

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No.155/MB-IV/2021

Under Section 7 of the I&B Code, 2016

In the matter of:

Vejas Power Projects Limited

[CIN: U40109MH2007PLC176368]

...Financial Creditor/Applicant

V/s

Vish Wind Infrastructure Limited

[AAA: 1760]

...Corporate Debtor/Respondent

Order pronounced on: 09.02.2023

Coram:

Mr. Manoj Kumar Dubey
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Ms. Priyanka Shetty, Advocate

For the Respondent(s) : Mr. Vikram Nankani, Advocate

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is an application being C.P. (IB) No. 155 NCLT/MB/C-IV/2021 filed by Vejas Power Projects Limited (formerly known as IL&FS Wind Projects Development Limited), the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code)

against Vish Wind Infrastructure LLP, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

2. The Application is filed by Mr. Kailash Vyas, authorize by the Financial Creditor vide Board Resolution dated 22.03.2019, claiming default amount of Rs.297,01,02,779/- (Rupees Two Hundred and Ninety-Seven Crore, One Lakh, Two Thousand, Seven Hundred and Seventy-Nine) as on 31.12.2020.
3. The date of Default is 08.02.2018. The petition is filed on 14.01.2021.
4. The case of the Financial Creditor is as under:
 - a) IL & FS Financial Services Limited had provided Financial assistance to Wind World Wind Farm (MP) Private Limited. (Borrower) of Rs. 100 Crores and 110 crores vide facility agreement dated 27.06.2014 and 24.09.2014 respectively.
 - b) The Corporate Debtor herein stood as corporate guarantor to these loans and executed irrevocable and unconditional letters of guarantee dated 27.06.2014 and 24.09.2014 respectively.
 - c) The facilities provided by IL & FS were assigned to the Financial Creditor (Applicant) herein vide assignment dated 30.12.2005.
 - d) There were several defaults, and the Financial Creditor sent a demand notice dated 10.01.2018 to the borrower and the corporate debtor (guarantor) herein. Thereafter, recall notice dated 29.01.2018 for an amount of Rs. 254, 72,62,584/- was sent to the borrower as well as the Corporate Debtor. Since the borrower failed to pay the amount as demanded, the Financial Creditor herein invoked the guarantee provided by the Corporate Debtor vide

notice dated 07.02.2018. The Financial Creditor had also invoked the Corporate Guarantee (s) and filed the application under Section 7 of the Code against the Corporate Debtor before this Hon'ble Tribunal. The counsel further informed that the date of default of the financial debt is 08.02.2018 and the Petition is stated to be filed within period of limitation. It is a clear case where there is debt and default and the petition is complete. A bare perusal of exhibits makes it clear that the Corporate Debtor was well aware and voluntarily signed documents at all stages and the Corporate Debtor has also admitted its liability in its own reply to the Petition.

- e) Thus, the basic requirement for admissions of Section 7 petition has been met and therefore this Petition should be admitted, and IRP as proposed by the applicant to be appointed.

Reply by The Corporate Debtor

5. Counsel for the Corporate Debtor filed affidavit in reply thereby denying each and every contention levelled in the Petition and submits that claim is not a 'financial debt' covered under Section 5(8) of the Code. The Corporate Debtor submit that the transactions do not come within the meaning of financial transaction/financial debt and is only facilitative transactions towards advance payment for the completion of supply of Wind power projects as per MOU dated 27.07.2010 between IL & FS Energy Development Company Limited, and Wind World India Limited. The learned counsel for the respondent further explained the background of the transactions as follows: -

- i. IL & FS Energy Development Corporation Limited (IEDCL) signed a MoU dated 27.07.2010 with Wind world India Limited (WWIL) for WWIL to set up wind energy project for a total

