

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1424 of 2023

(Arising out of Order dated 29.08.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench, Court No. II, Kolkata in C.P. (IB) No.156/KB/2022)

IN THE MATTER OF:

EPC Constructions India
Limited through its Liquidator-
Abhijit Guhathakurta,
Correspondence office: Deloitte India Insolvency
Professionals LLP, 32nd Floor, Tower 3, One
International Centre, Senapati Bapat Marg, Mumbai. Appellant

Vs

M/S Matix Fertilisers and Chemicals Limited,
Registered office: Panagarh Industrial Park,
P.O., Panagarh Bazar,
District- Purba Bardhaman Panagarh Bardhaman,
WB 713148 IN. Respondent

Present:

For Appellant:	Mr. Niranjana Reddy, Sr. Advocate with Mr. Abhishek Swaroop, Mr. Aditya Vikram Singh, Ms. Akhila and Ms. Shreya Chandhok, Advocates.
For Respondent:	Mr. Arun Kathpalia, Sr. Advocate with Mr. Shantanu Awasthi and Mr. Jatin Kapur, Advocate.

J U D G M E N T

ASHOK BHUSHAN, J.

This appeal has been filed challenging the order dated 29.08.2023 passed by the Adjudicating Authority (National Company Law Tribunal),

Cont'd.../

Division Bench, Court No. II, Kolkata rejecting Section 7 application filed by the Appellant.

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, District 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.

3. We have heard Shri Niranjan Reddy, learned senior counsel for the Appellant and Shri Arun Kathpalia, learned senior counsel appearing for the Respondent.

4. Shri Niranjan Reddy, learned senior counsel for the Appellant challenging the impugned order submits that the Cumulative Redeemable Preference Shares (CRPS) were allotted by the Respondent in lieu of the debt which was owed by the Respondent to the Appellant, which is an admitted fact. It is submitted that the Respondent has also admitted the debt of amount of Rs.310 Crores and claims its adjustment in the outstanding amount payable to the Respondent as per his case. It is submitted that the transaction under which the CRPS were allotted is a commercial transaction and the transaction is fully covered by Section 5 Sub-section (8) Sub-clause (f). The transaction having commercial effect of borrowing is a financial debt and the Adjudicating Authority committed error in rejecting the application filed by the Appellant under Section 7. It is submitted that it was Respondent who requested the Appellant to convert the amount outstanding from Matix to Appellant as Subordinated Debt. Matix clearly communicated that Matix has raised equity and the same will be earmarked for paying of this subordinate debt of Appellant [EPCC]. It is submitted that the nature of transaction is basis for determining the nature of debt. The present is a case which clearly proves that there was financial debt in the transaction entered between the parties under which CRPS were allotted. The shares were Cumulative Redeemable Preference Shares which required to be paid with dividend of 8%. Time value of money was also

clearly proved and reflected in the transaction. Within the meaning of I&B Code, the transaction fully satisfies the commercial effect of borrowing, hence, it was a financial debt. Learned counsel for the Appellant referred to Section 91 of the Evidence Act, 1872 and Illustration 1. It is submitted that the Adjudicating Authority erred in not considering the letter dated 24.08.2018 which in clear terms showed acknowledgment of debt by the Respondent. It is further submitted that in the Audited Financial Statement of 2016-17 of the Corporate Debtor it was shown as its liability. Learned counsel for the Appellant submits that Appellant has successfully proved that Respondent owed a financial debt. Appellant after three years of issuance of CRPS was entitled to redeem the same and Appellant having written to the Respondent to pay the redemption amount along with dividend, financial debt was owed by the Respondent and the Adjudicating Authority committed error in rejecting Section 7 application.

5. Shri Arun Kathpalia, learned senior counsel appearing for the Respondent refuting the submissions of learned counsel for the Appellant submits that Cumulative Redeemable Preference Shares is a capital and is not a financial debt owed by the Corporate Debtor to the Appellant. It is submitted that the outstanding amount which was payable to the Appellant under the contract by the Corporate Debtor having been converted into CRPS the debt extinguished. After debt is converted into shares, debt or liability loses the character of debt. It is submitted that terms 'preferential share' and 'investment' have been defined under the Companies Act, 2013, hence, relevant provision of the Companies Act,

