

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH,
KOLKATA**

C.P (IB) No.772/KB/2019

In the matter of

(An application under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016).

In the matter of

Stressed Assets Stabilization Fund, having its Registered office at 3rd Floor, IDBI Tower, WTC Complex, Cuffe Parade, Mumbai- 400005.

... Financial Creditor

Versus

In the matter of:

Delta International Limited, CIN: L51909WB1977PLC031225, having its Registered office at 4, Council House Street, Kolkata-700001.

... Corporate Debtor

Date of hearing : 24/03/2022

Order Pronounced on : 07/04/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Ms. Manju Bhuteria, Adv. } For the Financial Creditor
2. Ms. Gunja Pachisia, Adv.

1. Mr. Joy Saha, Sr. Adv. } For the Corporate Debtor
2. Mr. Sarvapriya Mukherjee, Adv.
3. Ms. Rajshree Kajaria, Adv.
4. Ms. Uttam Sharma, Adv.

O R D E R

Per: Harish ChanderSuri, Member (Technical)

1. The Court is convened by video conference today.
2. This petition section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, has been filed by **Stressed Assets Stabilization Fund**, constituted by Government of India as a Special Purpose Vehicle Trust for acquiring stressed and non-performing assets of erstwhile Industrial Development Bank of India and having its office at 3rd Floor, IDBI Tower, WTC Complex, Cuffe Parade, Mumbai- 400005 (hereinafter referred as Financial Creditor), through Sri. Shubhranshu Shekhar Sahoo, Assistant General Manager, who has been authorised by the Chief General Manager by a letter dated January 22, 2019 and seeks initiation of Corporate Insolvency Resolution Process in respect of Delta International Limited, a corporate entity having CIN No. L51909WB1977PLC031225 having its registered office at 4, Council House Street, Kolkata- 700001, West Bengal (hereinafter referred as the Corporate Debtor).
3. It is submitted in the petition that the Corporate Debtor availed credit facility to the tune of Rs. 750 lakhs from Industrial Development Bank of India. Against such credit facilities, the Corporate Debtor signed and executed various security documents and hypothecated its movable properties as well as mortgaged the said properties measuring 64.73 acres at Mouza Manickpore, Thana Sankrail, District Howrah in the State of West Bengal comprising of various plot numbers therein and also created charge of such properties in favour of the said Industrial Development Bank of India.
4. It is further submitted that the Central Government set up a special purpose vehicle in the form of a Trust by the name of 'Stressed Assets Stabilization Fund' with its principal office at IDBI Tower, Cuffe Parade, Mumbai - 400005 vide Trust Deed dated September 29, 2004, for acquiring the non-performing assets to the extent of Rs. 9000Cr. from

the said Industrial Development Bank of India. Under the Transfer Deed dated September 30, 2004, executed by the said Industrial Development Bank of India in favour of the Financial Creditor, the said Industrial Development Bank of India unconditionally and irrevocably sold, assigned, transferred and released to and unto the Financial Creditor the loan facility sanctioned by the said Industrial Development Bank of India to the Corporate Debtor with an intent that, the Financial Creditor shall be the full and absolute legal owner and the only legal person to receive the amounts due and payable by the Corporate Debtor to the Financial Creditor. The Central Government in exercise of the powers conferred upon it under sub-clause (ii) of clause (h) of Section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 issued a notification dated September 29, 2004 specifying the Financial Creditor as a Financial Institution for the purpose of the said clause.

5. It has been further submitted that several developments took place and ultimately a negotiated settlement was made between the Financial Creditor and the Corporate Debtor on December 4, 2008 in terms whereof the Financial Creditor agreed to accept Rs. 850 lakhs in full and final settlement consisting of cash portion of Rs. 750 lakhs and 10 lakh equity shares with face value of Rs. 10 per share of the Corporate Debtor. Such negotiated settlement was modified from time to time. It is further submitted by the Financial Creditor that in view of the failure of the Corporate Debtor to make payment of the negotiated settlement dated December 4, 2008, the same was revoked on July 11, 2014 and as a reason thereof, the Financial Creditor became entitled to recover Rs. 2,65,02,59,410.00 as on December 1, 2018. On account of non-payment of such sum the Financial Creditor had issued notice under Section 13(2) of the SARFAESI Act, 2002 and has also initiated proceedings under Section 19 of the Recovery of Debts due to Financial Institutions Act, 1993. Such proceedings are pending.
6. The Corporate Debtor however, in reply through its Director Mr. Tapas Kumar Chowdhury has submitted that the application of the Financial Creditor is not maintainable since the Financial Creditor is not a juristic

entity. It is also submitted by the Corporate Debtor that the Financial Creditor is not a Financial Creditor as defined under the IB Code, 2016. It is further submitted that the application is misconceived and barred by law of limitation as well as principles of waiver and estoppel.

