



NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

Company Petition No. (IB)-265/(PB)/2024

IN THE MATTER OF:

REC Limited

Core 4 Scope,
Complex 7 Lodi Road,
New Delhi, India- 110003

**...Applicants/
Financial Creditors**

Versus

Rattan India Power Limited

A-49, Ground Floor Road No. 4,
Mahipalpur, Southwest Delhi,
New Delhi-India, 110037

**... Respondent/
Corporate Debtor**

Under Section: 7 of IBC, 2016

Order delivered on: 17.09.2025

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

MS. REENA SINHA PURI, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Sr. Adv. Sunil Fernandes, Adv. Gaurav Arora, Adv. Mritunjoy Ray, Adv. Aditya Marwah, Adv. Anushri Joshi

For the Respondent : Sr. Adv. Krishnendu Datta, Adv. Karan B. Adv. Alina Merin Methew, Adv. Tanvi Sapra

ORDER

PER: SHRI ASHOK KUMAR BHARDWAJ, MEMBER (J)

Sans irrelevant details, the case of the Petitioner is that in terms of the revised Binding Settlement Proposal, Master Implementation Agreement, and conversion cum Subscription Agreement, the Corporate Debtor passed a board resolution on 27.12.2019 for allotment of equity shares, optionally



convertible cumulative redeemable preference shares and RPS to the consortium lenders including the Financial Creditor (Applicant). On same date the CD issued also an allotment letter for inter alia allotment of 2,87,20,978 RPS of face value of INR 10/- each. Thereafter, the Financial Creditor via its letter dated 08.01.2020, addressed to Power Finance Corporation Limited confirmed the receipt of financial instruments towards the revised Binding Settlement Proposal.

2. In terms of clause 8 of the Conversion cum Subscription Agreement dated 23.12.2019 read with the Master Implementation cum Assignment Agreement, the Redemption Amount was required to be paid by the Corporate Debtor to the consortium lenders including the Financial Creditor on pro-rata basis, on the date falling 2 years after the date of allotment i.e. 27.12.2021.

3. Since, the Redemption Amount was due and payable by the Corporate Debtor to the Financial Creditor on 27.12.2021, the Financial Creditor issued a notice dated 13.12.2021 and requested the Corporate Debtor to pay the Redemption Amount of INR 28,72,09,780/- (Redemption Amount) along with applicable coupon/dividend due in respect of RPS, to the Financial Creditor on or before 27.12.2021.

4. Following the above, the FC sent a reminder e-mail dated 23.12.2021 to the CD for payment of Redemption Amount of INR 28,72,09,780/- along with applicable coupon/dividend due in respect of RPS.

5. Instead of paying the Redemption Amount, the CD issued a letter dated 27.12.2021 addressed to the consortium lenders including the FC. In the letter, the CD stated that it is not in a position to redeem the RPS issued to



the consortium lenders including the FC at the expiry of term due, on account of negative reserves of the CD due to large accrued losses over the years. Accordingly, the CD requested the consortium lenders including the FC to extend the time period for redemption of RPS by a further period of 24 months commencing from the date on which the original period of 2 years expired i.e., 27.12.2021. The CD also requested the consortium lenders including the FC to give consent for variation of the terms of the RPS in terms of Section 48 of the Companies Act, 2013. As a sequel, the CD issued another letter dated 28.12.2021 to the consortium lenders including the FC.

6. Thereafter, on 13.01.2022, the meeting of the consortium lender including the FC was conducted/held to discuss the request of the CD for seeking extension of timeline for 2 years from 27.12.2021 for redemption of RPS. During the meeting, most of the consortium lenders expressed their views that the CD is giving false justification for extension of time by 2 years for redemption of RPS. Further, all the lenders also expressed their views that the CD is not serious about redemption of the RPS, which resulted in default in repayment of the RPS on due time.

7. On 18.01.2022, the Corporate Debtor issued another letter addressed to the consortium of lenders including the Financial Creditor. In the letter, the Corporate Debtor inter-alia informed about the difficulties in raising funds through fresh issue of shares for the purpose of redemption of RPS. Accordingly, the Corporate Debtor once again requested the consortium lenders to give their consent for extending the term of the RPS for a further period of 24 months from 27.12.2021. By way of said letter, the Corporate



Debtor also stated that it is still in the process of mortgaging land owned by PPDL and sought an extension up till 30.06.2022 to mortgage the land.

