

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, COURT No. II**

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**I A No. 440 of 2020 in  
C P No. 1874/MB/2019**

**In the matter of an Application under  
section 60(5) of the Insolvency and Bankruptcy Code, 2016**

*In the matter of*

**Paramount Consultants and Corporate Advisors Private Limited  
Vs.**

**Prabhat Technologies (India) Limited (formerly known as Prabhat  
Telecom (India) Limited)**

**Between**

**State Bank of India,**

Having its Corporate Centre at State Bank Bhawan,  
Free Press Journal Marg,  
Nariman Point, Mumbai – 400 021; and  
Having its branch office amongst others  
at: 112-115, 1<sup>st</sup> Floor, West Wing,  
Tulsiani Chambers, Free Press Journal Marg,  
Nariman Point, Mumbai – 400 021, Maharashtra

... **Applicant**

**Versus**

**1. Mr. Rajendra Bhuta**

Interim Resolution Professional of Prabhat  
Technologies (India) Limited (formerly  
known as Prabhat Telecom (India)  
Limited) Having his office at : 303,  
Raghuv eer Tower, Chamunda Circle,  
Borivali (W), Mumbai – 400 029

**2. ATG India Limited**

Having its registered office at:  
Plot no. 39, Nadir Colony, Shyamala Hills,  
Bhopal, Madhya Pradesh – 462 002

**3. Ad Sonic (HK) Co. Limited**

Having its corporate office at: Unit B,  
3<sup>rd</sup> Floor, Chun Wah Commercial Building  
No. 30, Minden Avenue, TST Kowloon,  
Hong Kong.

**4. Union Bank of India**

Zenit CHSL, Ground Floor, Plot No. 18,  
Bhavani Nagar, Marol Maroshi Road,  
Andheri (E), Mumbai 400059

**5. Bank of India**

Ashok Chambers, Ground Floor,  
Pandit M M Malviya Road,  
Near Everest Building,  
Tardeo, Mumbai – 400 034

... **Respondents**

**Date of Order: 06.01.2021**

**CORAM:**

**Janab Mohammed Ajmal, Hon'ble Member Judicial**  
**Mr. Ravikumar Duraisamy, Hon'ble Member Technical**

**Appearance:**

For the Applicant: Senior Advocate Mr. Sharan Jagtiani a/w Mr. Prateek Mishra, Mr. Tejas Gokhale, Mr. Indrajeet Hingane i/b L & L Partners

For the Respondents: Advocate Darryl B. Pereira for Respondent no. 1, (IRP), Advocate Dharendra Pratap Singh for Respondent no. 2 (Advocate Arvind Tiwari), Mr. S. U. Kamdar, Sr. Advocate a/w Meekakshi Dhunka Rungta i/b Dhanuka & Partners for Respondent no. 3.

**Per: Janab Mohammed Ajmal (Member Judicial)**

**ORDER**

This is an Application filed by one of the Financial Creditors impugning the decision of IRP (Respondent No. 1) in admitting Respondent Nos. 2 and 3 as Financial Creditors.

2. The factual backdrop leading to the Application may be stated as follows. This Bench by an order dated 10.10.2019 in CP No. 1874 of 2019 under section 7 of the Insolvency and Bankruptcy Code, 2016 (the Code) admitted the Company Petition and directed the initiation of Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor. It appointed the Respondent No. 1 as the Interim Resolution Professional (IRP). The IRP in accordance with the provisions of the Code made public announcement and constituted the Committee of Creditors (CoC). The CoC initially comprised of the Applicant and Respondent Nos. 4 and 5 as its members.

