Versus Reward Business Solutions CP.1168/IBC/MB/MAH/2020 ("Mangalam"), which deals with the aspect of proceeding in an application under section 7 of the Code, with respect to a claim where reliance is placed on an insufficiently stamped document.

(i) At the outset, it is submitted that the Mangalam judgement may not be applicable to the present facts and the captioned matter…

(ii) The Mangalam judgement is clearly distinguishable from the present matter on several facts and grounds, which are inter-alia as follows:

(a) Firstly, the question which was decided in the Mangalam judgment by the Tribunal was with respect to inadequacy of stamp duty. Therefore, the document sought to be relied therein bore some stamping. Whereas in the present case admittedly no stamp duty whatsoever has been paid and the said MOU is, on the face of it, an unstamped document.

(b) Secondly, neither was the findings of the Essar Judgment brought to the notice of the notice of this Tribunal nor was its subsequent confirmation and the relevant obiter of the Hon'ble Supreme Court in the Essar SC Judgment as set out in the paragraph 6.1.3. (ii) above not brought to the notice of this Tribunal. It is submitted that the aspect and parameters of adjudication for initiation of CIRP and the verification of claims by a Resolution Professional are similar. Therefore, once it is decided (by the Hon'ble Supreme Court in the Essar SC Judgment) that a party cannot make a claim in CIRP based on an unstamped document, it has to be necessarily held that CIRP cannot be initiated based on an unstamped document such as the said MOU.

(c) Thirdly, the corporate debtor therein had in its correspondence (reproduced and referred to at paras 31, 32 and 33 of the Mangalam judgment) admitted its liability to not only repay the loan but also its liability to pay interest. However, in the captioned matter the liability to (a) presently

repay the Security Deposit and (b) pay interest at all, has not been admitted to by the Respondent and are in fact denied.

(d) Fourthly, the Corporate Debtor therein had admitted that the amounts were due and payable to the Petitioner. However, the Respondent submits that the said Security Deposit is not presently due and payable and would, as agreed between the Petitioner and the Respondent, become payable only on the Respondent entering into a transaction with a third party and therefore the Respondent herein has not admitted that any amounts are due and payable to the Petitioner. Further, the Respondent herein has submitted that the no date was consciously entered into by the parties in the said MOU and this was because the Petitioner wanted more time and did not want to trigger clause 4 of the said MOU. Thereafter in October 2019 the Petitioner approached the Respondent with its inability to arrange funds, pursuant to discussions and negotiations it was agreed that the transaction between the parties was cancelled and the Parties agreed to repayment of the said amounts as set out in paragraph 4.7 hereinabove.

(e) Fifthly, in the Mangalam judgment the Petitioner therein had relied upon several other documents which were executed by the Corporate Debtor therein 'which demonstrated the confirmation of the debt and creation of additional security in favour of the financial creditor'. However, the Petitioner herein has not executed any document (save and except the said MOU, which as aforesaid cannot be relied upon) which demonstrate the purported debt as a financial debt.

(f) Further, in the Mangalam judgment the Tribunal has opined that the loan agreement therein was executed by the Corporate Debtor, who was (a) therein required to pay the adequate stamp duty, being the beneficiary of the said amount of Rs.45 crore lent to the Corporate Duty under the Loan Agreement and (b) was under a legal obligation to pay the adequate stamp duty to the extent of Rs.9,50,000/-. Thereby implying that the Corporate Debtor cannot take benefit of its own wrong. However, it appears that paragraph 38 of the judgment passed by the Supreme Court in the matter of *Garware Wall Ropes Limited Vs. Coastal Marines Constructions and Engineering Limited* [(2019) 9 SCC 209] ("Garware") which reads as follows was not brought to the notice of the court-

> *"38. Arguments taken of prejudice, namely, that on the facts of this case, the appellant had to pay the stamp duty and cannot take advantage of his own wrong, are of no avail when it comes to the application of mandatory provisions of law. Even this argument, therefore, must be rejected"*

It is pertinent to note that only the findings of the Garware in paragraphs 22 and 29 have been referred to a larger bench in the matter of NN Global and the balance contents of Garware continue to hold field and bind this Tribunal.

(g) The Tribunal has in the Mangalam Judgement referred to the judgement of NN Global under which a portion of the findings in Garware were referred to a larger bench. However, a bare perusal of NN Global would make it clear that only the finding in Garware with respect to invalidation

of arbitration agreement on the ground of deficit stamping was referred to a larger bench. The judgment of NN Global is strictly restricted to severability of an arbitration agreement and cannot be read to mean that a provision of an unstamped document can be 'acted upon' by any public authority. In this regard, the finding of the Supreme Court in Dharmaratnakar that the court cannot act upon an unstamped document continues to hold the filed

(h) Lastly, the provisions of Section 34 of the Maharashtra Stamp Act, 1958 are mandatory provisions and therefore the said MOU, being an unstamped document, cannot be acted upon.