8. Thereafter, on 28.02.2022, another meeting of the consortium lenders of the Corporate Debtor including the Financial Creditor was conducted/held. During the meeting, the consortium lenders once again discussed and deliberated about the extension of timeline of 2 years sought by the Corporate Debtor for redemption of RPS. After discussion, the lenders expressed their views that the Corporate Debtor is not having any intention to redeem the RPS in future also as the Corporate Debtor is having huge carried forward losses and over the ensuing period of time, the standalone profit of the Corporate Debtor would be set off against the carried forward losses.

9. Since the Corporate Debtor failed to pay the Redemption Amount on its due date i.e., 27.12.2021, the Financial Creditor issued a default notice dated 11.10.2022 addressed to the Corporate Debtor for default in redemption of RPS. In the said default notice, the Financial Creditor informed the Corporate Debtor that the request of extension of time for redeeming the RPS cannot be accepted by the Financial Creditor.

10. The Financial Creditor in its default notice called upon the Corporate Debtor and directed the Corporate Debtor to redeem the RPS issue to the Financial Creditor along with coupon/dividend along with interest in terms of the Conversion cum Subscription Agreement and immediately pay INR 28,72,09,780/- along with applicable coupon/interest.

11. Since no payment for Redemption Amount was forthcoming from the Corporate Debtor, the Financial Creditor issued notice dated 19.10.2022 to



PPDL for payment against shortfall in the redemption of RPS in terms of Clause 2.3 of the ICD Assignment Agreement dated 23.12.2019. In the notice, the Financial Creditor called upon and directed/requested PPDL to repay the shortfall of INR 28,72,09,780/- along with interest.

12. On 26.10.2022, in response to the Financial Creditor's notice dated 11.10.2022, the Corporate Debtor issued a letter dated 26.10.2022 and reiterated its position that it is unable to redeem the RPS on the due date i.e. 27.12.2021. The Corporate Debtor requested the Financial Creditor to consider the extension for 2 years.

13. On 28.10.2022, in response to Financial Creditor's notice dated 19.10.2022, PPDL sent a letter dated 28.10.2022 to the Financial Creditor wherein PPDL *inter-alia* informed that the land had been mortgaged on 13.10.2022 in favour of Vistra ITCL (India Limited), being the security trustee and requested the Financial Creditor to consider the Corporate Debtor's request to extend the term of RPS for a further period of 24 months commencing from 27.12.2021.

14. Despite repeated requests made to it, the Corporate Debtor defaulted in paying the Redemption Amount of INR 28, 72,09, 780/- along with interest and dividend, to the Financial Creditor against the RPS.

15. The allegation made in the application is that the CD defaulted in redeeming the RPS by paying the amount of Rs. 28,72,09,780/- as share price, the amount of Rs. 5,744/- as dividend and Rs. 8,76,31,245/- towards interest. The date of alleged is 28.12.2021. Clause 2 of Part-IV of the application reads thus:



2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DATES OF DEFAULT IN TABULAR FORM)	The total amount claimed to be in default is as under: - <table border="1"> <thead> <tr> <th>S. No.</th><th>Particulars</th><th>Amount (in INR)</th></tr> </thead> <tbody> <tr> <td>1.</td><td>Amount towards RPS</td><td>28,72,09,780</td></tr> <tr> <td>2.</td><td>Amount towards dividend @ 0.001% from 27.12.2019 to 27.12.2021</td><td>5,744</td></tr> <tr> <td>3.</td><td>Amount towards interest for non-payment of Redemption Amount @ 13.80% p.a. from 28.12.2021 to 13.03.2024.</td><td>8,76,31,245</td></tr> <tr> <td colspan="2">Total</td><td>37,48,46,769</td></tr> </tbody> </table>	S. No.	Particulars	Amount (in INR)	1.	Amount towards RPS	28,72,09,780	2.	Amount towards dividend @ 0.001% from 27.12.2019 to 27.12.2021	5,744	3.	Amount towards interest for non-payment of Redemption Amount @ 13.80% p.a. from 28.12.2021 to 13.03.2024.	8,76,31,245	Total		37,48,46,769
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		As per the loan policy of the Financial Creditor prevalent at the time of issuance of RPS, the lending rate was 13.15% p.a. on quarterly rest basis, and the effective annualized rate for the same is 13.80%. Accordingly, the Financial Creditor is															
PARTICULARS OF FINANCIAL DEBT																	
		claiming interest at the rate of 13.80% p.a. based on the loan policy of the Financial Creditor. The Financial Creditor reserves its right to place on record the loan policy at a later stage, if required. The Corporate Debtor failed to pay the Redemption Amount and therefore, the default occurred on 28.12.2021 in terms of the Conversion cum Subscription Agreement dated 23.12.2019 read with the Master Implementation cum Assignment Agreement and in terms of Section 55 of the Companies Act, 2013. A working of the computation of default is annexed as Annexure I-U.															