3. The first meeting of CoC was convened on 18.11.2019. In response to the advertisement the Respondent No. 2 and Respondent No. 3 submitted their claims respectively to the tune of Rupees 5 (five) Crores (Form-C dated 02.11.2019) and US\$ 8 million equivalent to Rupees 58.60 Crores (Form-C dated 04.11.2019) towards their debt owned by the Corporate Debtor.
4. The Applicant in the meeting dated 18.11.2019, claimed that the debt of the Respondent Nos. 2 and 3 should be classified as an Operational Debt. The Respondent Nos. 4 and 5 also went with it. The IRP however, was of the opinion that the Corporate Debtor being a financial guarantor owed a financial debt to the Respondent Nos. 2 and 3. Thus the Respondent Nos. 2 & 3 would have to be regarded as Financial Creditors of the Corporate Debtor.
5. It is contended by the Applicant that one Pragat Akshay Urja Limited, a wholly owned subsidiary of the Corporate Debtor, on 29.09.2018 entered into a Forward Purchase Agreement (FPA) with the Respondent No. 2 for purchase of certain products. The Corporate Debtor as the guarantor executed a deed of guarantee dated 01.10.2018 agreeing to pay to the Respondent No. 2 any amount that would remain outstanding against the said FPA on the event of default by the purchaser.
6. The Corporate Debtor on 28.12.2018 entered into FPA with Respondent No. 3 for purchase of certain materials. It on 05.02.2019 executed a deed of guarantee in favour of Respondent No. 3 agreeing to pay to the Respondent No. 3 any amount in case of default that may remain outstanding.
7. It is further contended that the FPAs were essentially agreements for supply of goods. The Corporate Debtor had agreed to the obligation to pay the outstanding dues, if any, remaining unpaid under the FPAs. Thus, the deeds of guarantee would not qualify to be financial guarantees so as to be covered under financial debt defined under section 5(8) of the Code. The decision of the Respondent No. 1 in accepting Respondent Nos. 2 and 3 as financial creditors in terms of the FPAs and the deeds of guarantee is thus erroneous. Respondent Nos. 2 and 3 could only be classified as Operational

Creditors. The Applicant accordingly came up with the present Application, seeking the following reliefs.

- a. This Hon'ble Tribunal be pleased to set aside the decision of the Respondent No 1 with respect to admission as well as classification of the claims of Respondents No. 2 and 3 as Financial Debt;
- b. This Hon'ble Tribunal be pleased to direct the Respondent No 1 herein to declare that the claims of Respondent No 2 and Respondent No 3 are to be classified as an 'operational debt', if the claims are declared to be verifiable under the Code and applicable regulations;
- c. This Hon'ble Tribunal be pleased to direct the Respondent No 1 herein to circulate an updated list of creditors in view of the facts and circumstances of the present case;
- d. This Hon'ble Tribunal be pleased to direct the Respondent No. 1 to accordingly modify the voting percentage of the Financial Creditors;
- e. This Hon'ble Tribunal be pleased to exclude time period from the CIRP from the day of appointment of IRP till the conclusion of Application;
- f. For any other orders which this Hon'ble Tribunal may deem fit and proper;
- g. For costs;

8. The Respondent No. 4 and Respondent No. 5 went with the Applicant.

9. In response to the notice the Respondent No. 1 filed a counter reiterating his stand taken before the CoC. It is contended by him that sec 5(8)(f) of the Code, covers the transactions of the FPAs and any liability in respect of the guarantees for such agreements would be covered as a financial debt. The terms of FPAs as well as the deeds of guarantee clearly indicated that deeds of guarantee would be a financial guarantee. Thus, the financial deeds have the commercial effect of borrowing. Therefore, the status of the Respondent Nos. 2 and 3 could only be those of financial creditors *vis-a-vis* the Corporate Debtor. The application thus deserves to be dismissed.

10. The Respondent Nos. 2 and 3 objected to the Application by filing separate replies. It is contended by the Respondent no. 2 that it entered into a FPA on 29<sup>th</sup> September, 2018 with Pragat Akshay Urja Ltd. for supply of certain goods to be used in installation of Solar Panel for generation of non-conventional energy. The agreement was valid for five years. The price of

the goods was decided on the date of the agreement and was fixed for the term of the agreement irrespective of the market value. Since the tender was time sensitive the Respondent had to keep a heavy inventory and it accordingly invested money for the purpose. It sought a guarantee from the Corporate Debtor to secure the payment in case of default. Accordingly, the Corporate Debtor executed a deed of guarantee on 1<sup>st</sup> October, 2018. The Corporate Debtor under the deed agreed to indemnify the Respondent against any delay in payment or non-payment by its subsidiary Pragat Akshay. The Corporate Debtor was privy to the invoices raised by the Respondent which were duly served on the Corporate Debtor periodically. Pragat Akshay made certain payments against the purchases up to 31<sup>st</sup> January, 2019. It however, altogether stopped payment in respect of the subsequent supplies. The Respondent thereafter issued demand letter dated 28<sup>th</sup> February, 2019 seeking payment for the goods supplied, failing which it would be constrained to invoke the deed of guarantee. The Corporate Debtor replied to the demand notice on 4<sup>th</sup> March, 2019 agreeing to make the payment and sought some time for the same. But in vain. Meanwhile having come to know about the CIRP of the Corporate Debtor, the Respondent filed the claim before the IRP on 2<sup>nd</sup> November, 2019 in Form C. The IRP accepted the claim on 3<sup>rd</sup> November, 2019. It is further contended that the Respondent agreed to supply materials to Pragat Akshay solely relying on the deed of guarantee executed by the Corporate Debtor. The FPA and the deed of guarantee were valid on the date of commencement of the CIRP. The claim of the Respondent against the Corporate Debtor is based on a deed of guarantee and not for supply of materials to Pragat Akshay. The amount invested by the Respondent to equip itself for the prospective orders from Pragat Akshay had the commercial effect of the borrowing. The pending dues to the tune of Rs.5,00,00,000/- (Rupees Five Crores) under the deed of guarantee amounts to a debt recoverable by the Respondent. The debt thus becomes a financial debt defined under Section 5(8) of the Code. Even otherwise the Corporate Debtor as the guarantor is bound under Section 126 of the Contract Act to make good the payment. Therefore, the action of the Respondent no. 1 in accepting the Respondent no. 2 as a Financial Creditor cannot be faulted. In this connection reliance is placed on the decision of the Hon'ble NCLAT in