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- capacity of 1004 MW for IEDCL in a phased manner.
- ii. WWIL and subsidiaries, including Wind Worls Wind Farms Private Limited and WWWFMPPL (hereinafter collectively WWIL, WWWFCPL and WWWFMPPL shall be referred to as 'WWIL' group)
 - iii. IEDCL created special Purpose Vehicles (SPVs) for the purpose of project examination, namely Jogihai Wind Energy Private Limited (JWEPL), Khandke Wind Energy Private Limited (KWEPL), Mahidad Wind Energy Private Limited (MWEPL), Ratedi Wind Power Private Limited (LWEPL), Tadas Wind Energy Private Limited (TWEPL), Sipla Wind Energy Private Limited (SWEPL) and Wind Urja India Pvt. Ltd. (WUIPL).
6. Significant commercial aspects of this entire capacity totalling to 1004 MW are :-
- i. Turnkey price of various contract placed on WWIL and WWRDPL for the supply installation, testing and commissioning of 0.80 MW wind turbine generators (WTGs) ranged between Rs. 4.36 cr to Rs. 4.39 cr per WTG.
 - ii. Payment by IEDCL SPVs was to be made as per following milestone under the purchase order placed by the IEDCL SPVs on WWIL:-
 - iii. 25%-payment interest free advanced against advance bank guarantees
 - iv. 65% - payment against supply of material
 - v. 5%- payment against commissioning of the wind turbines 5%- payment against hand over the entire project site.
 - vi. Upon achieving the milestone, WWIL raised invoices and

payment claims for supply erection, testing and commissioning and world wind resource development private limited a 100% subsidiary of WWIL (WWRDPL), raised invoices for transfer of development rights on the IEDCL SPVs.

7. WWIL was entitled to receive full payments from the IEDCL SPVs as and when the project milestones were achieved by WWIL from the IEDCL SPVs from time to time.
8. However, the IEDCL SPVs faced challenge in raising loans from its lenders to make the payments to WWIL under the purchase orders placed by them on WWIL. Consequently, WWIL was provided with advance by IL & FS group in the form of loans from IL & FS financial service limited (IFIN), the financial lending arms of IL & FS group and IFIN and WWIL entered into loan agreements from time to time to enable WWIL to receive funds advanced in the form of loans in lieu of projects related payments to be made to WWIL by the IEDCL SPVs as detailed above at market interest rates with a clear understanding that whenever WWIL completes its project obligations under various contract and becomes entitled to payment, vide a letter from WWIL to the respective IEDCL SPVs, these IEDCL SPVs will make payment directly to IFIN and IFIN will square the same against the advance payment made and shown as outstanding loans given by IFIN to WWIL. Thus, whenever the IEDCL SPVs realised they were not able to organize the project finances with their lenders in time for phase 4 and 5, the arrangement of funding project related advance and other payments in the form of loan from IFIN to WWIL was put into place. This resulted in several payment delays and on the other hand the IEDCL SPVs wanted WWIL to maintain a high rate of project commissioning irrespective of the delayed payment due to their proposed listing on Singapore Stock Exchange.

9. The total value of MoU was approximately Rs. 5525 cr for the 1004 MW capacity. However, advance/project milestones payments by way of loans were given to WWIL by IFIN in relatively small tranches of Rs. 50 to 100 cr. WWIL, having considerably invested into the projects, reluctantly agree with the IEDCL SPVs to take advance payment by way of loans on an understanding that at no point of time would there be default on the advance payments (loans) as there will always be enough projects progress to justify pre-payment of the advanced payment by way of loan by using the proceeds payable by the IEDCL SPVs to WWIL for squaring of the advanced amount (loans) against the supply made by WWIL to the IEDCL SPVs as detailed above:-

Loan No.	INR Crores	Borrower	Guarantor	Date of Disbursement	Tenure	Date of adjustment of the loan (advance payment)
1	100	WWIL	Vish Wind	27.11.2012	9 Yrs.	30.9.2014
2	20	WWIL	Vish Wind	14.6.2013	12	28.3.2014
3	50	WWIL	Vish Wind	26.8.2014	6	28.3.2014
4	28	WWIL	Vaayu India	21.3.2014	3	17.4.2014
5	32	WWWFCPL- Wind World Wind Farm Chitradurga Pvt Ltd- 100% subsidiary of WWIL	Vish Wind	21.3.2014	3 Months	17.4.2014
6	45	WWWFMPPPL- Wind World Wind Farm MP Pvt Ltd- 100% subsidiary of WWIL	Vish Wind	25.3.2014	6 Months	27.9.2014
7	50	WWWFCPL	Vish Wind/ Vaayu	28.5.2014	6 Months	30.5.2014
8	100	WWWFMPPPL- Wind World Wind Farm MP Pvt Ltd- 100% subsidiary of WWIL	Vish Wind/ Vaayu India	30.6.2014 to 26.8.2014	12 Months	Remain Unpaid
9	110	WWWFMPPPL- Wind World Wind Farm MP Pvt Ltd- 100% subsidiary of WWIL	Vish Wind	27.9.2014 to 30.9.2014	12 Months	Remain Unpaid