16. By way of the reply filed by it, 'RattanIndia Power Limited' ("Corporate Debtor" or "Respondent") espoused:-

- I. A conjoint reading of the Master Implementation cum Assignment Agreement dated 23.12.2019 makes it clear that the Applicant was inter-alia allotted a total of 2,87,20,978 Redeemable Preference Shares ("RPS") in the Respondent Company/ Corporate Debtor. Therefore, the amount received from Applicant was an investment in the share capital of the Corporate Debtor and it was not done with the intention of earning interest over a period of time.
- II. The Hon'ble National Company Law Appellate Tribunal ("Hon'ble NCLAT") in various cases has made it clear that shareholders of a company cannot be deemed to be its creditors.
- III. The redeemable preference shares with the rights attached to it under the Shareholders Agreement cannot be considered to fall under the definition of "financial debt" since it is neither money borrowed against payment of interest nor it is an amount raised pursuant to any note purchase facility, issue of bonds, notes, debentures, loan stock etc., and it does not have the effect of a borrowing.
- IV. In terms of the provisions of Section 55 of the Companies Act, 2013 preference shares cannot be redeemed except out of profits or proceeds of a fresh issue of shares.
- V. The Corporate Debtor neither has profits, nor has it issued any fresh shares. Hence, the purported preference shares cannot be redeemed at this stage. Moreover, provisions of a Master Implementation cum



Assignment Agreement dated 23.12.2019 cannot override the express provisions of law and hence, there is no default on the part of the Corporate Debtor.

- VI. Since there is no redemption of the preference shares as on date, there is no debt due by the Corporate Debtor to the Applicant.
- VII. The necessary process for the redemption of preference shares is governed by the provisions of Section 55 of the Companies Act, 2013, which provides that no such share would be redeemed except out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purpose of the redemption and, further, that such shares should not be redeemed unless they are fully paid. Where any shares are redeemed otherwise than out of the proceeds of a fresh issue, then, out of profits which would otherwise be available for dividend, there should be a transfer to a reserve fund to be called the Capital Redemption Reserve Account.
- VIII. The holder of a redeemable preference share does not stand on the same footing as a creditor and cannot sue the company for redemption of the shares as an ordinary creditor. Reliance is placed upon the following passages from the "Company Law" by Robert R. Pennington, 2nd edn.:-

“A shareholder is not a creditor of the company for his share capital, although he undoubtedly has a contractual right to share in the company's assets in a winding up after its creditors have been paid, and if the company has traded successfully, his share may amount to very much more than the money he originally subscribed. The reason why share



capital is shown on the liabilities side of the company's balance sheet is that a balance sheet shows what payments would fall to be made out of the company's assets if it were wound up immediately, and one of these payments, is, of course, share capital. It does not follow that all such payments are debts of the company; share capital is one of the payments which is not.

Share capital, then, is the amount contributed by the shareholders to the company's resources. The money with which the contribution is made becomes the company's property forthwith, but the company does not become the shareholder's debtor for its repayment. The shareholder has a number of contractual and statutory rights against the company, among which are a right to share in its assets when it is wound up, and a right to receive dividends out of its profits when duly declared in accordance with the articles and it is primarily these two rights which give his shares a value, and make them saleable.”