Dr. BVS Lakshmi v. Geometrix Laser (Company Appeal (AT) (Insolvency) No. 38 of 2017). The Application accordingly bears no merit and is liable to be rejected.

11. It is contended by the Respondent No. 3 that it had entered into FPA for supply of products which were to be developed under the brand of the Corporate Debtor. The FPA had the commercial effect of borrowing. The deed of guarantee provided for a guarantee to the tune of US\$ 50 Million. But the Respondent No 3 invoked only US\$ 8 Million which it actually spent/invested. This amounts to a debt recoverable by the Respondent No. 3, as the same has been spent on behalf of the Corporate Debtor. By way of the FPA Respondent No. 3 invested the initial capital in order to fulfil the requirement of the Corporate Debtor. The Corporate Debtor has assured in writing and guaranteed minimum sale to the Respondent No. 3. The FPA was for supply of products which were to be used by the Corporate Debtor as aforesaid. The transaction is squarely covered under section 5(8)(f) of the Code. Thus, it becomes a financial debt and the transaction would not come within the parameters of an operational debt. Thus, the contentions raised in the Application cannot be accepted. The Application accordingly is liable to be dismissed

12. We have heard Counsel from both the sides and perused the records. A financial debt is defined under section 5(8) of the Code. The same may profitably be quoted as under:

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

*(a) money borrowed against the payment of interest;*

*(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*

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

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

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

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

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

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

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

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

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

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

13. Clause (f) of the sub-section is of particular relevance in the present context. As is apparent the definition is essentially an inclusive definition and not an exhaustive one. A ‘debt’ in order to qualify as a ‘financial debt’ first needs to have been disbursed against ‘the consideration for the time value of money’. In addition, the amount *inter alia* raised under a forward purchase agreement would only become a ‘financial debt’ when it has the ‘commercial effect of a borrowing’. The amount raised under a FPA would not come within the definition of a financial debt unless it bears the dual attributes of having been i) disbursed against the consideration for time value of money and ii) has the commercial effect of a borrowing. Once the amount raised under such an agreement is classified as a financial debt, any liability in respect of the guarantee for transactions referred to in clause (f) would there upon be a financial debt in terms of clause (i) of the section.

14. For the purpose of ascertaining the above parameters, the recitals of the documents, in this case the FPAs, would assume significance. The effect of an agreement can only be derived from the contents thereof. It would therefore be appropriate to refer to the terms of the agreements.

15. The agreement between Respondent No. 2 and Pragat Akshay Urja Limited (a wholly owned subsidiary of the Corporate Debtor) is placed at Annexure-A6 of the Application. The parties thereto are respectively referred to as 'seller' and 'buyer'. The relevant recitals indicate that the buyer (Pragat Akshay Urja Limited) anticipated supplies through Government Tenders and approached the seller (Respondent No. 2) to source a stable supply of materials described in Annexure-1 (to the Agreement) and ensure timely delivery of supplies to meet its long terms obligations towards its customers. The seller (Respondent No. 2) agreed to supply the products within the lead time during the subsistence of the agreement (five years from 29.09.2018). The parties *inter-alia* agreed to as follows.