7. The Corporate Debtor has further submitted that there is no default in payment of the negotiated settlement amount of Rs. 750 lakhs inasmuch as the same has been fully accepted. It is further submitted that the negotiated settlement dated December 4, 2008 as modified from time to time, inter alia, provided that the Corporate Debtor will only be liable to pay interest at the rate of 13% per annum after payment of cash component of Rs. 750 lakhs for the delayed payment. In addition, the Corporate Debtor was obliged to buy-back equity shares of Rs. 10 per share at a price giving minimum yield of 13% per annum within a period of one year after repayment of deferred interest i.e. by May 1, 2016.
8. The Corporate Debtor has further submitted that it has made payment of the settled cash component of Rs. 750 lakhs within the extended periods allowed by the Financial Creditor as would appear from the chart attached to its affidavit. Since the Financial Creditor had accepted the sum in full under and in terms of the said negotiated settlement, the Financial Creditor is not entitled to disown and/or terminate the said negotiated settlement. Hence the Financial Creditor is not entitled to resile from that and claim that Rs. 2,65,02,59,410.00 was outstanding as on December 1, 2018.
9. The Corporate Debtor has also invited our attention to the contents of the letter dated July 11, 2014 terminating the negotiated settlement as set out hereunder:

“.....In terms of the settlement and as modified time to time, promoters/company was required to allot 10 lakh equity shares with face value of Rs.10/- per share in DIL/MPL and buyback the shares at a price giving a minimum yield of 13% p.a.

However, the company is in default in compliance of equity allotment and execution of buy back agreement thereof. Despite grant of sufficient time and opportunity, you have failed to submit an acceptable proposal to regularize the default committed. Further, the company has unilaterally altered the terms of allotment of equity to pledge of equity and has made no provision for buyback of equity/payment.....”

10. It is manifest from the aforesaid that the only ground of termination was the failure on the part of the Corporate Debtor to allot the said 10 lakh equity shares or to arrange for the buyback of the same. It will also appear from the termination letter dated July 11, 2014 that the Financial Creditor has no grievances with regard to the full and complete payment of the cash portion of Rs. 750 lakhs.
11. The Corporate Debtor has further submitted that in any event and without prejudice to the aforesaid terms of the said negotiated settlement, the Corporate Debtor was to make over shares worth Rs. 100 lakhs to the Financial Creditor which shares were to yield a return of 13% per annum and were to be bought back by the Corporate Debtor at the end of the third year of the negotiated settlement. As would appear from the said settlement, the same envisaged the transfer of shares worth Rs. 100 lakhs from the promoters of the Corporate Debtor. The said promoters of the Corporate Debtor were always ready and willing to transfer their shares in terms of the negotiated settlement but were unable to do so inasmuch as: -
 - a) The said shares were in physical form and were required to be dematerialized.
 - b) By a letter dated April 15, 2010 written by National Securities Depository Limited (NSDL) it was informed that the application for dematerialization of shares of the Corporate Debtor was not acceptable in view of the non-fulfillment of the conditions with regard to Minimum Net worth Rs. 1 Crore and Net worth erosion if any should not be more than 50% of the paid-up capital.

12. However, having regard to the fact that the allotment and transfer of the said shares of the corporate debtor belonging to its promoters could not be made over for the reasons stated above the promoters of the Corporate Debtor pledged the said shares by a letter dated January 28, 2011 together with the duly signed and executed share transfer certificates. Such shares are still with the Financial Creditor.
13. It is submitted by the Corporate Debtor that the conditions of the negotiated settlement with regard to the making over of equity shares of Rs. 100 lakhs were duly complied with by the Corporate Debtor and/or its promoters. By accepting the pledge of the said shares the value of which was in excess of Rs. 100 lakhs, the conditions of the settlement with regard to the allotment and buyback of the said shares of equivalent value was modified by acceptance of the pledge of the said shares which pledge could be invoked upon failure on the part of the Corporate Debtor to redeem the same within the time fixed by the negotiated settlement. In the circumstances, it would appear that both limbs of the said negotiated settlement were duly performed and/or worked out and/or given effect to by both parties.
14. It is further submitted that in any event, despite repeated requests by the Corporate Debtor the Financial Creditor has refused to accept the interest for the deferred payment and/or value of the pledged shares together with accrued agreed interest thereon on one pretext or the other.
15. The Financial Creditor filed its rejoinder to the reply filed by the Corporate Debtor. In the rejoinder, the Financial Creditor has stated that the Corporate Debtor paid the principal cash portion of Rs. 750 lakhs but defaulted in payment of interest @ 13% on the negotiated settlement amount. It is further submitted that the Corporate Debtor defaulted in allotment of equity shares valued at Rs. 1 crore and also defaulted in buy-back and ultimately expressed its inability to issue the equity shares. It is further submitted that the Corporate Debtor instead of issuing equity shares forwarded 10 lakhs equity shares with face value of Rs. 10 each of M/s. Delta International Limited in the name of Shri Suneel Jhunjunwala in March, 2011. It is further submitted that the Corporate

Debtor instead of allotting equity shares as per terms and conditions of the negotiated settlement, created a pledge thereof. It is submitted that such pledge was not acceptable to the Financial Creditor in terms of the letter of approval and thus the Financial Creditor revoked the negotiated settlement by its letter dated July 11, 2014. It is further submitted that an amount of Rs.1,92,769.00 is overdue. It is also submitted that due to non-compliance of terms of letter of approval and lack of diligence in making payment of the negotiated settlement in spite of several opportunities provided by the applicant from 2008 to 2014 and allowing modification of negotiated settlement terms at the requests of the Corporate Debtor, the Corporate Debtor deliberately failed to convert equity into cash and comply with the modified terms and conditions, consequentially, the Corporate Debtor was constrained to revoke the same on July 11, 2014. It is further submitted that upon revocation of the negotiated settlement, the Corporate Debtor became a defaulter in the eye of law and on the basis of the terms and conditions of the negotiated settlement scheme, the negotiated settlement was annulled, the waiver granted was reversed and original liability of the Corporate Debtor as it stood on December 4, 2008 upon adjusting the payment of Rs. 750 lakhs made by the Corporate Debtor was restored.