17. The Respondent (CD) has relied upon the judgments given by Hon’ble Calcutta High Court in the matter of ***Hindustan Gas and Industries Ltd. vs. Commissioner of Income-Tax***, (1979) 117 ITR 549 (CAL), inter-alia to plead that the incidences and consequences of issuing a share and borrowing money on loan or on a debenture are different and distinctive, as a debenture-holder as a creditor has a right to sue the company, whereas a shareholder has no such right. The CD has also relied upon the decision of Hon’ble High Court of Bombay in ***Aditya Prakash Entertainment Pvt. Ltd. Vs. Magikwand Media Pvt. Ltd.***, Company Petition No. 404 of 2016, to buttress the plea that in a case where redeemable preference shares are issued but not honoured when they are ripe for redemption, the holder of the



same will not automatically assume the character of a creditor of the company, as the shares can be redeemed only out of the profits of the company which would otherwise be available for dividend, or by issue of fresh shares.

18. In paras 22 to 27 of its reply, the CD made reference to judgments of Hon'ble Supreme Court as also other judicial precedents again to emphasise that the shares can be redeemed only out of dividend or out of the capital generated by issuing fresh shares. The paras reads thus:-

*"22. That, in the matter of **Radha Exports v. KP Jayaram reported in (2020) 10 SCC 538 para 42**, it was held as under:*

"The definition of 'financial debt' in Section 5(8) makes it clear that 'financial debt' means a debt along with interest, if any, disbursed against the consideration for time value of money and would include money raised or borrowed against the payment of interest; amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent; amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument; the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed; receivables sold or discounted other than any receivables sold on non-recourse basis or any amount raised under any other_ transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing The payment received for shares, duly issued to a third party at the request of the payee as evident from official records, cannot be a debt, not to speak of financial debt. Shares of a company are transferable subject to restrictions, if any, in its Articles of Association and attract dividend when the company makes profits. "

*23. Further, in the matter of **Aditya Prakash Entertainment Private Limited v. Magikwand Media Private limited reported in 218 SCC Online Bom 551 para 9**, it was held as under:*



"In this case, there is no dispute to the fact that petitioner was a shareholder holding preferential redeemable preference shares. The only question that requires to be considered is whether petitioner would be a creditor of the company. Sub-section 1 of Section 80 says, subject to the provisions of this section, a company limited by shares may, if so, authorised by its articles, issue preference shares which are, or at the option of the company are to be liable, to be redeemed. Proviso, however, states that no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption. This aspect, in my view, shows that where redeemable preference shares are issued but not honoured when they are ripe for redemption, the holder of those shares does not automatically assume the character of a "creditor". The reason is that his shares can be redeemed only out of the profits of the company which would otherwise be available for dividend, or by a fresh issue of shares. This is a limitation which is not applicable to any other creditor of the company. The shareholders of redeemable preference shares of the company do not become creditors of the company in case their shares are not redeemed by the company at the appropriate time. They continue to be shareholders, no doubt subject to certain preferential rights mentioned in Section 85 of the Companies Act, 1956. If they do not become the creditors of the company, they cannot apply for winding up of the company under Section 433(e) of the Companies Act, 1956."

24. Further, in the matter of **Lalchand Surana v. Mis Hyderabad Vanaspathu Ltd. reported in 1988 SCC Online AP 290 para 6**, it was held as under:

"The only question is whether, in case of failure of the company to repay the amount due thereunder, such shareholders become "creditors". It is in this context that proviso (a) to sub-section (I) of section 80 becomes relevant. Sub-section (I) of section 80 says that subject to the said section, a company limited by shares may, if so authorised by its articles, issue (i) preference shares which are to be redeemed, or (ii) preference shares which are liable to be redeemed at the option of the company.... This aspect, in my opinion, shows that where redeemable preference shares are



issued but not honoured when they are ripe for redemption, the holder of those shares does not automatically assume the character of a "creditor". The reason is that his shares can be redeemed only out of the profits of the company which would otherwise be available for dividend, or by afresh issue of shares. This is a limitation which is not applicable to the case of an ordinary creditor. In the face of this position in law, and in the absence of any authority on the subject, I hold that the holders of redeemable preference shares do not and cannot become creditors of the company in case their shares are not redeemable by the company at the appropriate time. They continue to be shareholders, no doubt subject to certain preferential rights ... "