3.5 It is submitted that the aspect and parameters of adjudication for initiation of CIRP and the verification of claims by a Resolution Professional are similar. Therefore, once it is decided (by the Hon'ble Supreme Court in the Essar SC Judgment) that a party cannot make a claim in CIRP based on an unstamped document, it has to be necessarily held that CIRP cannot be initiated based on an unstamped document such as the said MOU.

3.6 It is submitted that, as aforesaid, the said MOU ought to be disregarded and cannot be accepted as evidence of any transactions alleged by the Petitioner. It is submitted that the existence of a Financial Debt is a sine qua non to the maintainability of a Petition under Section 7 of the said Code. Therefore, in view of the aforesaid, as the said MOU cannot be looked into/acted upon by the Tribunal, there is no financial debt owed to the Petitioner by the Respondent and

the captioned Petition is not maintainable and ought to be dismissed. In the absence of a debt there can be no default and therefore the captioned Petition ought to be dismissed.

3.7 The Security Deposit and the said Compensation is not a 'Debt' as defined in the said Code

3.7.1 The said Code defines debt as follows:

'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".

3.7.2 As has been stated hereinabove no amounts are presently due and payable to the Petitioner by the Respondent. Therefore, the said Security Deposit and the said Compensation do not amount to a 'debt'.

3.7.3 Further, the Insolvency and Bankruptcy Board of India (Insolvency Regulation Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations") classify three kinds of creditors viz. Financial Creditors, Operational Creditors and Other Creditors. The Petitioners are, albeit wrongly, claiming as Financial Creditors. Further, it is pertinent to note that the Corporate Insolvency Resolution Process ("CIRP") can be triggered by on Financial Creditors and Operational Creditors and not by other creditors. For instance, where a decree for compensation has been passed in a suit for defamation, the plaintiff therein cannot make an application for initiation of CIRP.

3.7.4 Existence of a 'financial debt' is an essential feature of an application under Section 7 of the said Code.

However, in the present case there exists no 'debt' much less a financial debt'. Further, in the absence of a debt there can be no default and therefore the captioned Petition does not satisfy the essential requirements of an Application under Section 7 of the said Code and thus deserves to be dismissed.

3.8 There exists no 'Financial Debt'

3.8.1 'Refundable Security Deposit' is not a financial debt.

(i) 'Refundable Security Deposit' is not a financial debt. It is submitted that the amount of Rs.25,00,00,00/- (Rupees twenty-five crore only) was deposited by the Petitioner with the Respondent as a security deposit and does not have any time value of money.

(ii) It is submitted that the said Security Deposit cannot be construed as a financial debt by any stretch of imagination and does not fall within any of the contours of the provisions of Section 5(8) of the said Code.

(iii) Merely because the said MOU stipulates interest on the said Security Deposit the same would not ipso facto categorise the said Security Deposit as a Financial Debt when the said Security Deposit cannot by itself be categorised as a 'Financial Debt'. Further, it is trite law that the actual principal amount has to be a financial debt within the contours set out in the said Code, which the said Security Deposit is not.

(iv) The aforesaid is clearly borne out from the terms of the said MOU, the relevant clauses whereof are as follows:

"E. The Joint Developer has agreed that the Joint developer shall cause to arrange third party capital ("Third Party Capital") to discharge the existing liabilities of the Developer to an extent of Rs.609,76,82,720/- (Rupees six hundred nine crore seventy-six lakh eighty-two thousand seven hundred and twenty only) and further amounts as required to meet the Project Cost

F. Pending the finalization of the Definitive Documents (as defined below) the parties have agreed that the Joint Developer shall pay an Amount of Rs.25,00,00,000/- (Rupees twenty-five crore only) as and by way of a refundable security deposit ("the Refundable Security Deposit") to the Developers in the manner and on the terms and conditions as set out herein"

6. This MOU shall be kept confidential till the execution of definitive documents."

It is submitted that the aforesaid terms of the said MOU make it amply clear that the nature of the said MOU was such that a financial debt was never contemplated, and the said Security Deposit was made by the Petitioner for securing its obligation and not to create a financial debt. Further, the fact that the said MOU was to be kept confidential further corroborates the Respondents submission that the said MOU was undated as the Petitioner did not want to trigger the timelines in the said MOU. Further, the fact that Annexure 'A' referred to in the said MOU has not been annexed thereto.