2013 have to be looked into to find the nature of debt and claim under the CRPS. It is submitted that the preferential shares can only be redeemed as per Section 55 of the Companies Act out of the profit 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. It is submitted that the Company did not earned any profit in the relevant year so as to preferential shares could have been redeemed nor any amount was available towards fresh issue of shares for redeeming the preferential shares. No payment could have been made in the preferential shares as no amount was due nor any default could said have been committed. It is submitted that the Appellant has filed an application under Section 7 on the basis of 25 Crore CRPS which was foundation of Section 7 application. The nature of debt has to be found out from the transaction which culminated in 25 Crore CRPS. The CRPS is not a financial debt. The legislature is fully conversant of the law which it enacts. The legislature was well aware with the concept of preferential shares, debentures and in Section 5(8)(c) expression 'debentures' has been used but there is no mention of preferential shares. The legislature was fully aware that a preferential shareholder is not a financial creditor. It is submitted that written contract between the parties must be interpreted on its terms alone and any other evidence to interpret the same, must be excluded. There is no obligation to redeem preference shares when the company has not made any profit, and dividend has not been declared. I&B Code is a complete

code, hence, the financial debt has to be proved as per the provisions of the I&B Code.

6. Learned counsel for the parties have also placed reliance on various judgments of this Tribunal and Hon'ble Supreme Court in support of their respective submissions which we will go through while considering the rival submissions.

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"**

8. The above resolution dated 30.07.2015 was communicated to Matix and Matix after receipt of email dated 31.07.2015 has communicated approval of the Board of Matix as well as Shareholders for allotment of 25 Crore 8% CRPS of Rs.10 each. Copy of letter dated 20.08.2025 has been brought on record as Annexure A-6, which is as follows:

*"Matix Fertilisers And Chemicals
Ltd.
CIN : U24120WB2009PLC153272
Poonam Chambers
B-Wing, 5th Floor
Dr. Annie Besant Road
Worli, Mumbai - 400 010*

India.
T +91 22 61167000
F +91 22 61167011
info@matixgroup.com

26th August, 2015

To

**The Company Secretary
Essar Projects India Limited
Mumbai**

Sub.- Allotment of 25,00,00,000 8% Cumulative Redeemable Preference Shares of Rs.10/- each aggregating to Rs. 250,00,00,000 to Essar Projects India Limited (EPIL) against the outstanding receivables under EPC Contract

Dear Madam

We refer to your e- mail dated July 31, 2015 wherein Essar Projects India Limited Board has approved and accepted for conversion of outstanding receivables from Matix Fertilisers And Chemicals Limited (Matix) to EPIL towards work done under EPC Contract into 8% Cumulative Redeemable preference Shares (CRPS) of Matix The same was also approved by the Board of Matix in its Board Meeting held on 14th August, 2015 and thereafter, by the Shareholders of Matix in its Extra Ordinary General Meeting held on 26th August, 2015.

Pursuant to the approval of shareholders Matix Board in its meeting held on 26th August, 2015 Matix has allotted 25,00,00,000 8% Cumulative Redeemable Preference Shares of Rs.10/-each aggregating to Rs.250,00,00,000 to Essar Projects India Limited on the following terms and conditions:

Sr.	Particulars	Amount Rs.
1	Total Value of CRPS	Rs. 250 Crs (Rs. Two Hundred Fifty Crores)
2	Face value	Rs. 10 per share
3	Issue Price	At par (face value)
4	Tranches	Can be issued in one or more tranches
5	Tenor and Redemption	Redeemable at par at the end of 3 years. However, Company at its sole discretion, may redeem CRPS at any time within 3 years from the date of issue.
6	Annual Dividend rate (Cumulative)	8% in first year 8% in second year 8% in third year
7	Transferability	Can be transferred subject to the approval of Board of the Company
8	Listing	Not to be listed
9	Rights	These CRPS carry a preferential right with respect to— a) payment of dividend, and b) repayment, in the case of a winding up or repayment of capital, of the amount of the share capital paid-up or deemed to have been paid-up
10	Modification of terms	Can be modified before redemption with mutual discussions and written consent of both the parties.

We request your confirmation by signing as EPILs acceptance to proceed with documentation and other necessary compliances

Thanking you

For Matix Fertilisers And
Chemicals Limited

Company Secretary.