Post disbursement of the first four advanced/final payment by way of loans to WWIL, IFIN decided that there would not be any further advance payment by way of loans to WWIL but to WWIL subsidiaries who would be given advance payment by way of loan from loan number 5 onwards for WWIL to use the money for completion of IL & FS projects and the arrangement was with WWIL to square the advance payment by way of loans against supply that it would make to the IEDCL SPVs. This mechanism was insisted by IFIN because WWIL was referred to a joint lender Forum (JLF) under the RBI mechanism for stressed assets and IFIN did not want to be a part of the Joint Lender Forum (JLF). The same is substantiated by email of Ms. Kshama Lal of IFIN as enclosed.

10. It is pertinent to state that a Balance Confirmation letter was issued by IL&FS wind Projects development Ltd. The page two of the letter mentions the amount under this section 7 application as “Project Advance paid by IWPD (Latter name changed to Vejas Power) to WWFMPL and outstanding Rs. 210 Cr”. It is pertinent to state that the said confirmation letter was jointly signed by WWFMPL and WWIL which states that *“We confirm the following balances on behalf of WWIL as on 31st March 2017, to whom we assigned the above project advance as on 31st March 2016.”*
11. The Intent and obligations of the parties are clearly spelled out in these communications. It is pertinent to state that **ILFS described it as project advance and WWFMPL confirmed on WWIL, to whom the above project advance was assigned.** Thus, Vejas Power is factually a creditor of Wind World Indian Ltd but certainly not a ‘Financial Creditor’ of WWFMPL, eligible to file

section 7 applications against WWWFMP or its guarantors i.e., the Corporate Guarantor VW in the present case.

12. This fact has been suppressed by the Financial Creditor that it does not even have the authorized registration for NBFC with RBI or main object of the memorandum of association provide for performing lending activity. The so-called loan(s) were assigned with mala fide intent to benefit the of IL&FS group and deviously committing fraud and cheating WWIL.
13. With an ulterior motive arising out of internal compulsions at IL&FS Group, IL&FS induced WWIL to sign agreements on 1st October 2016, wherein IL&FS group had undertaken to execute 104 MW of projects between 1st October 2016 and 31st March 2017. However, to WWIL's utter dismay, IL&FS SPVs started invoking bank guarantees provided by WWIL from 3rd October 2016 eventually totalling to Rs. 187 crores.
14. This further created huge financial stress on WWIL's banking system while it was in the process of completing the projects. This deceitful act was done by the IL&FS group without any intimation to or discussion with WWIL, merely days after the agreement dated 1st October 2016, by which WWIL had provided additional security to the so-called Financial Creditor. Therefore, on the one hand, IL&FS SPVs cancelled orders of 128 MW, and on the other hand, they created a situation by eventually encashing bank guarantees of Rs. 256 crores by which WWIL suffered immeasurable financial difficulties and working capital constraints and seriously impairing WWIL's capability to complete pending projects with its banking system totally thrown out of gear.

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15. Thereafter, despite putting WWII through insurmountable difficulties. despite WWILs communications, IL&FS group further worsened the issue by not providing WWII with the installation permissions and other requisite documents to WWII. for installation of the pending 104 MW projects till December 2016. Therefore, the ill intent of IL&FS group was proved towards ensuring that the loans due from WWFMPPL. remain outstanding by not permitting WWIL to commission the projects and earn the revenue which would be used to repay the loans taken by the WWIL group from the IL&FS Group and release the collateral securities given by Corporate Debtor to the IL&FS Group.
16. It is pertinent to note that if (i) IL&FS SPVs had provided adequate advance for the completion of the projects on an accelerated timeline. (ii) Orders for 128.6 MW projects had not been cancelled. (iii) IL&FS SPVs had not encashed the bank guarantees, and (iv) IL&FS SPVs had permitted WWII. to complete the 104 MW projects (since WWII had already supplied material worth Rs. 300 crores for 104 MW projects by March: 2014), then the sales realization value of the projects would have been more than sufficient to repay the outstanding dues owed to the so-called Financial Creditor as was done in the past with Rs.348 crores. However. the conniving scheme of IL&FS group was only to ensure that the eighth and ninth loan were to survive, as they were secured by various assets of the Corporate Debtor, benefit the IL&FS Group with ill earned interest income from the loans granted to WWFCPL and WWFMPPL of Rs 210 Cr.