*"2. The Seller shall on the demand of Buyer as per the delivery schedule invest in the stock to supply the products within lead time and both parties shall mutually decide the minimum quantum of stock to be maintained by the Seller during the subsistence of this agreement.*

*3. The Seller shall supply the products within 15 days of placing Purchase Order by the Buyer and the seller inspect all the products before dispatch.*

*4. The Parties shall fix a price range of the products immediately on the execution of the agreement which will be effective for supply for a period of five years. The price so ascertained shall be reviewed annually at the beginning of every year considering margin for tolerance of (+) Plus / (-) Minus 5%.*

*5. In order to secure the investment being made by the Seller and also to secure the payment to the Seller, the Seller shall execute an agreement for Financial Guarantee amounting to 50% of the value of the Forward Purchase Agreement amount i.e. Rs. 150,00,00,000/- (Rupees One Hundred Fifty Crores Only). In case of default of payment by the Buyer, the Seller recover the contract value from the Guarantor under the said Financial Guarantee Agreement.*

*6. The Specification of the product to be delivered shall be as per ANNEXURE-I.*

*7. The seller under this forward supply agreement specifically undertakes that this agreement has been entered into with the buyer only on the basis of financial guarantee, by the guarantor as per terms contained in the Financial Guarantee Agreement entered separately.*

*8. The seller shall have right to claim the full value of the supplies of the product to be made within the contract period from the guarantor irrespective of any arrangement or lack of arrangement between the guarantor and the buyer and irrespective of the fact that buyer has not purchased entire quantity of the product over the contract period."*

16. Pursuant to the terms of the Agreement, the Corporate Debtor executed the deed of guarantee on 01.10.2018, annexed as Annexure A7 to the Application. The conditions of the guarantee *inter alia* provided that,

*“3. The Creditor has entered into a Forward Sale Agreement with M/s. Pragat Akshay Urja Limited, a subsidiary company of the Guarantor dated 29<sup>th</sup> September to supply materials to cater to tenders by Government Bodies and in order to secure the payment of the materials, the Guarantor has agreed to provide Financial Guarantee to the Supplier for 50% of the value of the Forward Purchase Agreement amount i.e. rs.150,00,00,000/- for 1 year subject to renewal for a term of 1 year for 5 years (period of Forward Purchase Agreement).*

xxx    xxx    xxx

*1. Guarantees and covenants with the Creditor that it will duly and punctually pay to the Creditor all debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not at any time owed by Principal Debtor to the Creditor upon demand wherever incurred and whether incurred by the Principal Debtor alone or with another or others, including, without limitation, all of the principal of, interest on and all other moneys owing as and when the same become due and payable; and*

*2. In the event of the failure to perform any of its obligations under the Forward Purchase agreement and in the event of default, the Guarantor shall, on first demand by the Creditor (such notice to be conclusive proof of the default) and without any demure, contest or delay, shall pay to the Creditor the Guarantee Amount (the “Guarantee Amount”) and in addition thereto shall also pay, costs, charges, expenses payable by the Principal Debtor to the Creditor under the Forward Purchase agreement or any part thereof.*

*3. Undertakes with the Creditor that whenever the Principal Debtor commits default and does not pay any amount when due and/or payable under or in connection with the Loan agreement and /or does not comply with the terms and conditions of the Forward Purchase agreement, the Guarantor, without making any delay or demur, shall, within thirty days of demand by the Creditor, pay that amount to the Creditor as the Principal obligor;”*

17. Similarly, the Corporate Debtor entered into a FPA (Annexure A9 to the Application) with Respondent No 3. Parties have been respectively referred to as ‘purchaser’ and ‘seller’. The agreement *inter alia* provided that-

*“3. The seller has agreed to supply products as per the Schedule 1 to the Purchaser after enough multi step quality checks as per the Purchaser’s requirement. The Purchaser undertakes and confirms that in order to adhere to and fulfil the requirements of the Purchaser the Seller has made an investment of 5 Million USD.*

4. *The Purchaser has agreed to provide Guarantee to the Seller of purchase of products up to 100 Million USD for a period of 2 years as per Schedule I as minimum commitment towards the ready stock and other various monetary considerations and expenses incurred by the seller in order to supply the product as per Schedule I.*

5. *The Seller should at any time supply or keep ready materials worth 8 Million USD to be delivered to the Purchaser as per their requirements Schedule I or demand whichever is earlier and get the same delivered to the Purchaser. Failing to fulfil the requirements of Pruchaser within the span of 15 days from the date of Purchase Order will make the Purchaser liable to pay 3% of the Purchase Order as penalty to the Purchaser.*

6. *The Seller will supply materials to "Purchaser" and to order to tenders by Government Bodies and in order to secure the payment of the materials, the Guarantor has agreed to provide Financial Guarantee to the seller of which a separate document shall be executed.*

7. *The Purchaser shall at the time of raising purchase order pay 20% of the document due as per purchase order to the seller as advance while balance will be paid 90 days Open Account from the date of delivery and due inspection of the goods received."*

18. Pursuant to such agreement the Corporate Debtor itself furnished the deeds of guarantee on 05.02.2019 under similar terms. The recitals of the Agreements and the deeds of guarantee doesn't envisage raising of any debt by the buyers/purchasers from the Respondent Nos. 2 and 3.