Accepted by

For Essar Projects
India Limited

Company Secretary”

9. Thus, the resolution of the Appellant, as noticed above, as well as the letter dated 26.08.2015 captures the transaction between the parties which indicate that the Matix has allotted 25 Crore 8% CRPS of Rs.10/- each to the Appellant. A letter was sent on 20.08.2018 on behalf of the EPC Constructions India Ltd. informing the Respondent to take steps to redeem the CRPS aggregating to Rs.310 Crores on 25.08.2018 on which date it is becoming due. Letter on which Appellant has relied is letter of the Matix dated 24.08.2018 where reply was given to the letter dated 20.08.2018 sent on behalf of the Appellant. It is useful to notice letter dated 24.08.2018 written by Matix to the Appellant, which is as follows:

*“Matix Fertilisers And Chemicals
Ltd.
CIN : U24120WB2009PLC153272
Poonam Chambers
B-Wing, 5th Floor
Dr. Annie Besant Road
Worli, Mumbai - 400 010
India.
T +91 22 61167000
F +91 22 61167011
info@matixgroup.com*

Date:-24th August, 2018

To

***EPC Construction India Limited,
1st Floor, Tower 2,
Equinox Business Park,
LBS Marg, Kurla (West),
Mumbai-400070.***

***Kind attn.:- Mr. Manoj Agarwala, (Chief
Financial Officer)***

Ref:-

1. Matix Company submitted its Claim dt. 10th May, 2018 & email dated 25th May, 2018;

2. Letter dt. 5th June, 2018 for adjustment amount of Issued 8% Cumulative Redeemable Preference Shares (CRPS) by Company against the claim raised in favour of EPC Construction India Limited ("EPC") |.

3. Your letter dt. 20th August, 2018 (acknowledged on 21st August, 2018 at around 5.20pm).

We note that your Financial Creditor(s) has appointed Insolvency Resolution Professional, Mr. Abhijit Guhathakurta in your Company, which is subsequently approved as Insolvency Professional ("IP") by the competitive authority and, in pursuant to your public announcement published on dated 27 April, 2018 under regulation 6 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016; the Company has submitted Its poof of claim for recovery of dues from EPC Construction India Limited in prescribed Form B, under Regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of Rs. 377.87 Crores (excluding claim on account of Performance LD (Provisional Future Claim) of Rs. 160.00 Crores).

Subsequently, Company informed to your IP vide letter dt. 5th June, 2018 for adjustment of total liability of CRPS amounting to Rs. 310.00 Crores (principal plus accumulated dividend) against of aforesaid raised and submitted claim. The copy of the letter is attached for your ready reference and records as annexure-A. It's a

deemed approval by your IP, and Company's liability towards redemption of CRPS along with cumulative dividend at the rate of 8% p.a. for three years, aggregating of Rs. 310.00 Crores, is considered as adjusted against of our filed claim of Rs. 377.87 Crores (excluding claim on account of Performance LD (Provisional Future Claim) of Rs. 160.00 Crores), and we shall appreciate for payment of balance amount of our claim after adjusting the amount of aforesaid CRPS at the earliest.

Hence, payment of CRPS amount aggregating to Rs. 310.00 Crores will be Rs. NIL as on 25th August, 2018 (the date of redemption of CRPS).

Thanking you.

*Your sincerely,
FOR MATIX FERTRILISERS AND CHEMICALS LIMITED*

AUTHORISED SIGNATORY

Encl.:- The copy of the letter date 5th June, 2018 as Annexure-A.

*CC:- Mr. Abhijit Guhathakurta
Regn. No.: IBBI/IPA-003/IP-N000103/2017-2018/111S8
Insolvency Professional of EPC Constructions India Limited
Deloitte Touche Tohmatsu India LLP
Indiabulls Finance Centre, Tower 3,
27th Floor, Senapati Bapat Marg,
Elphinestone Road (West),
Mumbai – 400 013.”*

10. The demand was issued by the Resolution Professional from the Matix on 25.08.2018 of Rs.632.7 Crore which also include 310 Crores towards CRPS and it was thereafter Section 7 application was filed. Part

IV of the Section 7 application gives the particulars of financial debt. It is useful to notice Part IV of the application, which is as follows:

“PART-IV

PARTICULARS OF FINANCIAL DEBT		
1	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	INR 250,00,00,000/- <i>(Rupees two hundred fifty crores)</i> <i>Term-sheet dated 26.08.2015</i>
2	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE OCCURRED DEFAULT (ATTACH WORKINGS COMPUTATION THE FOR OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	Total Amount: INR 310,00,00,000/- <i>(Rupees three-hundred and ten crores)</i> 26.08.2018 <u>Date On Which The Default Occurred:</u> <i>The date of default has been taken as 26.08.2018 i.e. the date from which the Corporate Debtor defaulted in the payment of redemption amount of Redeemable Cumulative Preference Shares. The amount of INR 250 crore out of the total receivables of INR 450 crore (approx.) as on March/April 2015, was infused as a sub-debt into the capital of the corporate debtor and in lieu of such infusion, 25 crore CRPS, carrying cumulative dividend of 8% every year, was issued, which was payable at par after three years. The amount of INR 310 crores is outstanding as on date and has been acknowledged as payable debt/liability in</i>