(v) The aforesaid proposition is corroborated by the decision of the NCLAT in the matter of Sanjay Kewalramani Versus Sunil Kewalramani [2018 SCC Online NCLAT 310], where the NCLAT has held as follows:

> "*12. There is nothing on the record to suggest that 2nd and 3rd Respondents had given the loan in favour of the 'Corporate Debtor' which can be termed to be 'disbursement of an amount for consideration for the time value of money' as required under Section 5(8). Merely grant of loan and admission of taking loan will ipso facto not treat the 2nd and 3rd Respondents as 'Financial Creditors', till they show that it complies with the substantive definition or any one or other clause of Section 5(8). 13. Mere fact that the company paid interest @ 12% per annum, during certain period cannot be the ground to hold that the 'debt' comes within the meaning of 'Financial Debt' to treat the 2nd and 3rd Respondents as 'Financial Creditors'.*"

(vi) Further, the Supreme Court has in the matter of Orator Marketing Private Limited Versus Samtex Desinz Private Limited [2021 SCC Online SC 513] held as follows:

> *"21. The definition of 'financial debt' in Section 5(8) of the IBC has been quoted above. Section 5(8) defines 'financial debt' to mean "a debt along with interest, if any, which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest, as per Section 5(8) (a) of the IBC. The definition of 'financial debt' in Section 5(8) includes the components of subclauses (a) to (i) of the said Section.*

22. The NCLT and NCLAT have overlooked the words "if any" which could not have been intended to be otiose. 'Financial debt' means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt._Both NCLAT and NCLT have failed to notice clause(f) of Section 5 (8), in terms whereof 'financial debt' includes any amount raised under any other transaction, having the commercial effect of borrowing."

(vii) From the aforesaid case laws, it is evidently clear that mere obligation to pay interest would not lead to the amount being classified as a 'Financial Debt' and therefore, the said Security Deposit, which as aforesaid lacks the essential ingredient of being treated as a financial debt, cannot be classified as a financial debt merely because the said MOU stipulates payment of interest.

(viii) In any event by accepting a cheque towards the said Compensation of Rs. 1,93,97,260/- (Rupees one crore ninety-three lakh ninety-seven thousand two hundred and sixty only) as compensation and thereafter acting upon it by depositing it (albeit in malafide manner and contrary to the express understanding between the Petitioner and the Respondent), the Petitioner has acted in contravention of the said MOU and has abandoned the said MOU and therefore cannot be permitted to rely on the said MOU. Without prejudice to the above, having regard to the fact that the Petitioner and the Respondent had cancelled the transaction, the claim of the Petitioner, if any, would be in the nature of

contractual restitution under Section 65 of the Indian Contract Act, 1872 which is not a Financial Debt.

3.8.2 No Commercial effect of borrowing

i. The word 'commercial' has been defined in the Collins English dictionary as follows:

"commercial - adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser: commercial television. 3. having profit as the main aim: commercial music. 4. (of chemicals, etc.) unrefined and produced in bulk for use in industry. 5. a commercially sponsored advertisement on radio or television"

ii. The Supreme Court has in the matter of *Pioneer Urban Land and Infrastructure Ltd. v. Union of India* [(2019) 8 SCC 416] held as follows

"77.…Also of importance is the expression "commercial effect". "Commercial" would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is "raised" under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have "commercial" interests in the same the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment.

iii. Further, the Supreme Court has in the matter of Anuj Jain, Interim Resolution Professional for *Jaypee Infratech Limited*

Vs. Axis Bank Limited and Others [Civil Appeal No. 8512 -8517 of 2019] held as follows:

> *"41.1.6 Read as a whole and with reference to its context, it is but clear that in Pioneer Urban this Court has not enunciated that the scope of the expression 'financial debt' be read as if to encompass any debt of whatsoever nature."*

iv. As apparent from a bare perusal of the said MOU, the said Security Deposit has been defined as a 'Refundable Security Deposit' and was deposited by the Petitioner with the Respondent to secure its obligations under the said MOU. The said Security Deposit was not made by the Petitioner having profit as its main aim and therefore the transaction does not and cannot have 'commercial effect of borrowing' as required under the said Code. Further, the said Security Deposit has been deposited by the Petitioner with the Respondent and would therefore not constitute borrowing.

3.8.3 Claim to interest, if any, stands waived/ abandoned

i. It is submitted that as per the purported interest working annexed by the Petitioner (Exhibit F to the captioned Petition), an amount of Rs.2,04,34,093/- (Rupees two crore four lakh thirty-four thousand and ninety-three only) would have purportedly accrued as interest up to 30th November 2019. However, the said Compensation viz., an amount of Rs.1,93,97,260/- (Rupees one crore ninety-three lakh ninety-seven thousand two hundred and sixty only) duly accepted by the Petitioner is an amount much less than the purported interest of Rs.2,04,34,093/- (Rupees two crore four lakh thirty-four thousand and ninety-three only). It is submitted

that the Respondent is not disputing the quantum of interest but is denying its liability to pay any interest.