16. It is further submitted that the Financial Creditor being a Trust, in the nature of a financial institution has every right of recovery of its outstanding dues which are enforceable before the DRT as well as under the Code of 2016. Furthermore, the Financial Creditor has reiterated that since the negotiated settlement has been revoked due to default committed by the Corporate Debtor, a sum of Rs. 2,65,02,59,410.00 as on December 1, 2018 is outstanding and payable by the Corporate Debtor.
17. We have heard Learned counsel for both parties at length. During the course of the arguments, the counsel for the Corporate Debtor had submitted that it had always been ready and willing to make payment of the outstanding interest, if any and also buyback the shares of Rs. 100 lakhs pledged with the Financial Creditor as per the agreed terms.

However, such offer of the Corporate Debtor has been outrightly rejected on the ground that the negotiated settlement had been revoked and there was no question of accepting any further amounts thereunder.

18. The Learned counsel for the Financial Creditor has submitted that in view of the notification issued by the Central Government on September 29, 2004, the question of Financial Creditor being not entitled to maintain this application does not survive. On the other hand, the Learned Counsel for the Corporate Debtor has invited our attention to Clause 23 of the Trust Deed wherefrom it would appear that the debt was not assigned to the Financial Creditor but to its Trustees. Hence, the Financial Creditor, without the Trustees being party to the proceedings, could not maintain the instant application.
19. The Learned Counsel for the Financial Creditor also submitted that in view of the negotiated settlement having been revoked, the Financial Creditor has become entitled to claim the amount originally due. On the other hand, the Counsel for the Corporate Debtor has submitted that the negotiated settlement dated December 4, 2008 as modified from time to time clearly stipulated payment of interest as provided therein and there was no question of the same being revoked. The Counsel invited our attention to the letter dated July 11, 2014 which records the only default of the Corporate Debtor being non-compliance of equity allotment and execution of the buy-back agreement. In fact, there is no whisper in the letter of July 11, 2014 with regard to default in payment of the cash component and/or interest thereon.
20. First of all, it is quite clear from the letter dated July 11, 2014 that the negotiated settlement was sought to be terminated on account of failure of the Corporate Debtor to allot 10 lakh equity shares with face value of Rs. 10 per share and buy back of such shares at a price giving a minimum yield of 13% per annum. This is admitted by the Financial Creditor in Paragraph 7(f) of its rejoinder as reproduced hereunder:

“(f) With reference to paragraph 4(rr) to 1 and 2 of the said reply I say that due to non-compliance of the terms of the letter of approval and lack of

diligence in making payment of the Negotiated Settlement inspite of several opportunities provided by the applicant from 2008 to 2014 and allowing modification of Negotiated Settlement terms at the requests of the Corporate Debtor, the Corporate Debtor deliberately failed to convert equity into cash and comply with the modified terms and conditions, consequentially, the applicant was constrained to revoke the same on 11.07.2014. Upon revocation of the Negotiated Settlement, the corporate debtor became a defaulter in the eye of law and on the basis of the terms and conditions of the Negotiated Settlement scheme, the Negotiated Settlement was annulled, the waiver granted was reversed and original liability of the Corporate Debtor as it stood on December 4, 2008 upon adjusting the payment of Rs. 750 lacs made by the Corporate Debtor was restored.”

21. Thus, it is clear that the Financial Creditor has approached this Tribunal on account of the default of the Corporate Debtor in buying back the shares in terms of the negotiated settlement. There is also dispute with regard to the legality and validity of such revocation and diverse proceedings are pending before other forums including the High Court at Calcutta and the Debt Recovery Tribunal.
22. Section 3 (12) of the IB Code, 2016 defines “default” as **non-payment of debt when whole or any part of 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...**
23. It is thus clear that no default as defined under the Insolvency and Bankruptcy Code, 2016 had occurred. The default alleged by the Financial Creditor is a default in allotment of shares and agreeing to buy back such shares. It is a contractual dispute which has arisen by reason of the alleged breach of contract. Remedy for breach of contract would lie in a civil suit.
24. From the series of letters exchanged between the parties, it is clear that the Financial Creditor never treated allotment of equity shares to be essence of the Negotiated Settlement and in fact never insisted on the

same until the entire sum of Rs. 7.50 crores were paid on 30.04.2014.