25. Further, in the matter of **State Bank of India v. Alstom Power Boiler Ltd. reported in 2003 SCC Online Bom 321 para 25**, it was held as under:

"The right given under clause (b) of Sub-section (2) is "to vote on every resolution placed before the company at any meeting. " In our opinion, the words "before the company at any meeting" refer to a meeting of the company i.e., a meeting of the members of the company A preference share is not a debt instrument. Preference share amount is a capital and not a debt. Thus, in the meeting of the creditors, it would not be possible to assign a value to the vote of a holder of preference share. "

26. Further, in the matter of **Hindustan Gas & Industries Ltd. v. Commissioner of Income Tax reported in 1978 SCC Online Cal 410 para 4, 10, 11, 12, 13**, it was held as under:

"... obtaining capital by issue of shares is different from obtaining loan on debentures and that a loan obtained cannot be treated as an asset or advantage for the enduring benefit of the business of the assessee '

" ... the holder of a redeemable preference share did not stand on the same footing as a creditor and could not sue the company for redemption of the shares as an ordinary creditor ... '

"Consequently, when the date for the redemption of redeemable preference shares has passed, their holders cannot sue the company for the repayment of their capital as



creditors though they may petition for the winding up of the company as shareholders."

27. That, in the matter of **M.F.R. D'Cruz v. K.N. Vishwanathan reported in (1941) 54 LW 745: AIR 1941 Mad 806**, it was held as under:

"No dividend shall be payable except out of the net profits arising from the business of the company.

10. No dividend can be paid unless the company makes profits. This company never made any profits, but always incurred losses. No dividend can therefore be paid. The priority of the preference shares for payment of 7 1/2 per cent. is in regard to dividend. As there were no profits which could justify a dividend, there can be no dividend payable to the preference shareholders. The contention put forward on behalf of the preference shareholders is that each share is entitled to a sum equivalent to 7 1/2 per cent. from the amount of the capital. That would amount to interest being payable each year. Neither the Memorandum nor the Articles provide for any interest. In my view, as there were no profits no dividends could be declared and were not declared; nothing is payable to the preference shareholders in respect of dividend or interest and they are entitled only to repayment of the actual share capital. There will be an order accordingly. "

19. Relying upon the judgment of this Tribunal (Kolkata Bench), the CD has contended that a Preference Shareholder cannot be treated as FC unless the Preference Shares becomes due for redemption. The plea in a way is admission on behalf of CD that a Preference Shareholder become FC when the Preference Shares becomes due for redemption. Para 29 of the reply reads thus:-

"29. Reliance also placed on the judgment titled "EPC Constructions India Limited Through its Liquidator -Abhijit Guhathakurtha Vs. Mis Matix Fertiliser and Chemicals Limited", Company Petition (J.B.) No. 1 56/KB/2022, wherein the Hon'ble Adjudicating Authority, Kolkata bench has inter-alia held that a Preference Shareholder is not a



Financial Creditor unless the Preference Shares become due for redemption.”

20. As has been viewed hereinabove, the above para of the reply in a way is admission on behalf of the CD that if the RPS becomes redeemable, the RPS holder turn FC. However, the shares become redeemable only on due date, subject to the conditions that the company has made sufficient profit or has issued fresh shares to generate sufficient funds to redeem the Preference Shares.

21. With reference to the judgment of the Hon'ble Karnataka High Court in the matter of **Kirloskar Electric Co. Ltd. v CIT**, the Ld. Counsel for the CD contended that the Preference Share Capital is contribution to the capital of the company by its subscribers or shareholders and is not a “*borrowing*” by the company subject to payment of interest.