ii. It is submitted that the acceptance and subsequent deposit (albeit malafide and contrary to the express understanding between the Petitioner and Respondent) of the said Cheques by the Petitioner clearly establishes the fact that even as per the Petitioner's own conduct it was/is not entitled to any interest, as alleged or at all. Without prejudice to the above, it is submitted that the purported claim to interest, if any, stands abandoned by the Petitioner and cannot now be made by the Petitioner.

iii. It is submitted that the parties to the said MOU have mutually acted contrary to the terms thereof and have abandoned the said MOU and therefore the said MOU cannot be the basis of initiating Corporate Insolvency Resolution Process against the Petitioner …

3.8.4 Amount not 'raised'

(i) The said Security Deposit has been deposited by the Petitioner with Respondent as a 'Refundable Security Deposit' to secure its obligations under the said MOU. It has not been 'raised' which as a Financial Debt. Therefore, the said Deposit does not constitute to be a Financial Debt.

3.9 No Default

3.9.1 The said Code defines 'default' as follows:

"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 debtor or the corporate debtor, as the case may be.

3.9.2 Admittedly, the said MOU is undated. No date was consciously entered into by the parties, this was because the Petitioner wanted more time and did not want to trigger clause 4 of the said MOU. As Clause 4 of the said MOU provides that the Petitioner would be obliged to obtain the said Loan Amount (as defined in the said MOU) 'within a period of 60 (sixty) days from the date hereof'. The aspect of repayment would only arise within 30 days of the Petitioner failing to arrange the said Loan Amount (as defined in the said MOU) and it is because of this reason that the parties consciously did not insert a date in the said MOU.

3.9.3 As such, since there is presently no debt due, there has been no default. Further, the Supreme Court has in the matter of Orator Marketing Private Limited Versus Samtex Desinz Private Limited held as follows:

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

3.9.4 In any event, aspect of payment of interest was never acted upon. This is primarily because one of the cheques given as

security was for an amount of Rs.1,93,97,260/- (Rupees one crore ninety-three lakh ninety-seven thousand two hundred and sixty only) (including Tax Deducted at Source) which is not the amount in terms of the calculation as provided under the said MOU i.e. 14% interest per annum compounded annually from 9th May, 2019 to 30th November which would amount to Rs.2,04,34,093/- (Rupees two crore four lakh thirty four thousand and ninety three only) (as set out at Exhibit 'F' of the said Petition). It is for this reason clear and apparent that the cheque issued by the Respondent was a onetime compensation, which was to be retained by the Petitioner as security. There was no element of profit in the context of compensation. It is for this reason that the Petitioner despite the said Cheques being dishonoured never served the Respondent with a demand notice or initiated proceedings under Section 138 of the Negotiable Instrument Act, 1881.

3.10 Petition is defective and ought to be dismissed

3.10.1 The Petition is defective as the Petitioner has failed to comply with (a) point 7 of part V of the form prescribed under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which requires copies of the Entries in a Bankers Book in accordance with the Bankers Book Evidence Act, 1891, and (b) Regulation 2A of the CIRP Regulations which requires the Financial Creditor to produce certified copy of entries in the relevant account in the bankers' book as defined in clause (3) of section 2 of the

Bankers' Books Evidence Act, 1891. Regulation 2A CIRP Regulations provides as follows:

"2A. Record or evidence of default by financial creditor.

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

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

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

3.10.2 It is submitted that the bank statements annexed by the Petitioner at Exhibit 'I' and Exhibit 'J' to the said Petition are not 'certified copies' as required under the Bankers Book Evidence Act, 1891. It is submitted that mere entries in banks books of accounts or mere copies thereof are not sufficient to charge anyone with liability thereof. It is therefore specifically provided in Section 4 of the Bankers Book Evidence Act, 1891 that only a 'certified copy' of any entry in a banker's book shall be received as evidence of existence of such an entry.

3.10.3 In view of the aforesaid, the purported bank statements annexed by the Petitioner cannot be received as evidence of existence of such an entry.

6. Further Submission by the Financial Creditor is as under:

A. There is a debt due and payable to the Petitioner by the Respondent:

1. As per clauses 4 and 5 of the MOU the sum of Rs.25 crore was advanced to the Respondent for a limited duration and pending the execution of definitive documents or the failure of the transaction. The sum of Rs.25 crore was 'refundable', along with interest thereon. It made no difference whether the larger transaction went through or failed, because in either of the circumstances the sum of Rs.25 crore advanced by the Petitioner to the Respondent was to be repaid by the Respondent with interest thereon.
2. In paragraph 5(g) of the Affidavit in Reply [Pg.3/Affidavit in Reply], the Respondent has expressly accepted and admitted that the Respondent was liable to refund the said amount to the Petitioner. It is, however contended that there was some alleged agreement by which the Respondent was to refund the said amount only after it entered into a transaction with a third party. However, the admitted position is that the debt owing to the Petitioner by the Respondent is due and payable.
3. The Respondent furnished cheques towards repayment to the Petitioner, which they would never have done, had the debt not been due and payable to the Petitioner. It is nobody's case that the said cheques were undated, and therefore, it was obvious to the Respondent at the time of issuing the cheques that the same would have to be deposited within 3 months from the dates thereof or else the cheques themselves would lapse. Thus, at the time of issuing the cheques, the Respondent was well aware that there was a debt owing and the cheques were issued towards discharge of the debt.