		<i>the audited balance sheets of the Corporate Debtor upto Financial Year 2020-21 (which are a part of the annual general report).</i>
--	--	--

11. Section 2(37) of the I&B Code provides that words and expressions used but not defined in the Code but defined in other statutes including Companies Act, 2013 shall have meaning respectively assigned to them in those acts. Certain provisions of the Companies Act, 2013 which are relevant to find out the nature of the preferential shares allotted to the Appellant needs to be noticed. The Companies Act defines ‘shares’ as well as ‘debentures’ in Section 2(84) and 2(30) of the Companies Act, which are as follows:

“(84) “share” means a share in the share capital of a company and includes stock;”

“(30) “debenture” includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not:

² [Provided that—

(a) the instruments referred to in Chapter III-D of the Reserve Bank of India Act, 1934 (2 of 1934); and

(b) such other instrument, as may be prescribed by the Central Government in consultation with the Reserve Bank of India, issued by a company, shall not be treated as debenture;]”

12. Section 43 of the Companies Act deals with 'Kinds of Share Capital'. Share Capital are equity share capital or preference share capital. Section 43 of the Companies Act is as follows:

“43. Kinds of share capital.—The share capital of a company limited by shares shall be of two kinds, namely:—

(a) equity share capital—

(i) with voting rights; or

(ii) with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed; and

(b) preference share capital:

Provided that nothing contained in this Act shall affect the rights of the preference share holders who are entitled to participate in the proceeds of winding up before the commencement of this Act.

Explanation.—For the purposes of this section,—

(i) “equity share capital”, with reference to any company limited by shares, means all share capital which is not preference share capital;

(ii) “preference share capital”, with reference to any company limited by shares, means that part of the issued share capital of the company which carries or would carry a preferential right with respect to—

(a) payment of dividend, either as a fixed amount or an amount calculated at a fixed rate, which may either be free of or subject to income-tax; and

(b) repayment, in the case of a winding up or repayment of capital, of the amount of the share capital paid-up or deemed to have been paid-up, whether or not, there is a preferential right to the payment of any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company;

(iii) capital shall be deemed to be preference capital, notwithstanding that it is entitled to either or both of the following rights, namely:—

(a) that in respect of dividends, in addition to the preferential rights to the amounts specified in sub-clause (a) of clause (ii), it has a right to participate, whether fully or to a limited extent, with capital not entitled to the preferential right aforesaid;

(b) that in respect of capital, in addition to the preferential right to the repayment, on a winding up, of the amounts specified in sub-clause (b) of clause (ii), it has a right to participate, whether fully or to a limited extent, with capital not entitled to that preferential right in any surplus which may remain after the entire capital has been repaid.”

13. Section 55 on which reliance has been placed by learned counsel for the Respondent deals with 'Issue and Redemption of Preferential Shares'.

Following has been provided in Section 55 Sub-section (2):

“(2) A company limited by shares may, if so authorised by its articles, issue preference shares which are liable to be redeemed within a period not exceeding twenty years from the date of their issue subject to such conditions as may be prescribed:

Provided that a company may issue preference shares for a period exceeding twenty years for infrastructure projects, subject to the redemption of such percentage of shares as may be prescribed on an annual basis at the option of such preferential shareholders:

Provided further that—

(a) 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;

(b) no such shares shall be redeemed unless they are fully paid;

(c) where such shares are proposed to be redeemed out of the profits of the company, there shall, out of such profits, be transferred, a sum equal to the nominal amount of the shares to be redeemed, to a reserve, to be called the Capital Redemption Reserve Account, and the provisions

of this Act relating to reduction of share capital of a company shall, except as provided in this section, apply as if the Capital Redemption Reserve Account were paid-up share capital of the company; and

(d) (i) in case of such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133, the premium, if any, payable on redemption shall be provided for out of the profits of the company, before the shares are redeemed:

Provided also that premium, if any, payable on redemption of any preference shares issued on or before the commencement of this Act by any such company shall be provided for out of the profits of the company or out of the company's securities premium account, before such shares are redeemed.