17. It is further pertinent to note that the interest liability accrued on the outstanding amount of Rs.210 crores forced upon WWWFMPPL is approximately Rs.163 crores till date out of which Rs.123 crores has been paid out of the revenue sources earned by the assets of the Corporate Debtor and the other assets of the promoters of WWIL, vide Escrow Agreements where the revenue of these assets are being deposited.
18. As is evident from the above narrated true facts and events, this is not a debt as envisaged under the provisions of Insolvency and Bankruptcy Code, 2016. The loans advanced to WWWFMPPL for which the Corporate Debtor stood as a guarantor, were actually in the nature of project payments, which were structured as loans solely for the purpose of convenience of IL & FS Group. In view of the above, the Applicant fails to satisfy the requirements of the definition of the term "financial debt" as laid down in Section 5(8) of the IBC since the present case is a case of project payments being paid by the IL&FS Group Company. In absence of existence of financial debt proceedings under Section 7 of IBC are legally untenable.
19. It is submitted that the transaction hereinabove is not a debt, more so financial debt. It is submitted that no debt is owed in law or in fact, as it was a business arrangement entered into between WWIL and IL&FS Group. The IL&FS Group has already filed its claims in the Insolvency proceedings in the case of WWIL. It is submitted that WWWFMPPL was used as a pawn to further the interests of IL&FS Group. Therefore, it cannot be said that a "Loan" in the nature of financial debt as described under IBC was provided by the IL&FS Group to WWWFMPPL and in turn the same cannot be

construed as a Financial Debt for the purposes of IBC and thus, no Section 7 proceedings against the Corporate Debtor herein who is the alleged Corporate Guarantor of WWWFMPPL, could be initiated by Petitioner herein as there cannot be any debt which is owed by the Corporate Debtor or WWWFMPPL as it was a colorable transaction, which cannot be enforced in law.

20. The submissions made hereinabove clarify that the Petitioner has malafidely approached this Hon'ble Tribunal to fraudulently initiate insolvency proceedings with malicious intent, for the purpose other than the resolution of Insolvency or liquidation under IBC.
21. In the above regard, the Corporate Debtor, at the cost of repetition, deems it appropriate to refer to the ratio laid down in the judgment of Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17, wherein the Hon'ble Supreme Court referred to the provisions of IBC enabling this Hon'ble Tribunal to discourage fraudulent and/or malicious intention of CIRP under IBC.
22. The facts and circumstances of the present case puts forth that the Petitioner herein has malafidely approached this Hon'ble Tribunal, with the intention to initiate CIRP of the Corporate Debtor for the purpose other than the resolution of Insolvency or liquidation under IBC and by wrongfully presenting the Transaction as 'Financial Debt. The intention of the Petitioner herein is fraudulent and malicious, being so the present case is a fit case to invoke jurisdiction of this Hon'ble Tribunal under Section 65 of IBC.
23. Applying the above law to the facts of the instant case, it becomes abundantly clear that the Petitioner herein had never disbursed any

debt. against the consideration for the time value of money, to the Corporate Debtor. It is submitted without prejudice that the alleged obligation of the Corporate Debtor, arising out of the transaction as explained above. at best can be considered as a security towards the debt of a third party. It is a matter of record that the Petitioner herein is not involved in assessing the viability of the Corporate Debtor or in restructuring the loan. The only interest of the Petitioner herein is recovery of its debt and realizing its security interest which clearly disentitles the Petitioner herein from exercising any rights as a Financial Creditor. Admittedly, the Petitioner is not involved in the functional existence of the Corporate Debtor and hence cannot be entrusted with the task of ensuring the sustenance and growth of the Corporate Debtor. In the garb of proceedings under the Code, the sole intent of Petitioner herein is to obtain unjust enrichment which is legally impermissible.