25. From the said correspondence it will also appear that time was never of essence of the agreement between the parties. Although initially the Financial Creditor was interested in payment of Rs. 1 crore with minimum yield of 13% p.a. by way of buy back agreement, the Financial Creditor although having received pledged shares, did not lodge the same to get them transferred in its name.
26. The Corporate Debtor tendered payment of the interest amount due on Rs. 7.50 Crores but the same was refused to be accepted by the Financial Creditor. Hence, the only issue that survives is buying back of shares which is not within the jurisdiction of NCLT.
27. Furthermore, Section 5(8) of the IB Code, 2016 defines Financial Debt to mean a debt alongwith interest if any, which is disbursed against the consideration of the time value of money and included money borrowed against the payment of interest. In the instant case, there is no default within the meaning of IB Code, 2016.
28. **During the course of arguments, Ld. Counsel for the Financial Creditor has made the following submissions:-**
 - i. That the applicant is Financial Creditor which was set up with the object of acquiring by transfer the stressed assets of the IDBI for the purpose of recovering the amounts due thereunder in consideration of the Transfer of stressed assets of IDBI. It is submitted that by and under Deed of Assignment dated 30th September, 2004, the Financial Creditor agreed to acquire the stressed assets of the IDBI. Under the said Deed of Assignment, IDBI unconditionally and irrevocably assigned all its stressed assets to the Financial Creditor. The Deed of Assignment and the supplementary Deed of Assignment form part of this petition.
 - ii. It is submitted that the claim of the Financial Creditor is in respect of subscription agreement dated 1st February, 1995 and the Rupee Term Loan Agreement dated 23rd December, 1998. It is

stated that the total outstanding amount as on 1st December, 2018 was Rs.2,65,02,59,410/- (Calculation at pages 664 and 665 of the petition). It is submitted that under the subscription agreement dated 1st February, 1995 between the Corporate Debtor Delta Industries Limited and IDBI, IDBI agreed to subscribe to 15.5% privately placed debentures of Rs.5 Crores of Delta Industries Limited on the terms and conditions contained in the said subscription agreement. Pursuant to the said Agreement Delta Industries Ltd. allotted debentures on 13th February, 1995 and the first instalment was to be paid in the year,2002.

iii. It is submitted that Delta Industries Ltd. merged with Delta International Limited (Corporate Debtor). The date of the order sanctioning the scheme is August 11, 1997. Delta Industries Ltd. amalgamated with the Corporate Debtor with effect from April 01, 1996.

iv. It is further submitted by the Ld. Counsel that by and under a Loan Agreement dated 23rd December, 1998, IDBI granted a loan of Rs.7,50,00,000/- (Rupees Seven Crores Fifty Lacs only) to the Corporate Debtor. It is submitted that Article VI of the said Loan Agreements provides that the Agreement became binding on the borrower of the lender on and from the date mentioned therein and it shall remain in force till all the moneys due under this agreement are fully paid off. It is further submitted that Clause 1.2 of the Loan Agreement provides for liquidated damages on default amounts. It is further submitted that Sections 3.9 and 3.10 (ii) under the clause 1.2 of the general conditions of the loan agreement provides for liquidated damages on default amounts.

“ Section 3.9: In case of default in payment of instalment of principal, interest and all other monies (except Liquidated Damages) on their respective due dates, the Borrower shall pay on the defaulted amounts, Liquidated Damages @ 2.10% p.a. for the period of default. Liquidated Damages shall be payable in the manner and on the dates as specified in the Loan Agreement for payment of interest. Arrears of Liquidated Damages shall carry interest as stipulated in Section 3.3(1) hereof.”

“ Section 3.10 (ii): In case of default in making such reimbursement within 30 days from the date of notice of demand, the Borrower shall also pay on the defaulted amount Liquidated Damages @ 2.10% p.a. from the expiry of 30 days from the date of notice of demand till reimbursement in accordance with the provisions of Section 3.9”.

- v. It is submitted that in terms of the said Loan Agreement, the last payment was to be made on 1st January 2006. The Corporate Debtor availed the loan limit of Rs.6,47,00,000/-
- vi. It is submitted that in the year,2000, IDBI came to know that by an order dated 21st December, 1999 a scheme of arrangement has been sanctioned whereby the properties mortgaged to IDBI were transferred to one Meghdoot Projects Limited and Delta Limited. IDBI made an application for recall of the said order in August,2000. It is submitted that by an order dated 29th August, 2000, an interim order was passed whereby the respondents, i.e. the Corporate Debtor, Meghdoot Projects Limited were restrained from aliening, transferring, encumbering or dealing with in any manner whatsoever the assets and properties which belonged to the Corporate Debtor before the order dated December 21, 1999 was passed by this Tribunal.
- vii. It is submitted that by an order dated September 22,2004, the application filed by IDBI being CA No. 540 of 2004 was disposed of by confirming the interim order dated August 29,2000 and the court further directed that the order dated August 29, 2000 will continue till the entire dues of IDBI are paid off. It is stated that the said order further directed the respondents to give an undertaking to the respective directors individually that they would not take the plea of claim of compromise either in the pending litigation before the DRT or otherwise in respect of their responsibility towards the applicant with regard to payment of their dues. A copy of the said order dated September 22, 2004 is annexed to the petition. It is submitted that Meghdoot Projects Limited and Delta Limited were before the BIFR from the year 2000 to 2016.