B. The debt is a financial debt under Section 5(8) of the IBC.

4. There can be no dispute that there is a debt owing to the Petitioner. The sum of Rs.25 crore was given by way of refundable advance, by whatever name called and *ex facie* the same was to be refunded by the Respondent with interest as stipulated in the MOU. There was no stipulation to forfeit the sum of Rs. 25 crore or any part thereof for any breach or non-performance, as would normally be provided in case of a security deposit. This squarely brings the transaction within the meaning of a loan or money advanced against repayment with interest as contemplated under Section 5 (8)(a) of the IBC.

5. Even otherwise, it is beyond dispute that the money was advanced and was refundable to the Petitioner with interest thereon, and therefore the same is clearly a transaction having commercial effect of borrowing, thus falling within the contemplation of Section 5(8)(f) of the IBC.

6. As held by the Hon'ble Supreme Court in *Orator Marketing Private Limited v. Samtex Desinz Private Limited [2021 SCCOnLine SC 513]*, (paragraphs 22 and 23), sub clauses (a) to (i) of section 5 (8) of the IBC are illustrative and not exhaustive. Any amount advanced and which is to be repaid, with or without interest, constitutes a financial debt. The present case squarely falls within the definition of a financial debt. The relevant portions of the aforesaid judgment are reproduced hereinbelow:

   "22. The NCLT and NCLAT have overlooked the words "if any" which could not have been intended to be otiose. 'Financial debt' means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a

financial debt. Both NCLAT and NCLT have failed to notice clause (f) of Section 5 (8), in terms whereof 'financial debt' includes any amount raised under any other transaction, having the commercial effect of borrowing.

23. Furthermore, sub-clauses (a) to (i) of Sub-section 8 of Section 5 of the IBC are apparently illustrative and not exhaustive. Legislature has the power to define a word in a statute. Such definition may either be restrictive or be extensive. Where the word is defined to include something, the definition is prima facie extensive."

C. Event of default:

7. In this case, the default first occurred upon the failure of the Respondent to refund the sum of Rs.25 crore within 90 days of its payment i.e. by August 7, 2019. Thereafter the default occurred on the dishonour of the cheques on January 4, 2020, when the cheques were returned for the reason of "Funds Insufficient". It is clear that the failure of the Respondent to pay the Petitioner the sum of Rs.25 crore together with interest thereon is a default of the terms of the MOU.
8. The Hon'ble Supreme Court in *Innoventive Industries Limited v. ICICI Bank & Anr. [(2018) 1 SCC 407]* (paragraphs 28 and 30) has made it clear that in the case of a Corporate Debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the Financial Creditor to satisfy itself that a default has occurred. As held by the Hon'ble Supreme Court, it is of no matter that the debt is disputed, so long as the debt is 'due' i.e. payable unless interdicted by law or not yet become due in the sense that it is payable at a future

date. For the reasons set out hereinabove and hereinbelow, there can be no dispute that the debt is due and payable by the Petitioner and that a default has occurred in making the payment. The relevant portions of the aforesaid judgment are reproduced hereinbelow:

> *"28.…The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete…*
>
> *30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."*

9. In the present case, apart from the evidence by way of the MOU itself and the cheque payments made and dishonoured, the Petitioner has placed on record [Pgs.25 to 31/Petition], the Report of the information utility NeSL clearly affirming and confirming the authenticity of the existence of the default on the part of the Respondent.

AS TO THE PURPORTED DEFENCES OF THE RESPONDENT:

A. The MOU is undated and therefore there is no liability to pay:

10. It is contended on behalf of the Respondent that the MOU does not bear a date of execution and therefore there is no starting point for making payment and the terminology used in the MOU of payment

being required to make within 60 days 'hereof' could not be given effect to because there was no date of execution. This contention is untenable for the following reason:

(i) Admittedly [Pg. 43/Petition] the payment of Rs.25 crore was made and disbursed on May 9, 2019. As per the terms of clause 4 of the MOU, the interest commenced from the date of payment of the sum of Rs.25 crore and obviously the time for repayment was co-terminus with the time for the transaction to fructify i.e. 60 days.