22. During the course of hearing, the Ld. Counsel for the CD relied upon the judgment of Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 1424 of 2023 in **EPC Constructions India vs. M/s Matix Fertilisers and Chemicals Limited** to contend that the non-redemption of RPS on account of non-fulfilment of conditions stipulated in Section 55 of the Companies Act, 2013, would not constitute default in payment of debt. Paras 2, 7, 14, 28 and 29 of the judgment reads thus:-

“2. Brief facts of the case necessary to be noticed for deciding this appeal are:

- (i) The Appellant executed an EPC contract with the Respondent for setting up a fertilizer complex for production of ammonia-urea complex at Panagarh Industrial Park, Distict Burdwan, West Bengal on 11.12.2009. Contracts for onshore supply, offshore*



supply as well as engineering and construction were entered between the parties in the year 2010.

- (ii) Amounts became due and payable by the Respondent towards the Appellant in pursuance of the contract. The Respondent on 28.04.2015 wrote a letter to the Appellant requesting Essar Projects (India) Ltd. (earlier name of the Appellant) to consider converting the amounts outstanding as subordinated debt.*
- (iii) The Appellant sent its agreement vide letter dated 08.05.2015 to give an extended credit upto Rs.403 Crores against their receivables from Matix.*
- (iv) A resolution dated 30.07.2015 was passed by the Appellant giving consent to make investment upto Rs.400 Crores into 8% Cumulative Redeemable Preference Shares (hereinafter referred to as 'CRPS') of Rs.10/- each of Matix Fertilizer and Chemicals Limited (Matix) in one or more tranches.*
- (v) The Respondent responded to the e-mail of the Appellant dated 31.07.2015 on 26.08.2015 that the decision of Appellant in converting outstanding receivables from Matix to the Appellant towards work done under EPC contract into 8% Cumulative Redeemable Preference Shares of Matix has also been approved by the board in its meeting dated 14.08.2015 as well as in meeting of the shareholders. Matix in consequence allotted 25,00,00,000 8% Cumulative Redeemable Preference Shares of Rs.10/- each to Appellant and Essar Projects in terms and conditions mentioned therein. The Cumulative Redeemable Preference Shares were renewable within three years.*
- (vi) NCLT initiated CIRP against the Appellant by order dated 20.04.2018. The Appellant issued a letter on 28.08.2018 to the Matix asking the Matix for redemption of CRPS including dividend, aggregating to Rs.310 Crore.*
- (vii) Matix sent a reply dated 24.08.2018 informing that liability towards redemption of CRPS along with cumulative dividend,*



aggregating to Rs.310 Crores have been adjusted against the claim which Matix has against the Appellant. It was also informed that Matix has submitted a claim in the CIRP of Appellant of Rs.377.87 Crores, information of which was also sent on 05.06.2018 for adjustment of total liability of CRPS against the aforesaid claim.

- (viii) The Resolution Professional of the Appellant also wrote a letter on 27.10.2018 to the Matix claiming total amount of debt of Rs.632.71 Crores which included amount of Rs.250 Crores towards investment in CRPS with dividend of Rs.60 Crores totaling to Rs.310 Crores.
- (ix) The Liquidator of the Corporate Debtor moved an application before the Adjudicating Authority seeking leave under Section 33 of the I&B Code for taking proceeding for recovery of the debt of the Appellant. Consequently, an application under Section 7 was filed by the Liquidator of the Appellant on 25.04.2022 against the Matix claiming default amount of Rs.250 Crores + Rs.60 Crores totaling to Rs.310 Crores. Date of default was mentioned as August, 2018.
- (x) Notice was issued under Section 7 to the which reply was filed by the Matix. Matix contested the claim of the Appellant. Rejoinder and Sur-rejoinder were also filed before the Adjudicating Authority. The Adjudicating Authority heard both the parties and by the impugned order dated 26.07.2023 has rejected Section 7 application.
- (xi) The Adjudicating Authority framed three issues for consideration, as noted in Para 14.2 of the order, which are as follows:
- “**14.2.** The issues that have cropped up for determination are as follows:
- (i) Whether a Preference Shareholder is a Creditor of a Company.
 - (ii) Whether an application under Section 7 of I&B Code filed by a Preference Shareholder is maintainable.