- viii. It is submitted that the date of default is 4th March, 2004, i.e, the date when the IDBI recalled the entire principal amounts of loan together with interest and all other amounts due in respect thereof. It is submitted that letter dated March 04,2004 is annexed to the petition whereby IDBI had recalled entire principal amount together with interest due in respect of both agreements.
- ix. It is submitted that the Corporate Debtor has from time to time admitted its liability and such admission is within the period of limitation as such the claim of the applicant/ Financial Creditor is within the period of limitation. The Corporate Debtor has from time to time promised to pay the outstanding dues. The same would be evident from the following :-
- (a) In terms of the loan agreement dated 23rd December, 1998, the Corporate Debtor was to make payment of the last installment by 1st January, 2006. In terms of the subscription agreement, the due date of redemption was three installments at the end of 5th, 6th and 7th year from the allotment.
 - (b) Both subscription agreement and the loan agreement provide that the agreement shall be in force till all the moneys due and payable under the agreements are fully paid off.
 - (c) Order dated September 22,2004, provides that the interim order passed on August 29, 2000 would continue till the entire dues of the applicant/ Financial Creditor are paid off.
 - (d) On 21st October, 2008, the Corporate Debtor had promised to pay a sum of Rs.750 lakhs in three installments and issue 5,00,000 equity shares of the Corporate Debtor valued at Rs.50 Lakhs.
 - (e) On December 4, 2008, the Financial Creditor agreed to accept an amount of Rs.850 lakhs by way of full and final settlement consisting of cash portion of Rs.750 lakhs and Rs.10 lakhs equity share of the Corporate Debtor/meghdoot subject to the terms and conditions set out in appendix attached to the said letter dated December 04,2008. In the

said appendix, clause (h), clearly mentions, inter alia, that if the default in payment persists for 30 days, the Financial Creditor shall have the right to reserve the waiver of dues and restore the original liability as per the terms of the loan agreement entered into by the Corporate Debtor and adjust the payment received by it towards the dues.

- (f) By a letter dated 15th January, 2009, pursuant to discussions with the Corporate Debtor, the Financial Creditor agreed to some modifications as stated in the said letter.
- (g) By a letter dated April 2, 2009, pursuant to discussions with the Corporate Debtor, the Financial Creditor agreed to some modifications as stated in the said letter.
- (h) By a letter of December 23, 2009, pursuant to discussions with the Corporate Debtor, the Financial Creditor agreed to reschedule the monthly instalments without hampering the terminal date i.e., January 1, 2013.
- (i) By a letter dated October 14, 2011 of the petition, pursuant to discussions with the Corporate Debtor, the Financial Creditor agreed to some modifications as stated in the said letter.
- (j) By a letter dated January 2, 2014, the Financial Creditor called upon the Corporate Debtor to clear the default failing which the Financial Creditor shall revoke the settlement and restore all original liabilities and take further action.
- (k) By a letter dated February 1, 2014, the Financial Creditor informed the Corporate Debtor that the revised DRS is not acceptable.
- (l) By a letter dated 6th February, 2014, the Corporate Debtor promised to pay in the manner mentioned in the said letter.
- (m) By a letter dated May 20, 2014, the Financial Creditor pointed out the default on the part of the Corporate Debtor and advised the Corporate Debtor to clear the overdue and submit an acceptable proposal, failing which the Financial Creditor shall revoke the settlement and restore all original

liabilities and take further action.

- (n) Several part payments were made by the Corporate Debtor and the same would be evident from Annexure-D to the reply filed by the Corporate Debtor. The said part payments were made between 26th February, 2009 and 30th April,2014.
 - (o) By a letter dated July 11,2014, the Financial Creditor revoked the settlement and reversed the waiver of dues and restored the original liability.
 - (p) On May 19,2017, the Financial Creditor issued a notice under Section 13(2) of SARFAESI Act, 2002. The particulars of default is mentioned in the petition.
 - (q) The Financial Creditor has also filed O.A. No.281 of 2017 in July, 2017 before the DRT, Kolkata against the Corporate Debtor and others.
 - (r) By a letter dated 3rd October,2017, the Corporate Debtor proposed to buyback shares of Rs.1 crore and make payment of interest amounting to Rs.388.69 lakhs to be paid in 24 equal monthly installments. The said proposal was not accepted by the Financial Creditor.
29. It is submitted that in the affidavit filed by the Corporate Debtor on 9th August, 2019 the Corporate Debtor has admitted a sum of Rs.4,88,69,626/-is due and has prayed for making the said payment in installments.
30. It is submitted that the Corporate Debtor has admitted its liability from time to time and the balance sheets of the Corporate Debtor would reflect that the balance sheets of the Corporate Debtor from year 2013 till 2018 are annexed to the supplementary affidavit. It is evident from the above that there is a default by the Corporate Debtor in making payment and default made is in excess of Rs.1 lakh.
31. The Financial Creditor has relied upon judgment passed by the Hon'ble Supreme Court in the Case of **Asset Reconstruction Co.(India) Ltd. Vs. Bishal Jaiswal**, in Civil Appeal No. 323 of 2021. Letters issued by