(ii) The clear and obvious intendment of the parties was that the said sum of Rs.25 crore would be repaid by the Respondent after a period of 60 days from its payment, within which period the definitive documents was to be executed or the transaction would be terminated. Thereafter, on the expiry of 60/90 days from the payment, whether or not the transaction had culminated in the execution of definitive documents, the said sum was to be refunded together with interest thereon as per the timelines and on the terms and conditions as set out in Clauses 4 and 5 of the MOU.

(iii) Even assuming arguendo that the date of May 9, 2019 ought not to be taken as the starting point, (which is not accepted as correct by the Petitioner), as per the Respondent's own case in paragraph 5(g) of the Affidavit in Reply, the transaction between the parties had been mutually terminated by October 2019. Assuming for argument's sake that, this is the date upon which the transaction came to an end, clause 4 contemplates that within 30 days of the transaction being terminated (i.e. 90

days – 60 days), the sum of Rs.25 crore plus interest was to be refunded. Thus, at very minimum, after the termination, which the Respondent claims took place in October 2019, the liability to refund *ex facie* arises. Even taking October 2019 as the starting point the sum referred to above is due and payable to the Petitioner.

(iv) This contention raised by the Respondent is also *ex facie* contrary to the Respondent's own conduct. If in fact the time to make the payment had never arisen in the first instance, then there is no reason why the Respondent issued cheques to the Petitioner for refund of the sum of Rs.25 crore together with interest thereon. This conduct of issuing the cheques entirely belies the argument of Respondent that the time to make payment had never arisen because of there being no date of execution written on the Agreement.

(v) To accept the Respondent's contention would mean that notwithstanding the express terms of the MOU requiring the Respondent to refund the above sums to the Petitioner, the mere absence of a date would imply that the Petitioner was divested of its entitlement to Rs.25 crore together with interest thereon. This is clearly unsustainable.

(vi) Even otherwise, and without prejudice, by issuing the above cheques, the Respondent has itself accepted that the liability to pay has arisen and cannot now dispute the same.

B. Reasons given for absence of a date on the Agreement:

11. Some reasons were given stating that a date was not put so as to avoid triggering event of the Petitioner from being precluded from a part of the subject project. This contention is contrary to the MOU. It is irrelevant as it is admitted by the Respondent that the transaction was mutually terminated by the parties and further if the date was kept blank for the Petitioner's benefit it cannot be used to the Petitioner's detriment by postponing repayment indefinitely.

C. There was an oral agreement that the sum of Rs.25 crore plus interest would be refunded once the Respondent entered into a transaction with a third party for funding.

12. This contention raised in paragraph 5(g) of the Affidavit in Reply is entirely untenable for the following reasons:

    (i) There is no such stipulation or clause whatsoever in the MOU and a party cannot be permitted to raise a contention, which is *ex facie* in the teeth of the agreed written document executed between the parties;

    (ii) There is not a single contemporaneous correspondence, document, material or communication whatsoever which remotely indicates any such alleged oral agreement. Indeed, it would be entirely untenable to even imagine that notwithstanding the clearly defined timelines in the MOU, the Petitioner would agree to some indefinite, uncertain and future date for repayment as and when the Respondent manages to get funding, which may or may not ever occur.

    (iii) This stand has never been agitated or even remotely referred to until filing of the Reply on August 3, 2021 almost two years after the date of the default.

(iv) This contention is also contrary to the conduct of the Respondent in issuing the cheques towards repayment of the dues. If no payment was due, there would have been no occasion to issue the cheques which as aforesaid were dated therefore valid only 3 months from the date of the cheques and would have had to be deposited.

D. Interest was not payable as claimed by the Petitioner, but the Respondent had agreed that over and above Rs.25 crore a lump sum compensation of Rs. 1,93,97,260/- would be paid to the Petitioner as full and final settlement:

13. First and foremost, this contention only pertains to the interest component and proceeds on the basis that the principal amount of Rs.25 crore is due and payable. Thus, on this ground alone the Petition ought to be admitted, as the debt of Rs.25 crore which is much more than the statutory minimum of Rs.1 crore, is admitted as being due and payable.

14. Even otherwise, by admitting that a sum of Rs.1,93,97,260/- is due and payable towards compensation, which admittedly has not been paid, the Petition is liable to be admitted against the Respondent, on this ground alone.

15. Furthermore, and although in actual fact there is no tenable dispute raised, it is a well settled position in law that merely because there may be a dispute as to some part of the quantum of the debt due, this will not be a material consideration for the adjudicating authority at the stage of admission of an Application under Section 7 of the IBC. So long as the bare minimum statutory amount of Rs.1 crore is admittedly found to be due, there is no infirmity whatsoever with

admitting the Petition notwithstanding any purported dispute on quantum.