(ii) in a case not falling under sub-clause (i) above, the premium, if any, payable on redemption shall be provided for out of the profits of the company or out of the company's securities premium account, before such shares are redeemed.”

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.

15. The present is a case where Respondent's consistent case is that after allotment of CRPS to the Appellant, Respondent Company never declared dividend or earned profit to redeem the preferential shares. If the preferential shares allotted to the Appellant could not have been redeemed, no debt became due. The finding of the Adjudicating Authority is that the preferential shares being not redeemable, the company having not earned profit nor there were any proceeds of fresh issue of shares made for the purpose of such redemption. We, thus, fully concur with the finding of the Adjudicating Authority that there was no existence of default on the part of the Respondent so as to admit Section 7 application.

16. Much emphasis has been laid by learned counsel for the Appellant that the preferential shares were allotted in lieu of amount outstanding which was to be converted as subordinated debt as was requested by Matix itself. The correspondence between the parties which ultimately resulted in approval of resolution by the Board of Directors of the Appellant on 30.07.2015 and allotment of shares by letter dated 26.08.2015 are evidence of contract between the parties for allotment of 25,00,00,000 8% Cumulative Redeemable Preference Shares of Rs.10/- each aggregating to Rs.250,00,00,000. Thus, it is the transaction, nature of which shall determine as to whether the Appellant is a Financial Creditor. When preferential shares were allotted to the Appellant, the shares were towards the capital of the Company and the earlier outstanding amount, which according to the Appellant was foundation of issuance of preferential shares, shall come to an end. Learned counsel for the Respondent has

relied on judgment of Hon'ble Delhi High Court in **“Commissioner of Income Tax–V vs. Rathi Graphics Technologies Limited, 2015 SCC Online Del 14470”**. The Delhi High Court in Para 15 made following observations:

“15. When pursuant to a settlement the creditor agrees to convert a portion of interest into shares, it must be treated as an extinguishment of liability to pay interest to that extent. In essence there will be no further outstanding interest to that extent. Consequently, the situation where an interest payable on a loan is converted into shares in the name of the lender/creditor is different from the situation envisaged in Explanation 3C to section 43B of the Act, viz., conversion of interest into “a loan or borrowing”. In the latter instance, the liability continues, although in a different form. However, where the interest or a part thereof is converted into equity shares, the said interest amount for which the conversion is taking place is no longer a liability.”

17. Another judgment relied by learned counsel for the Respondent is judgment of this Tribunal in **“Rita Kapur vs. Invest Care Real Estate LLP, 2020 SCC Online NCLAT 627”**. In the above case, an amended agreement was entered where investment was certified as capital contribution. In the above case, the Adjudicating Authority rejected Section 7 application. This Tribunal affirming the above judgment made following observations in Para 10:

“10. From the above provisions of law, it is latently & patently clear that once the ‘Debt’ is converted into “Capital” it cannot be termed as ‘Financial Debt’ and the Appellant cannot be described as ‘Financial Creditor’.”

18. Learned counsel for the Respondent has also relied the judgment of Hon’ble Supreme Court in **“Radha Exports vs. KP Jayaram, (2020) 10 SCC 538”**. In the above case, shares were allotted on request made by the Respondent No.2 and Appellant has allotted shares. The Hon’ble Supreme Court in the above case in Para 42 while dealing with Section 5(8) of the I&B Code held following:

“42. 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 dematerialised 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. Explanation to Section 5(8) which relates to real estate projects is of no relevance in the facts and circumstances of this case. 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.”

19. Learned counsel for the Respondent has also relied on judgment of the Bombay High Court in **“Aditya Prakash Entertainment Pvt. Ltd. vs. Magikwand Media Pvt. Ltd., 2018 SCC Online Bom 551”**. In the said case also Petitioner was a shareholder holding preferential redeemable preference shares. Application by the Petitioner was filed for winding up of the Company, in which case the Bombay High Court held that holder of preferential shares does not assume character of creditor. In Para 9 of the judgment following was laid down:

“9. 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 afresh 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.

20. Similar view has also been taken by the Andhra Pradesh High Court in **“Lalchand Surana and others vs. M/s Hyderabad Vanaspathy Ltd., 1988 SCC OnLine AP 290”** as well as by Bombay High Court in **“State Bank of India v/s Alstom Power Boilers Ltd. & Ors, 2003 SCC OnLine Bom 321”**. Other judgment relied by the Respondent in this context has already been noticed by the Adjudicating Authority which needs no repetition.