Corporate debtor constitutes a promise to pay within the meaning of Section 25(3) of the Indian Contract Act, 1872 and as such the defense of limitation would not stand. Reliance is placed on **(i) Hooghly Mills Co.Ltd. reported in 143 Company cases 83, ii. Judgement dated 27th dated 27th February 2020 passed in C.P.(IB) No. 432/KB/2019 in the matter of Asset Reconstruction Company Limited vs. Raigarh Properties Private Limited. iii. Judgment dated 5th March,2020 passed in C.P.(IB) No.233/9/JPR (In the matter of: Uniword Telecom Limited vs. Taurus Exports Private Limited. Reliance was placed on judgment dated 20th November,2019 passed in C.P.(IB) No.1198/KB/2018 , in the matter of Asset Reconstruction Company India Limited Vs. Dagcon India Private Limited.**

32. The Ld. Counsel for the Financial Creditor has also filed **Additional written notes of argument**, it is submitted that this Adjudicating Authority had raised a query computation of dues and such clarification was given by way of Supplementary Affidavit which was filed on 23.03.2022, and it is mentioned therein that the rates of interest, Penal Interest and Liquidated Damages are provided in the Agreement particulars whereof are as follows:

1. Loan Agreement dated 23.12.1998.Clause 1.2. of the loan agreement provides for liquidated damages on default amounts. Sections 3.9 and 3.10(ii) under the clause 1.2 of the general conditions of the loan agreement provides for liquidated damages on default amounts.

“ Section 3.9: In case of default in payment of instalment of principal, interest and all other monies (except Liquidated Damages on their respective due dates, the Borrower shall pay on the defaulted amounts, Liquidated Damages @ 2.10% p.a. for the period of default. Liquidated Damages shall be payable in the manner and on the dates as specified in the Loan Agreement for payment of interest. Arrears of Liquidated Damages shall carry interest as stipulated in Section 3.3(1) hereof.”

“ Section 3.10 (ii): In case of default in making such reimbursement within 30 days from the date of notice of demand, the Borrower shall

also pay on the defaulted amount Liquidated Damages @ 2.10% p.a. from the expiry of 30 days from the date of notice of demand till reimbursement in accordance with the provisions of Section 3.9”.

2. Clause 2.1 provides interest @ 16.5% per annum and provides for interest tax at the rate applicable from time to time.

Subscription Agreement dated 01.02.1995 of the Supplementary Affidavit.

Clause 1.4

- i. The Company shall until the Debentures are fully redeemed or paid off pay to the Debenture holders interest on the principal amount of the Debentures outstanding from time to time, at the rate of 15.5% per annum subject to deduction of income tax (where applicable) at the rate prescribed from time to time under the Income Tax Act, 1961 or any statutory modification or re-enactment thereof for the time being in force, and such interest shall be payable a yearly on the dates mentioned in Schedule 1.
- ii. All interest on the Debentures and on all other monies accruing due under this Agreement shall, in case the same be not paid on the respective due dates, carry further interest at the rate applicable computed from the respective due dates and shall become payable upon the footing of compound interest with half yearly rates as mentioned in sub section(i) above.
- iii. All interest on other monies which shall accrue under these presents shall also be payable in the manner and on the dates as mentioned in sub-section (i) above.
- iv. Subscription to Debentures made pending creation of final security as stipulated in Article II hereof shall, after the expiry of 365 days from the date of first disbursement, carry further interest at the rate of 1.05% per annum till creation of such security.

Clause 1.11

Provides for Liquidated Damages on the defaulted amount by the Company. The relevant page of the supplementary affidavit

are annexed. Hence, the computation of dues was done in terms of Loan Agreement and Subscription Agreement which has executed between the parties.

It is pertinent to mention here that SASF as an entity is not regulated by RBI and the various norms and guidelines on accounting of NPAs are specifically not applicable to it. The very fact that SASF as a SPV had acquired all NPA Accounts of erstwhile IDBI, the Development Finance Institution, it has so acquired all the rights and interest against the underlying contracts and has been accordingly, charging the interest, further interest, penal interest, liquidated damages and other charges on these accounts as its claims as per those contracts.

33. **Ld. Counsel for the Corporate Debtor** has further submitted that in compliance of the orders passed by this Adjudicating Authority on 1st march,2022 directing the Financial Creditor to file an affidavit duly sworn by Senior Officer detailing therein the rate of interest applicable as per the guidelines issued by the RBI from time to time and the rate of interest charged, it was further directed that the Financial Creditor will also specify as to what formula has been adopted in calculating the interest amount by the Financial Creditor and one of the explanations in the affidavit would be as to how much amount has been returned by the Corporate Debtor, on what dates and how much principal and the interest is still due, giving figures separately. It is submitted that in term of the said order, the Financial Creditor has filed an affidavit of compliance by Sri Santosh B.Shinde on 10.03.2022.
34. Ld. Counsel for the Corporate Debtor submitted that the total amount of debt sanctioned was only Rs.11,47,00,000/-(Rupees Eleven Crores and Forty Seven Lakh only) and the total amount outstanding claimed by the Financial Creditor as on 1st December, 2018 is Rs.265,02,59,410/- (Rupees Two Hundred Sixty Five Crores, two lakh, fifty nine thousand four hundred ten only) . Ld. Counsel argued that as against the principal

sum of Rs.11.47,00,000/-, interest is in excess of Rs.254 Crores, which is clearly unconscionable and hit by the principles of usurious loans. Ld. Counsel for the Corporate Debtor has submitted that on page 15 of the petition the following credit facilities are stated to have been sanctioned:-