(iii) *Whether Cumulatively Redeemable Preference Shares ("CRPS" for brevity) was in the nature of an investment or a financial debt having commercial effect of borrowing."*

(xii) *The Adjudicating Authority after considering various facts and circumstances and precedent relied by the parties held that the Cumulative Redeemable Preference Shares are not payable, hence, no default is established. In Para 14.4 the Adjudicating Authority made following observations:*

"14.4. It is evident that 'Preference Shares' are not defined in the I&B Code. Therefore, one must then look into its definition and meaning assigned to preference shares under the Companies Act. Companies Act is a complete code enacted to consolidate and amend the law relating to companies and the legislature was conscious of this fact in drafting the I&B Code. It is accordingly that Section 3(37) of the I&B Code states that "words and expressions used but not defined in this Code but defined in the ...Companies Act, 2013(18 of 2013) shall have the meanings respectively assigned to those Acts." Therefore, the definition and relevant provisions of the Companies Act must be looked into in order to determine whether a preference share is an instrument "having the commercial effect of borrowing" as contended by the Petitioner."

(xiii) *The Adjudicating Authority further held that preferential share is not a financial debt unless the preferential shares becomes due for redemption. In Para 14.9 following was observed:*

*"14.9. Thus, Section 55 is explicit that if the issuing company is not making profits which are available for dividend or has not raised any equity investments specifically for the purpose of redemption of preference shares, then the preference shares cannot be redeemed. Thus, shareholders cannot receive any payment before the debt of the company is fully discharged, unless preference shareholders are paid out of dividend/ profits of the company and thus, the non-redemption of preference shares does not result in preference shareholders becoming creditors or the carrying value of preference shares and dividends becoming a debt. **Therefore, a Preference Shareholder cannot step into the shoes of***



a creditor of the Company unless their Preference Shares become redeemable in above terms.”

xiv) The Adjudicating Authority came to the conclusion that no case of any debt due to the Appellant and no existence of default on part of Respondent has been made out, hence, Section 7 application is not maintainable. In Para 15 of the order following was observed by the Adjudicating Authority:

“15. Such being the factual and legal position, we are constrained to hold that no case of any "debt" due to the Applicant and no existence of "default" on the part of Respondent within the meaning ascribed to the terms "debt" and "default" in the Code, is made out. In the aforesaid backdrop, we hold that this Petition, filed under Section 7 of IBC, 2016, is not maintainable.”

(xv) Application under Section 7 was thus rejected by order dated 29.08.2023, aggrieved by which order this appeal has been filed.

XXX

7. We have considered the submissions of learned counsel for the parties and perused the record. Before we proceed to enter into the respective submissions of learned counsel for the parties, it is necessary to notice the transaction between the parties which is basis of filing of Section 7 application by the Appellant. Appellant in the appeal has brought on record relevant correspondence between the parties with respect to allotment of Cumulative Redeemable Preference Shares. Appellant has brought on record as Annexure A-5, the copy of resolution passed by the Directors of Essar Projects dated 30.07.2015 where consent was given by the Board to make investment upto Rs.400 Crores into 8% Cumulative Redeemable Preference Shares of Rs. 10/- each of Matix Fertilizer and Chemicals Limited. It is useful to extract Annexure A-5, which is as follows:



"Essar Projects (India)
Limited
Equinox Business Park
Tower 2
Off Bandra Kuria Complex
L. B. S. Marg, Kurla (W)
Mumbai 400 070
India
Corporate Identity Number
U99999MH1989PLC063280
T +91 22 6733 5000
F +91 22 6706 2194
www.essarprojects.com
www.essar.com

**CERTIFIED EXTRACT OF
THE RESOLUTION PASSED
UNANIMOUSLY AT THE
MEETING OF THE BOARD
OF DIRECTORS OF ESSAR
PROJECTS (INDIA) LIMITED
HELD ON JULY 30, 2015
AT THE REGISTERED
OFFICE OF THE COMPANY
AT ESSAR HOUSE, 11 K. K.
MARG, MAHALAXMI,
MUMBAI- 400 034.**

**INVESTMENT INCUMULATIVE REDEEMABLE
PREFERENCE SHARES OF MATIX FERTILIZER
AND CHEMICALS LIMITED.**

"RESOLVED THAT subject to such statutory approvals as may be required, if any and pursuant to the provisions of Section 179, 186 and any other applicable provisions, if any, of the Companies Act. 2013 read with rules made thereunder and subject such consents and approvals, if any, as may be required, the consent of the Board of Directors of the Company be and is hereby accorded to make investment upto Rs. 400 Crores into 8% Cumulative Redeemable Preference Shares of Rs. 10/- each of Matix Fertilizer and Chemicals Limited (Matix) in one or more tranches.