16. Reliance on the following judgments:

(i) Gouri Prasad Goenka, Ex-Chairman of NRC Limited v. Punjab National Bank and Anr. [2019 SCC OnLine NCLAT 1137]:

"11. …In so far as joining of issue by the Corporate Debtor qua the quantum of payable debt is concerned, same does not fall for consideration of the Adjudicating Authority at the stage of admission of the application under Section 7 of the I&B Code. The only requirement is that the minimum outstanding debt should be to the tune of Rupees One Lakh. The actual amount of claim is to be ascertained by the Resolution Professional after collating the claims and their verification which comes at a later stage. The contention raised on this score also fails."

(ii) Apya Capital Services Private Limited v. Guardian Homes Private Limited [2020 SCC OnLine NCLAT 803]

"8. …Once the liability in respect of Rs.75 lakh was admitted and the same was not discharged by the Corporate Debtor, dispute in regard to quantum of debt would be immaterial at the stage of admission of application under Section 7 unless the debt due and payable falls below the minimum threshold limit prescribed under law…"

E. The MOU is unstamped and cannot be acted upon:

17. The Respondent has contended that the MOU being unstamped cannot be acted upon for any purpose and has placed reliance on Section 34 of the Maharashtra Stamp Act, 1958. The Respondent has also placed reliance on the judgment of the Ahmedabad Bench

of NCLT in *Resolution Professional for Essar Steel India Ltd. In the matter of: Standard Chartered Bank and Anr. v. Essar Steel India Limited [2019 SCC OnLine NCLT 750]* and the judgment of the Hon'ble Supreme Court in *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v. Bhaskar Raju & Bros.*, *[(2020) 4 SCC 612]*. The contentions raised by the Petitioner are unsustainable for the following reasons:

(i) Even if a document is unstamped that will not prevent a Court from acting on the basis of the document for the purpose of admitting a Petition under Section 7 of the IBC, even assuming that the document ought to be impounded.

(ii) Reliance has been placed by the Petitioner on the Hon'ble Bombay High Court decision in *Morpheus Media Ventures Private Limited v. Anthony Maharaj [(2017) 2 Bom CR 459]* (paragraphs 24 and 27), *Rupinder Singh Arora v. Kapil Puri [(2017) 2 Bom CR 459]* (paragraphs 10 and 11) and *Kapil Puri v. Rupinder Singh [2019 (3) Mh.L.J 155]* (paragraph 12). Where objections on stamp duty were considered and the Hon'ble High Court proceeded to hold that the Court ought to pass necessary orders as it deemed fit in the summary suit jurisdiction including for deposits and conditions for leave before granted, notwithstanding the stamp duty objection, as stamp duty was only a fiscal measure and was not intended to arm a litigant with a weapon of technicality to meet the case of his opponent. The same logic applies here. Even if the MOU requires stamping, which in itself has not satisfactorily been demonstrated by the Respondents. There is no fetter to the Petition under Section 7 being admitted.

(iii) The reliance placed on the judgments in the *Resolution Professional for Essar Steel India Ltd. (supra)* is entirely erroneous. In that matter a question arose as to whether an unstamped document could be relied upon as a foundation of a claim before Resolution Professional. In that case, there was no consideration either by the Adjudicating Authority or by the Hon'ble Supreme Court of an unstamped document at the stage of admission of a petition under Section 7. The present issue is no longer *res integra;* it is well settled that even if a document is unstamped, there is no bar against the petition being admitted by the Adjudicating Authority and the Respondent would do well not to attempt to confuse the powers of the Adjudicating Authority to admit a Petition under Section 7 with the power of the Resolution Professional to entertain the claim on the basis of an unstamped document. Even otherwise the Hon'ble Supreme Court in the above matter has expressed no view on the aspect of stamping and merely chosen not to interfere with concurrent orders of the courts below. It is well settled that a judgement must be read in the context of its facts and what it actually decides.

Findings:

7. We have heard the arguments of the Learned Counsel for both the parties and perused the records. The following questions of law and facts are to be decided in this case:

i) Whether an undated, unstamped and unregistered Memorandum of Understanding (MoU) signed by the Respondent along with Harmony Developers Private Limited (the Developers) on one side

and the Petitioner (the Joint Developer) on other side can be relied upon by the Tribunal?

ii) Whether the Payment of Refundable Security Deposit made by the third party i.e. Sunteck Realty Ltd., a Company with distinct Corporate Entity and a Partner in Petitioner Firm Magnate Industries LLP, a Limited Liability Partnership a different entity, entitles the Petitioner to file a Petition as Financial Creditor?

iii) Does the Refundable Security Deposit given by a Joint Developer constitute a Financial Debt?

iv) As to when the default has occurred?

v) Can the dishonour of cheques issued by the Respondent in favour of the Petitioner constitute the existence of Financial Debt and Default due from Respondent to Petitioner?