21. Learned counsel for the Appellant referring to the entries in the balance sheet of the Corporate Debtor submits that the balance sheet reflects the financial liabilities. Learned counsel for the Respondent refuting the above submission contends that the fact that under Indian Accountancy System the entry of balance sheet has to be made as per accounting standard is not determinative of true nature of the transaction. Learned counsel for the Respondent submits that in the financial statement of Matix for FY 2015-16, the CRPS are shown as part of share capital in the audited balance statement of Matix and in the same year, it is also shown as investment in Financial Statement of the EPCC. Due to change of accounting standards in the FY 2016-17, from GAAP to Ind AS, the CRPS were required to be shown as a form of financial liability from FY 2016-17 onwards. Following of accounting standard is only for the purpose of accounting perspective and it does not change or determine the nature of liability, which has to be determined on the basis of the transaction entered between the parties.

22. Learned counsel for the Respondent has referred to the financial statement of the Matix as on 31.03.2017. In the 'Notes to Financial Statements for the year ended 31 March 2017, Note (b) provides as follows:

“b. Redeemable preference shares

Under previous GAAP, the redeemable preference shares were classified as equity. Under Ind AS 109, these preference shares have been classified as a financial liability. The effect of this change is decrease

in equity and increase in borrowings as at 31 March 2016 of Rs.2,50,00,00,000.

Further dividend provided on the same for the year ended 31 March 2016. The effect of this change is increase in CWIP (Finance cost) and other financial liabilities as at 31 March 2016 of Rs.14,37,70,104.”

23. Learned counsel for the Respondent has placed reliance on judgment of Hon’ble Supreme Court in **“Union of India vs. Assn. of Unified Telecom Service Providers of India, (2020) 3 SCC 525”** where noticing the accounting standard AS-9 following was observed in Para 65 and 76:

“65. As per Clause 20.4, a licensee must make quarterly payment in the prescribed format as Annexure II showing the computation of revenue and licence fee payable. The format is part of the licence and is independent of accounting standards and is in tune with the definition of gross revenue, and is the basis for the calculation of licence fee. It is only for uniformity that the account has to be maintained as per accounting standards AS-9 which are prescribed from time to time. Once the licensee provides the details to the Government in format Annexure II along with accounts certified by the auditor, the reconciliation has to take place. The accounting standard AS-9 is relevant only for whether the figure given by the licensee as to gross revenue is maintained in proper manner once gross revenue is ascertained, then after certain deductions, adjusted gross revenue has to be worked out. The accounting standard provided in AS-9 cannot override the definition of gross revenue, which is the

total revenue for licence and the finding in Union of India v. Assn. of Unified Telecom Service Providers of India in this regard is final. binding and operative. The accounting standard AS-9 makes it clear that same is in the form of guidelines, it is not comprehensive and does not supersede the practice of accounting. It only lays down a system in which accounts have to be maintained. Accounting standards make it clear that it does not provide for a straitjacket formula for accounting but merely provides for guidelines to maintain the account books in systematic manner.”

“76. The definition of gross revenue is crystal clear in the agreement. How the adjusted gross revenue to be arrived at is also evident. It cannot be submitted that the revenue has not been defined in the contract. Once the gross revenue is defined, one cannot depart from it and the very meaning is to be given to the revenue for the agreement. Overall revenue, has to be taken into account for determination of licence fees without set off, as provided in the agreement. The same was defined to simplify it to rule out the litigation, disputes and accounting myriads. The submission raised that the term revenue has to be interpreted as the consideration payable in keeping with commercial and financial parlance is what is intended to be avoided. Raising of such submission is a futile attempt that has been made to wriggle out of the definition of gross revenue, which has been held to be binding in the previous judgment in Union of India v. Assn. of Unified Telecom Service Providers of India. The submission that the contract recognises the applicability of accounting standards, in our opinion, it is only to

maintain books of accounts. To a certain extent, it cannot be disputed that to have clarity, uniformity and definitiveness; the accounting standards lay down guidelines with respect to financial terms. However, when the financial terms in the agreement are clear in the form of definition of gross revenue governed by Clause 19.1 of the agreement, the definition of Accounting Standard 9 cannot supersede it which is a general one.”

24. We may notice the judgment of Hon’ble Supreme Court in **“Global Credit Capital Ltd. & Anr. vs. Sach Marketing Pvt. Ltd. & Anr., Civil Appeal No.1143 of 2022, decided on 25.04.2024”** where Hon’ble Supreme Court held that for determining the nature of debt, the real nature of transaction has to be looked into. Where in Para 14 of the judgment observed, *“Therefore, it is necessary to determine the real nature of the transaction on a plain reading of the agreements”*.