- i. Convertible Debentures - Rs.5 Crores
- ii. Rupee Term Loan - Rs. 7.5 Crores

35. It is submitted that out of the said Rupee loan of Rs. 7.5 crores, only a sum of Rs.6.47 crores was utilized by the Corporate Debtor and in terms of the settlement dated 4th December, 2008, the entire Term Loan of Rs.7.5 Crore of which only Rs.6.47 utilized has been fully paid of as per the details provided in pages 49 -50 of the Affidavit in Reply.
36. Ld. Senior Counsel for the Corporate Debtor further submitted that in respect of the convertible debentures, between 1995 and 1999, the Corporate Debtor has made payment of a sum of Rs.3,21,94,000/- which would appear from the balance sheet of the Corporate Debtor (Annexure-A). It is submitted that the said fact has been completely suppressed in the affidavit of compliance affirmed on 10th March, 2022. It was under these circumstances, that the total settlement amount of Rs.8.5.Crores was divided into two components of Rs. 7.5 Crores and Rs.1 Crores to be secured by equity shares.
37. Ld. Counsel has further submitted that negotiable settlement between the parties dated 4th December, 2008 admittedly provided as follows:-
- a. SASF would accept a total sum of Rs.850 lakhs in full and final settlement of its claim.
 - b. The said settlement value of Rs. 850 lakhs would comprise of a cash portion of Rs.750 lakhs.
 - c. The remaining Rs.100 lakhs would be secured by the pledge of equity shares of Delta International Limited /Meghdoot Projects Limited.
38. It is submitted that the entire cash component of Rs.750 lakhs has been duly paid by the Corporate Debtor to the Financial Creditor.

“ In terms of the settlement and as modified from time to time, promoters/ company were required to allot 10 lakh equity shares

with face value of Rs.10/- per share in DIL/MPL and buyback the shares at price giving a minimum yield of 13% p.a.

However, the company is in default in compliance of equity allotment and execution of buy back agreement thereof. Despite grant of sufficient time and opportunity, you have failed to submit an acceptable proposal to regularize the default committed. Further, the company has unilaterally altered the terms of allotment of equity to pledge of equity and has made no provision for buyback of equity/payment.”

39. Ld. Counsel further argued that it is manifest from the said letter of termination dated 11.07.2014 that the same does not in any manner whatsoever touch upon or concern or relate to the upfront cash payment of Rs.750 lakhs but is confined only to the alleged failure to provide the said equity shares for a total value of Rs.1 Crore.
40. It is further submitted that although the letter of termination is restricted and/or confined only to the shares of a value of Rs.1 Crore, the table at page 9 seeks to raise a claim of Rs.156,65,27,781/- in respect of the cash component of Rs.750 lakhs which has already been paid. In the circumstances, the entire claim of Rs.156,65,27,781/- is liable to be disregarded, ignored and held to be a mala fide, illegal and unlawful attempt at obtaining undue enrichment and gratification.
41. It is submitted that in so far as the claim on account of “Debenture” is concerned, it is relevant that:-
- i) *The principal outstanding has been reflected to be Rs.5 Crores whereas the same could not, by any stretch of imagination, exceed a sum of Rs.1 Crore being the value of the equity shares to be made over in terms of the settlement dated 04.12.2008.*
 - ii) *A sum of Rs. 15,06,04,818/- has been claimed on account of interest without specifying-*
 - a) *Rate of interest*
 - b) *The period for which such interest has been charged,*
 - c) *The provision of law under such interest is charged,*
 - d) *The provision in the settlement between the parties entitling to SASF to charge such interest.*
 - iii) *A sum of Rs.76,05,34,253/- has been claimed on account of further interest without specifying-*

- a) *Rate of further interest,*
 - b) *The period for which such further interest has been charged,*
 - c) *The provision of law under which such further interest is charged,*
 - d) *The provision in the settlement between the parties entitling to SASF to charge such further interest.*
- iv) *A Sum of Rs. 12,25,92,558/- has been claimed on account of liquidated damages without specifying-*
- a) *Rate of liquidated damages,*
 - b) *The period for which such liquidated damages has been charged,*
 - c) *The provision of law under which such liquidated damages is charged,*
 - d) *The provision in the settlement between the parties entitling to SASF to charge such liquidated damages.*

42. Ld. Counsel submitted that a certificate of rate of interest has been disclosed at page 10 of the Compliance Affidavit. The said Certificate is liable to be disregarded and ignored in that:-