RESOLVED FURTHER THAT either of the followings namely 1) Mr, A V. Amarnath 2) Mr. Chander Krishnamoorlhy 3) Mr. Vasant Savla 3) Mr. D. V Prasad 4) Mr Raghupati Mishra 5) Ms. Yogita Purohit (hereinafter referred to as "the Authorised Executives") be and are hereby severally authorised to take all decisions and steps in respect of the above investment as may deem appropriate, and to do and perform all such acts, deeds, matters and things, as may be necessary or expedient in



this regard and to exercise all the rights and powers which would vest in the Company in pursuance of such investment.

RESOLVED FURTHER THAT *a copy of the foregoing resolution duly certified by any Director or Company Secretary be forwarded as may be required.”*

For Essar Projects (India) Limited

***Yogita Purohit
Company Secretary
ACS 29624”***

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14. The proviso to the Section 55 provides that no such shares shall be redeemed except out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of such redemption.

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*28. Present is a case where CRPS were allotted to the Appellant, there is no Share Subscription and Shareholders Agreement entered between the parties nor CRPS is hedged by any such condition which may lead to accepting the transaction as financial debt. We, thus, are of the view that judgment of this Tribunal in **Sanjay D. Kakade** is clearly distinguishable and has not applicability in the facts of the present case.*

29. In view of the above discussion and conclusions, we are of the view that the Appellant who is holder CRPS is holder of shares which is in the nature of equity in capital, which is part of preferential share capital as defined in Section 43. Preferential shares being part of the preferential share capital of the Company shall not transfer any debt so as to initiate any Section 7 proceeding. Further, the Company having not earned any profit nor any dividend having been declared, no redemption was permissible by the statutory provision, hence, no debt



was due on basis of which Section 7 application could be filed by the Appellant. There is also no material that any proceeds of a fresh issue of shares made for the purpose of such redemption was available. We, thus, fully endorse the finding of the Adjudicating Authority that there did not exist any default. We, thus, do not find any merit in this appeal. Appeal is dismissed.”

23. Though, in the rejoinder filed on behalf of the Petitioner it has been mentioned that in FY 2021-2022, the Corporate Debtor made profit of INR 348 Crores which is reflected in annual report of the CD for the year 2021-2022, but it is not the case of the Applicant that the aforementioned profit became available for dividend. If CD is making the profit and not making the same available for dividend, the Applicant may resort to the appropriate remedy against the CD for its such conduct. There are conditions stipulated in Section 123 of the Companies Act, 2013, for making the profit available for dividend. Section 127 of Companies Act provides for consequence of failure to declare dividend. In the present proceedings, we cannot go into the issue of satisfaction of the conditions as to whether the profit was sufficient enough to pay the dividend. In such cases where the dividend is declared and the redemption amount becomes payable to the Redeemable Preference Shareholder, the situation turn different.

24. In the wake of judicial precedence relied upon by the CD and the view taken by the Hon’ble NCLAT its order dated 09.04.2025 passed in Company Appeal (AT) (Insolvency) No. 1424 of 2023 in ***EPC Constructions India vs. M/s Matix Fertilisers and Chemicals Limited***, we are left with no option but to take a view that non-redemption of RPS on account of non-availability of sufficient profit or the capital on account of issuance of fresh shares would



not be ground to invoke Section 7 of IBC, 2016, qua the company which failed to redeem the RPS. Thus, the application is rejected. However, it is made clear that the present order would not come in the way of the Applicant to workout its other remedies regarding the rights accrued in its favour as RPS holder. It is also made clear that our order is founded on the premise that the RPS could not be redeemed on account of non-fulfilment of conditions stipulated under Section 55 of Companies Act, 2013. If the conditions mentioned in Section 55 of Companies Act are satisfied, then the situation regarding entitlement of FC to receive the redemption amount would be different. **Application stands disposed. No order as to cost.**

Sd/-
(REENA SINHA PURI)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)