25. Learned counsel for the Appellant has relied on judgment of the Hon’ble Supreme Court in **“Roop Kumar vs. Mohan Thedani, (2003) 6 SCC 595”** in support of his submission that Section 91 of the Evidence Act declare doctrine of substantive law in the case of a written contract, that all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it. In Para 13 of the judgment regulating principles of Section 91 of the Evidence Act, the Hon’ble Supreme Court has laid down following:

“13. Section 91 relates to evidence of terms of contract, grants and other disposition of properties reduced to

form of document. This section merely forbids proving the contents of a writing otherwise than by writing itself; it is covered by the ordinary rule of law of evidence, applicable not merely to solemn writings of the sort named but to others known sometimes as the "best-evidence rule". It is in reality declaring a doctrine of the substantive law, namely, in the case of a written contract, that all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it. (See Thayer's Preliminary Law on Evidence, p. 397 and p. 398; Phipson's Evidence, 7th Edn., p. 546; Wigmore's Evidence, p. 2406.) It has been best described by Wigmore stating that the rule is in no sense a rule of evidence but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process - the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of facts are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. But this prohibition of proving it is merely that dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to "prove" it or "give evidence" of it; otherwise, any rule of law whatever might be reduced to a rule of evidence. It would become the legitimate progeny of the law of evidence. For the purpose of specific varieties of jural

effects – sale, contract etc. there are specific requirements varying according to the subject. On the contrary there are also certain fundamental elements common to all and capable of being generalised. Every jural act may have the following four elements:

(a) the enactment or creation of the act;

(b) its integration or embodiment in a single memorial when desired;

(c) its solemnization or fulfilment of the prescribed forms, if any; and

(d) the interpretation or application of the act to the external objects affected by it.”

26. The present is a case where both the parties are relying on written correspondence including the letter dated 26.08.2015 by which 25 Crore CRPS were allotted to the Appellant. The Hon’ble Supreme Court with regard to Section 91 held *“this section merely forbids proving the contents of a writing otherwise than by writing itself”*. Section 91, thus, itself does prevent to look into any other material except written letter brought by the Appellant itself to know the nature of the transaction. When the CRPS have been allotted in favour of the Appellant, submission of the Appellant has to flow from the said shares and it is precluded to lead any other evidence or material to show or reflect on the nature of transaction.

27. Learned counsel for the Appellant relied on judgment of this Tribunal in **“Sanjay D. Kakade vs. HDFC Ventures Trustee Company Ltd. and Ors., Company Appeal (AT) (Insol.) No.481 of 2023.”**, where this

Tribunal had occasion to consider Share Subscription and Shareholders Agreement between the Promoters and IL&FS Trust Company Ltd., the Financial Creditor. Section 7 application was filed by the Financial Creditor which application was admitted by the Adjudicating Authority. Challenging the said order, the Suspended Director had filed the appeal. It is submitted by learned counsel for the Appellant that in the said case the investment made through Share Subscription and Shareholders Agreement was treated to be financial debt. Learned counsel for the Respondent submits that judgment of this Tribunal in **Sanjay D. Kakade** is clearly distinguishable since in the said case question involved was not of preferential shares. **Sanjay D. Kakade** was not a case of preferential shares simpliciter as in the present case. The Share Subscription and Shareholders Agreement which was entered contained various rights including guarantees and indemnities which took it into the realm of a financial debt within the meaning of Section 5(8) of the I&B Code. Several relevant conditions in the Share Subscription and Shareholders Agreement in **Sanjay D. Kakade's Case** were noticed by this Tribunal in Para 11,12 and 13, which are as follows:

"11. The transaction between the parties and the sequence of events are not in dispute. Investment was made in the Corporate Debtor by means of Share subscription and Shareholders Agreement, between the Financial Creditor, Promoters of the Corporate Debtor and the Corporate Debtor - Kakade Estate Developer Private Limited. The Company has been engaged in construction of commercial/ residential