24. From the perusal of the aforesaid provisions, it is evident that in terms of the provisions of the Section 18 of the Stamp Act if an instrument is executed outside Maharashtra then same has to be stamped within 3 months from the date first it is received in the State. In the present case, alleged documents were executed outside Maharashtra and therefore, as soon as same are received in the state of Maharashtra, same need to be stamped within the statutory period of 3 months. Where any such document has not been duly stamped, it may be taken within the said period of three months to the Collector of Stamps, who shall stamp the same, in such manner as the Maharashtra Government may by rule prescribe, with stamp of such value as the person so taking such instrument may require and pay for.

25. It is submitted that the alleged documents forming part of the petition were executed outside Maharashtra and were placed on record before this Hon'ble Tribunal.
26. The amount of duty chargeable on such instrument have to be the amount of duty chargeable as executed in the state of Maharashtra less the amount of duty, if any, already paid under any law in force in India excluding the State of Jammu and Kashmir on such instrument when it was executed, and in addition to the stamps, if any, already affixed thereto shall be stamped with the stamps necessary for the payment of the duty chargeable on it as an instrument executed in the State with the higher duty and applicable penalty.
27. This first has to be decided by a competent authority and not by this Hon'ble Tribunal. Under the Indian Stamp Act, an instrument doesn't become a contract, namely, that it is not enforceable in law, unless, it is duly stamped. Therefore, even a plain reading would make it clear that, provisions in an instrument would not exist when it is not enforceable by law.
28. The Hon'ble Supreme Court in various judgments, has held that "The Court should before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsory registrable. If the document is found to be not duly stamped. Section 35 of the Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the

Stamp Act and follow the procedure under Section 35 and 38 of the Stamp Act".

29. If an unstamped instrument is brought before a person authorized to receive evidence or holding a public office, such person is required to impound the instrument. Such unstamped instrument cannot be received in evidence by or acted upon by such person unless the stamp duty and any penalty is paid in full by the party responsible for such payment or relying upon as the case may be. These easily inferred that the commercial contract cannot be given effect to unless same is duly stamped. Further, it is submitted that as per the provisions of the Maharashtra Stamp Act, 1958 this Hon'ble Tribunal is entrusted with the responsibility of impounding the alleged instruments referred to in this petition so that stamp duty and penalty is duly paid before same can be acted upon by any authority including this Hon'ble Tribunal. It is reiterated that an instrument not duly stamped is not admissible as evidence including the evidence that exists any debt or default.
30. In the present case, the Petitioner/ Financial Creditor sought to refer and rely upon alleged loan documents and other ancillary documents which were actually entered into for purchase of the wind energy products and not loan. It is further submitted that as there are several documents which are referred to would allegedly have created an obligation or right or interest in favour of the Applicant/Petitioner then same would be covered under article 5(h)(iv)(b) and would attract stamp duty of 0.2% of the amount specified in the alleged documents. Similarly, as the Petitioner has alleged that there is a hypothecation agreement then same would attract the stamp duty in accordance with article 6 of the Schedule.

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31. It is not out of place to mention that the Petitioner has also relied upon an alleged assignment deed executed in its favour wherein allegedly two loan transactions namely Loan Agreement dated 27.06.2014 and 24.09.2014 have been assigned under one Assignment deed. However, the said document cannot be relied upon as same is also not sufficiently stamped. In this regard, section 5 of the Stamp Act is pertinent for consideration and the same is reproduced as under:
32. “Any instrument comprising or relating to several distinct matters or transactions shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of 062 such matters or transactions would be chargeable under this Act.
33. Section 5 deals only with the instrument which comprises more than one transaction and it is immaterial for the purpose whether those transactions are of the same category or of different categories. It is not out of place to mention that as per section 5 of the Maharashtra Stamp Act that instruments relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instrument would be chargeable.
34. The Corporate Debtor relied on *Swiss Ribbons (P) Ltd. Vs. Union of India, (2019) 4SCC 17*, wherein the Hon’ble Supreme Court referred to the provisions of IBC enabling this Hon’ble Tribunal to discourage fraudulent and/or malicious intent of CIRP under IBC, the Petition deserves to be dismissed. The Corporate Debtor further relied upon *Anuj Jain (RP of Jaypee Infratech Ltd.) Vs. Axis Bank Ltd. 2020 SCC Online 237* wherein the Hon’ble Supreme

Court has held that a person having only security over the assets of the Corporate Debtor would stand outside the sect of financial Creditor as defined in Sec. 5(7) & (8) IBC.