- i. *The first portion of the table at page 10 deals with the rupee loan which has been Fully Paid up and in respect whereof the petitioner has made no claim in the termination letter dated 11.07.2014. In the circumstances, the first portion of the table at page 10 must be deemed to be a deliberate attempt to mislead and misrepresent.*
- ii. *The second portion of the table at page 10 relates to "Debenture". In this regard it is stated that:-*
 - a) *The loan amount of Rs.5 Crores is in itself wholly baseless, concocted and made with an intent to fabricate, falsify and mislead. The principal value of the said equity shares being restricted to Rs.1 Crore the loan amount could not be claimed to have been Rs. 5 Crores.*
 - b) *The interest has been calculated from 13.02.1995 till date although the settlement itself was arrived at on 04.12.2008. In the circumstances, interest has been wrongfully and illegally calculated for a period of eight and half years. While calculating interest @ 16.55% and/or @ 15.50% the deponent has failed to mention the provision of the statute and /or Interest Act, entitling SASF to claim interest at the said rate.*
 - c) *The settlement dated 04.12.2008 does not in any manner whatsoever specify 16.55% or 15.50% to be the rate of interest. The said rates of interest have thus been claimed unilaterally and without any basis, statutory, contractual or otherwise.*
 - d) *The settlement dated 04.12.2008 does not in any manner whatsoever specify 16.55% or 15.50% to be the further rate of interest. The said further rates of interest have thus been*

claimed unilaterally and without any basis statutory contractual or otherwise.

e) The settlement dated 04.12.2008 does not in any manner whatsoever specify 2.1% to be the liquidated damages. The said liquidated damages have thus been claimed unilaterally and without any basis statutory contractual or otherwise.

43. In our view, it is a case with peculiar facts where the Corporate Debtor has been lured for an amicable settlement and after accepting the major portion of its liability towards Financial Creditor, the Corporate Debtor has been left in the lurch only because it could not encash its equity to pay its allegedly remaining debt of about Rs.1Crore. It is not disputed that out of the then total outstanding of Rs.8.5 Crores, Rs.7.5 Crores has already been paid and for the remaining amount of Rs.1Crore, which was otherwise agreed between the parties that the share holding worth Rs. 1 Crore will be issued to the Financial Creditor, but it could not be done because according to the Corporate Debtor, paper shares scrips were to be dematerialized as is clear from the letters and correspondences between the parties, and as submitted by Learned Senior Counsel for the Corporate Debtor.
44. The way, the Financial Creditor has swelled up and inflated its amount disproportionately and on the basis of whimsical interest rates, penal interest rates and liquidated damages imposed on the Corporate Debtor, it seems the Financial Creditor has tried to reintroduce the age old obsolete practices so that it may raise heavy claim against Corporate Debtor. But claim has increased from Rs.1 Crore to unimaginable figure of Rs.265 Crores and odd which is unheard of in the modern commercial world, particularly when the Financial Creditor is stated to have been the creation of the Government of India. It reminds us of an old Mahajans/ Sahukars (Money lenders) who would suck each and every drop of the borrower but even then there interest would not be repaid.
45. Without going into the quantum of principal debt or interest, we are convinced that there was no claim of money that could have made the basis of this petition. After payment of Rs.750 Lakhs on 30th April, 2014,

it is very clear from the letter dated 11th July, 2014, that the remaining claim of Rs.1 Crore was only as regards equity that was pledged with the Financial Creditor, which was not lodged for getting it transferred in its name. The only default of the Corporate Debtor, if at all, was its failure to buy back its shares of Rs.1 Crore with minimum yield of 13% p.a. The Financial Creditor has based its claim on a glaringly unconscionable agreement just to pressurize the Corporate Debtor with all times high and inflated claims based on the rate of interest, penal interest and liquidated damages against its only claim to the tune of 10 lacs equity shares of Rs.10 each, which according to the Financial Creditor, the Corporate Debtor could not buy back with minimum yield of 13% pa. This fact is also disputed by the Corporate Debtor because Ld. Counsel has submitted that the Corporate Debtor has always been ready and willing to pay the sum of Rs.1 Crore along with interest totaling upto Rs.5 Crore but the Financial Creditor refused to accept the amount and has filed this petition.

46. In the aforesaid facts and circumstance, we are not at all convinced that this is a genuine claim of the Financial Creditor which could form the foundation of these proceedings under Section 7 of the Code. The Corporate Debtor has in straight forward manner proved that the amount of Rs.750 Lakhs had been paid in term of the settlement between the parties and for the remaining Rs.1 Crore also towards equity buy back which was pledged with the Financial Creditor and was not lodged for transfer. The Corporate Debtor is still ready and willing to pay the amount of Rs.1 Crore on accounts of equity along with accrued minimum yield @ 13% pa, which is stated to have been refused by the Financial Creditor on the contrary the Financial Creditor has suppressed certain facts relating to repayment by the Corporate Debtor, and instead unilaterally cancelled the settlement after receipt of payments.
47. We have carefully gone through the petition, reply, rejoinder along with the documents placed on record by the parties. In view of the arguments and the records placed before us, we do not find it to be a fit case for admission of the application or for initiation of CIRP in respect of the

Corporate Debtor. We are compelled to reject the application of the Financial Creditor under Section 7 of the Code because there was no financial debt due or default in repayment of the said debt in terms of the provisions of the IB Code, 2016. The Financial Creditor may avail other legal remedies, if so advised.

48. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on, this 7th day of April, 2022

Pj