*buildings/ setting up of residential township project on the land in village Bhugaon, District Pune. The Share Subscription and Shareholders Agreement dated 14.05.2008 was entered into by the Financial Creditor and the Company, where Financial Creditor agreed to subscribe shares in accordance with the terms and conditions of the Original Agreement. An Amended and Restated Share Subscription and Shareholders Agreement (“**Amended Agreement**”) was entered between the Promoters, Financial Creditor, Company and the Corporate Debtor on 14.05.2008. The Financial Creditor, by virtue of Clause 2 of the Agreement, agreed to pay a sum of Rs.72,86,65,720/-. For shares, under Clause 14, there was certain encumbrance to sell or transfer the shares. The Financial Creditor had pre-emption right in their favour in event of any of the Promoters of the Corporate Debtor desires to transfer his shares. Clause-16 of the Agreement provided for ‘Exit Mechanism’ to the Investors. Put Option was also contained in Clause 16.4. As per Clause-16.4, Promoters were under unconditional obligation to buy shares on an as if converted basis at the Fair Market Value as determined under Clause 19.9. Clause 16.4, is as follows:*

“16.4 Put Option

- (a) In the event the Promoters and the Company are unable to provide an exit to the IL&FS Investors and/ or the HIREF Investors and/ or their Affiliates before March 31, 2015 in any manner as specified in Clauses 16.1 to 16.2 above, without prejudice to any other rights or remedies available to the IL&FS Investors and/ or the BIREF Investors, the IL&FS*

Investors and/or the HIREF Investors shall have the option to require the Promoters to buy their Shares and the Promoters shall be under an unconditional obligation to buy such Shares on an as if converted basis at the Fair Market Value as determined under clause 19.9 below. For this purpose the IL&FS Investors and/or the HIREF Investors and/or their Affiliates shall serve to the Promoters as put option notice ("Put Option Notice"), and the Promoters shall be obliged to perform their respective obligation as aforesaid, within 60 days from the date of receipt of the Put Option Notice.

- (b) If the Promoters fail to comply with their obligations to buy Shares held by the IL&FS Investors and/or the HIREF Investors and/or their Affiliates, then each of the IL&FS Investors and/or the HIREF Investors shall forthwith (i) takeover the control and the management of the Company and may consider partial sale of division or assets of the Company and may consider partial sale of division or assets of the Company to recover the IL&FS Investors Capital Investment and HIREF Investors Capital Investment at the Fair Market Value under this Agreement, and (ii) have lien over the Shares held by the Promoters and their Affiliates. The Promoters hereby irrevocably and by way of security for its obligation contemplated herein appoints one nominee Director of the IL&FS Investors and one nominee Director of the HIREF Investors as their constituted attorney to execute and deliver any documentation and do any act or thing required in connection with creation of lien on the Shares held by the Promoters."*

12. Clause-17 dealt with 'Events of Default' and Clause-18 'Consequences of Event of Default'. Clause-19 provided for 'Consequences of Termination of this

Agreement Vis-à-vis IL&FS Investors'. Paragraph 19.1 (a) and 19.6(a), which are relevant are as follows:

“19.1 Upon the exercise by the IL&FS Investors, of their right to terminate this Agreement pursuant Clause 18, the Non-defaulting Shareholders shall, without prejudice to any other rights they may have under this Agreement or otherwise, have the right, at their sole discretion to either:

(a) Require the Defaulting Shareholders Group to purchase from the Non-defaulting Shareholders all the Shares held by the Non-defaulting Shareholders at a price that provides the Non-defaulting Shareholders an Internal rate of return of 15% per annum compounded annually, or the Fair Market Value, whichever is higher, subject to applicable laws. Provided if the Non-defaulting HIREF Shareholders have also exercised their right under Clause 19.6(a), the Defaulting Shareholders Group shall purchase all the Shares held by the Non-defaulting Shareholders and Non-defaulting HIREF Shareholders; and

19.6 The Non-defaulting HIREF Shareholders shall, without prejudice to any other rights they may have under this Agreement or otherwise, have the right, at their sole discretion to either:

(a) require the Defaulting Shareholders Group to purchase from the Non-defaulting HIREF Shareholders all the Shares held by the Non-defaulting HIREF Shareholders at a price that provides the Non-defaulting HIREF Shareholders an Internal Rate of Return of 15% per annum compounded annually, or the Fair Market Value, whichever is higher, subject applicable laws. Provided if the Non-defaulting Shareholders have also exercised their similar right under Clause

19.1(a), the Defaulting Shareholders Group shall purchase either all the Shares held by the Non-defaulting HIREF Shareholders and the Non-defaulting Shareholders; and”

13. Clause-21 provided for ‘Indemnity’, which was given by the Company and the Promoters to indemnify the IL&FS Investors and the HIREF Investors. The Agreement contained other details of terms and conditions.”

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.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

09th April, 2025

Archana