Rejoinder by the Financial Creditor

35. The Financial Creditor filed affidavit in reply thereby deny all allegations, averments, insinuation and contentions levelled in the petition. The Financial Creditor submits that the Corporate Debtor is attempting to complicate the matter by referring to agreement/entities/companies which are not connected to the present petition.
36. The Corporate Debtor has referred to a loan transaction between a company known as Wind World India Limited ("WWIL") and IL&FS Energy Development Company Limited ("IEDCL"). WWIL had failed to repay IEDCL which led to a corporate insolvency resolution process ("CIRP") against WWIL, now pending before the NCLT Ahmedabad Bench. By the Corporate Debtor's own admission WWII is a completely distinct entity from the Corporate Debtor. However, the Corporate Debtor with a malafide intent is attempting portray that the loan agreements are intertwined and interconnected with each other, which is a baseless and false statement.
37. The Corporate Debtor has falsely claimed/alleged that it was "coerced" into providing guarantee for the loan transaction. All the greements/letters for guarantee have been signed by the Corporate Debtor in 2014-15. No issues/disputes were raised by the Corporate Debtor while executing the agreements. The Corporate Debtor has not filed any proceedings before any forum for allegedly being deceived to

provide guarantee to WWMP/principal borrower. No disputes were raised when the Financial Creditor issued guarantee invocation notice to the Corporate Debtor. The Corporate Debtor has conveniently not raised the issue of being allegedly "coerced into entering into the agreements before filing the section 7 proceedings.

38. The Corporate Debtor as an afterthought has raised an issue of the agreements not being sufficiently stamped in the Reply. These issues were never raised prior to filing the present Company Petition. The proceedings filed under the IBC for initiation of a CIRP are summary proceedings and there is no requirement of admitting a document in evidence at the admission stage before this Hon'ble Tribunal. In a similar earlier case has clarified that a Section 7 application can be filed in a simple form as prescribed under the IBC even without pleadings. Even the "debt" and "default" can be proved through the records of the "debt" and "default" maintained by the "information utility" even without filing any documents by the party. Once the Hon'ble Tribunal is satisfied with these two legal requirements and if the application is complete in accordance with the IBC, the Hon'ble Tribunal ought to admit the Company Petition without going into any other trivial technical issues raised by the Corporate Debtor as held by Hon'ble Supreme Court in various rulings.
39. The Corporate Debtor is the guarantor of WWMP i.e. the principal borrower who committed a default. The Financial Creditor has a statutory right to file an application for initiation of CIRP against the Corporate Debtor on the occurrence of a default. The IBC entails only a summary adjudication by this Hon'ble Tribunal. This Hon'ble Tribunal has the power to admit an application made under Section 7, if it is satisfied regarding the existence of a default. Further, it is a settled principle of law that as long as the amount due is more

than Rs. 1,00,000 (Rupees one lakh) and there is a default in payment of the same, the application made under section 7 shall be admitted. Since a coordinate bench of this Hon'ble Tribunal has failed to appreciate the same, the Financial Creditor has filed an appeal.

40. The Financial Creditor further submits that from the definition of "financial creditor" "person" and "financial debt" it is clear that the Financial Creditor has properly filed the Petition. It has not been denied by the Corporate Debtor that the loan was taken by the principal borrower and that a guarantee in that regard was provided by the Corporate Debtor. It is also clear that there has been default in the said loan and guarantee. The Corporate Debtor has not stated that it is not a corporate guarantor to WWMP. In view of this, by the Corporate Debtor's own admission, the Corporate Debtor is a guarantor in respect of the loan provided by the Financial Creditor to WWMP (the principal borrower). All these baseless contentions raised by the Corporate Debtor are nothing but a malafide attempt to circumvent the provisions of IBC.