8. Accordingly, the following is hereby ordered: -

a) From the findings, on the basis of facts of the case and position of Law, it is constituted beyond doubt that the Petitioner entered as Joint Developer into an undated, unstamped and unregistered MoU with the Respondent, inter alia having a provision of payment of Rs.25,00,00,000/- (Rupees twenty-five crore only) as refundable security deposit to be paid by the Petitioner to the Respondent. The Petitioner was to arrange third party capital of Rs.400 crore required for the re-development project of the Respondent. This refundable Security Deposit of Rs.25 crore was to be repaid, irrespective of the fact that Petitioner arranged the third party capital or remained unsuccessful in arranging the same.

As this document is undated, unstamped and unregistered it cannot be relied upon by this Tribunal as a valid document to proceed against the Respondent as has been laid down by the Hon'ble Supreme Court in M/s *N.N. Global Mercantile V. M/s Indo Unique Flame Ltd & Others* [(2021) 4 SCC 408]:

> *"We will now apply the law to the facts of the present case. 5.1 The Appellant-Global Mercantile submitted that the application under Section 8 for reference of disputes to arbitration was not maintainable, since as per Section 34 of the Maharashtra Stamp Act, 1958 the Work Order being an unstamped document could not be received in evidence for any purpose, or acted upon, unless it is duly stamped. Consequently, the arbitration clause in the unstamped agreement also could not be acted upon or enforced since the arbitration clause would have no existence in law, unless the applicable stamp duty (and penalty, if any) is paid on the Work Order. Reliance was placed on paragraph 22 of the judgment in Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited, 15 wherein it has been held : ".. that an arbitration clause in an agreement would not exist when it is not enforceable by law"."*

Section 35 of the Indian Stamp Act, 1899 also talks about the non-admissibility of the documents which are not duly stamped. Section 35 of the Indian Stamp Act, 1899 is as follows:

> *35. Instruments not duly stamped inadmissible in evidence, etc.—No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped: Provided that—*

(a) any such instrument [65] [shall], be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act.

In the present case, the MOU is itself undated, unstamped and unregistered. As this document is undated, unstamped and unregistered it cannot be relied upon by this Tribunal as a valid

document to proceed against the Respondent as has been laid down by the Hon'ble Supreme Court in various judicial pronouncements.

b) Factually, the payment of Rs.25 crore was made by one Sunteck Realty Ltd. to the respondent, which is a distinct corporate entity than Magnate Industries LLP, the petitioner. Sunteck Realty Ltd. is allegedly a Partner in the Petitioner LLP and not a party to this Petition.

As no disbursement has been made by the Petitioner to the Respondent, the Petitioner Magnate Industries LLP is not entitled to file an application under section 7 of the IBC-2016 as Financial Creditor against Respondent Safal Developers Private Limited. Section 5(7) of the Code defines the term 'Financial Creditor' as under:

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

Admittedly, the petitioner has filed Axis Bank Statement of Sunteck Realty Ltd. as Exhibit-I of the petition, showing a payment of Rs.25 crore to the Respondent. If at all, somebody can file Insolvency petition against the Respondent under section 7 or under section 9 of IBC-2016, it is Sunteck Realty Limited, of course subject to satisfying the criteria of being a financial or an operational creditor, as the case may be.

c) The refundable security deposit of Rs.25 crore arranged by 'the Joint Developer' petitioner through a third entity cannot constitute a financial debt as per section 5(8) of the Code owed by 'the

Developer' respondent to the petitioner. Section 5(8) of the Code defines the 'Financial Debt' as follows:

(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 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 nonrecourse basis;

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

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

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

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

d) As there is no financial debt owed by the respondent to the petitioner being a Joint Developer, the Joint Developer becomes a Joint Venture Partner in the project, the question of default does not arise. The date of default as mentioned in the Part-IV of the Form 1 of Petition is 31.07.2020 whereas, as per NeSL record of default the date of default is shown as 04.01.2020 as submitted by the petitioner himself.

e) The respondent issued two cheques in favour of the petitioner amounting to Rs.25,00,00,000/- and Rs.1,74,57,534/- totalling to Rs.26,74,57,534/-. These cheques were dishonoured. For dishonouring of the cheques, there is a specific remedy available to the petitioner under section 138 of the Negotiable Instrument Act 1881. The petitioner chose not to proceed against the respondent in this regard. The mere fact of dishonouring of cheques, by itself, cannot be construed as existence of financial debt and default so as to admit a petition under section 7 of the IBC-2016.

9. Accordingly, CP(IB)No.1167/MB-IV/2020 filed by Magnate Industries LLP, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Safal Developers Private

Limited, Corporate Debtor is hereby dismissed. No costs to either side. File may be sent to records in the registry.

10. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on grounds of dismissal of the present petition.

Sd/- Sd/-

Rajesh Sharma **Suchitra Kanuparthi**
Member (Technical) **Member (Judicial)**

06.10.2021