19. The Hon'ble NCLAT in the matter of Dr. B. V. S. Lakshmi v. Geometrix Laser Solutions Private Limited (Company Appeal (AT) (Insolvency) No. 38 of 2017 decided on 22<sup>nd</sup> December 2017) quoted the following observation from the order impugned, with approval, where the definition of a 'Financial Creditor' has been succinctly dealt with.

*"A perusal of definition of expression 'Financial Creditor' would show that it refers to a person to whom a Financial debt is owed and includes even a person to whom such debt has been legally assigned or transferred to. In order to understand the expression 'Financial Creditor', the requirements of expression 'financial debt' have to be satisfied which is defined in Section 5(8) of the IBC. The opening words of the definition clause would indicate that a financial debt is a debt along with interest which is disbursed against the consideration for the time value of money and it may include any of the events enumerated in sub-clauses (a) to (i). Therefore, the first essential requirement of financial debt has to be met viz. that the debt is disbursed against the consideration for the time value of money and which may include the events enumerated in various sub-clauses. A Financial Creditor is a person who has right to a financial debt. The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money. In other words, the legislature*

*has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black's Law Dictionary (9th edition) the expression 'Time Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned". In both the cases, the inflows and outflows are distanced by time and there is a compensation for time value of money. It is significant to notice that in order to satisfy the requirement of this provision, the financial transaction should be in the nature of debt and no equity has been implied by the opening words of Section 5(8) of the IBC. It is true that there are complex financial instruments which may not provide a happy situation to decipher the true nature and meaning of a transaction."*

20. As already indicated a Forward Purchase Agreement may or may not be regarded as a financial transaction for it to be a financial debt. It must have the commercial effect of a borrowing. The recitals of the Forward Purchase Agreement indicated above do not envisage the financial transactions in the nature of financial debt as defined under section 5(8) of the Code. The Agreements do not satisfy the parameters discussed in the cited precedent *supra*. A forward contract to sell a product at the end of a specified period cannot be regarded as a financial contract.

21. Both the FPAs indicate that they were essentially forward contracts for supply of specified goods (products). The Corporate Debtor or for that matter the purchaser under the Agreement dated 29.09.2018 has not raised any amount thereunder. Under the Agreements they agreed to purchase certain products and pay therefor. The Corporate Debtor executed deeds of guarantee binding itself to pay any shortfall in case of default. Such transactions accordingly may at best amount to an operational debt in terms of section 5(21) of the Code for provision of goods and services and payment in respect thereto. Therefore, the FPAs dated 29.09.2018 and 28.12.2018 cannot be regarded as financial transactions in which a debt was raised or payment was made against the consideration for the time value of money which also had the commercial effect of borrowing. On examination of the nature of the transactions, we find that the transactions were essentially simple agreements of sale and purchase. The same would not come within the definition of 'financial debt' under section 5(8)(f) of the

Code. The principal agreements not being financial transactions and the amount of any liability in respect of the guarantee contemplated under section 5(8)(i) of the Code, would accordingly not come within the purview of the financial debt. The guarantee essentially was for payment against default in the sale consideration of the products agreed to be purchased respectively from Respondent Nos. 2 and 3. The guarantees being not a liability arising out of the transaction in terms of section 5(8)(f) of the Code, would not come within the purview of the financial debt.

22. Accordingly, the decision of the Respondent No 1 in regarding Respondent No. 2 and Respondent No. 3 as Financial Creditors cannot be sustained. We are of the considered view that the Respondent No 2 and Respondent No 3, accordingly cannot find a place in the CoC. Hence ordered.

**ORDER**

The application be and the same is allowed in part on contest. The decision of the Respondent No. 1 admitting the claims of Respondent Nos. 2 and 3 as financial creditors is set aside. Respondent Nos. 2 and 3 shall be regarded as Operational Creditors. The list of the Creditors in the CoC shall accordingly be redrawn and their voting percentage re-worked. The prayer for exclusion of time taken in this Application from CIRP period cannot be allowed, the same having not been made under section 12(2) of the Code. No Costs.

**Sd/-  
(Ravikumar Duraisamy)  
Member Technical**

**Sd/-  
(Janab Mohammed Ajmal)  
Member Judicial**