Findings:

41. We have prudently heard the Ld. Counsel for both the sides and perused the material available on record.
42. Commercial aspects of the agreement shows the payment by IEDCL SPVs was to be made as per milestones under the purchase orders placed by the IEDCL SPVs on WWIL.
43. WWIL was entitled to receive full payment from the IEDCL SPVs as and when the project milestones were achieved.
44. However, the IEDCL SPVs faced challenges in raising long term loans to make the payment to WWIL under the purchase order placed by them on WWIL. Consequently, by way of arrangement, WWIL was asked to and provided with advance in terms of agreement but in the form of loans from IL & FS

Financial Service Limited (IFIN), the Financial lending arm of IL & FS group. IFIN and WWIL entered into agreements termed as loan agreement from time to time to enable WWIL to receive advance payment in the form of loans in lieu of project related payments to be made to WWIL by the IEDCL SPVs. A clear understanding was that whenever WWIL completed its project/obligations under various contract it became entitled to payments.

45. Thus, when the IEDCL SPVs realised that they are not able to organise the project finances with their lenders in time, the arrangement of funding project related advance and other payments in the form of loans from IFIN to WWIL was put into place.

46. It is very clear from the document placed by the Respondent that the essence of transaction as entered between the parties herein is advance payment/final payment towards supply of materials, commissioning of wind turbines/ completion of wind energy project for subsidiaries of IEDCL. The advance/progressive payments for such work is clearly authored by ILFS group and the loan amount were adjusted at the time of final payment for the work performed by WWIL and its subsidiary company WWWRDPL. The aforesaid facts clearly suggest that the payment has been made by IFIN to WWIL and its subsidiary towards supply of material and for rendering services. The correspondence, email and documents specially two emails namely email dated 22.01.2015 which shows that the IL & FS considered and confirmed that the payments by IFIN and IL & FS are the obligation of IL & FS and same is advanced towards the supply and by incremental supply of WEG; and the second email dated 08.07.2015 shows that the amount disbursed by IFIN to WWIL and WWMPPL (subsidiary of WWIL) is by way of advance payment/payment against supply of materials commissioning

of the wind turbines and on completion of hand over of the wind energy project, though shown as loan. The Corporate Debtor herein is merely the corporate guarantor along with another Vishwind Infrastructure LLP as co-guarantor.

47. The amounts assigned by IFIN to the Financial Creditor have been accounted for by Vejas Power Project Limited, as 'capital advance' in the audited balance sheet as filed with the Registrar of Companies for F.Y. 18 & F.Y. 19. This clearly shows that the Vejas Power Project Limited has knowledge that the amount due does not come within the meaning of 'financial debt', therefore, accounted the amount as a 'Capital Advance' and not as a "Financial Loan".

48. It is settled law that under Section 129 of the Companies Act, 2013 financial statements shall give true and fair view of the state of affairs of company and shall comply with the Accounting Standard. Therefore, no contrary stand can be taken by Vejas Power Project Limited.

49. In this case, both sides have clearly functioned collectively through their group companies in order to fulfil the terms of MoU and the transactions as stated by the Petitioner needs to be looked as a part of the transaction under the initial MoU dated 27.07.2010 entered between IL & FS Energy Development Company Limited (IEDCL) and Wind World India Limited (WWIL). Thus, the amount that has been disbursed by IFIN do not come within meaning of 'Financial Debt' as defined under Section 5(8) of the IBC as was held in the matter of *Anuj Jain IRP of Jaypee Infratech Limited Vs. Axis bank Limited & Ors.* 2020 SSC Online SC 237. Though, the IFIN or Vejas Power Limited may claim to be a creditor of Wind World India Limited; towards the advance as paid by

them, but such a claim is clearly not a claim in the nature of a 'Financial Debt' under Section 5(8) of IBC. In the light of above, the applicant cannot be considered as a Financial Creditor and therefore under Section 7 petition is dismissed as not maintainable.

Sd/-

Manoj Kumar Dubey
Member (Technical)

/NP/

09.02.2023

Sd/-

Kishore Vemulapalli
Member (Judicial)