NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAIBENCH

Company Appeal (AT)(CH) (Ins) No. 271 of 2022
& I.A. Nos. 581 & 582 of 2022

[Arising out of Order dated 13.05.2022, passed by the Adjudicating Authority/National Company Law Tribunal, Hyderabad Bench in I.A. (IBC) 335/2021inCP (IB) No. 17/7/HDB/2021.]

IN THE MATTER OF:

White Stock Limited
A company incorporated under the laws of Cyprus
Having its registered office at:
55, Ippocratous Street,
1015 Nicosia, Cyprus. **...Appellant**

Versus

Prajay Holdings Private Limited
A company incorporated under the Companies Act, 2013
Having its registered office at:
5th Floor, Prajay Corporate House,
1-10-63 & 64, Chikoti Gardens, Begumpet,
Hyderabad-500016 **...Respondent**
Telangana.

Present:

For Appellants	:	**Mr. P.H. Arvindh Pandian, Sr. Advocate.**
For Respondents	:	**Dr. K. Ravichandran, PCS.** **Ms. S. Manjula Devi, Advocate.**

J U D G M E N T
(Virtual Mode)
(07.09.2022)

NARESH SALECHA, MEMBER (TECHNICAL)

I.A. No. 581 of 2022:

Learned Counsel for the Appellant has filed an Interlocutory Application bearing I.A. No. 581 of 2022 with a prayer to this Hon'ble Appellate Tribunal to condone the delay of 10 days in filing the appeal against the 'impugned order' dated 15.05.2022. Prayers have been mentioned in I.A No. 581 of 2022 which are follows:-

> *"4.That, the Impugned Order, though pronounced on May 13, 2022 by the Hon'ble Adjudicating Authority, was uploaded on its official website (https://nclt.gov.in/) only on or around June 03, 2022.*
>
> *5.That, the counsel for Applicant/Appellant filed an application on June 06, 2022, requesting that it be provided with a certified copy of the Impugned Order passed in the proceedings in C.P.(I.B.) No. 17/7/2021 on May 13, 2022. The Applicant/ Appellant received a certified copy of the Impugned Order only on June 06, 2022. It is further submitted that the Appellant herein is a foreign entity incorporated in Cyprus, and hence has taken some time from receipt of the copy of the Impugned Order to filing of this instant appeal. The present application has been filed by way of abundant caution."*

In view of the above reasons, delay of 10 days in filing the `Appeal' is condoned in accordance with Proviso to Section 61(2) of the I & B Code, 2016.

Company Appeal (AT) (CH) (Ins.) No. 271 of 2022:

Background:

The Present Appeal is filed against the 'impugned order' dated 13.05.2022 passed in IA (IBC) 335/2021 in CP (IB) No. 17/7/HDB/2021by the 'Adjudicating Authority', ('National Company Law Tribunal, Hyderabad Bench'), whereby, the main Company Petition was referred, for mediation to

`International Arbitration & Mediation Centre', Hyderabad, (in short **IAMCH)** preferably to be taken up along with the ongoing mediation in CP No. 468/241/HDB/2018, which were referred earlier by the `Adjudicating Authority' vide Order dated 24.12.2021. Aggrieved by the reference to 'IAMCH', (instead of) considering the `Application' filed under Section 7 of the Insolvency & Bankruptcy Code, 2016 (in short **I & B Code**), the `Appellant' has filed the 'Present Appeal' before this 'Appellate Tribunal'.

<u>Brief Facts</u>:

2. This `Tribunal' has perused the available materials on record, in the instant Company Appeal (AT) (CH) (Ins.) No. 271 of 2022 preferred by the `Appellant' as an `Aggrieved' (including the 'Appeal' typed set of papers, 'pleadings' projected by the respective Learned Counsels of the `Parties', perused the main Petition filed before the `Adjudicating Authority' in the matter of `Section 241 & 242 of the Companies Act, 2013', to appreciate the whole gamut of issues involved coupled with the issues concerned in earlier Petition (before the `Adjudicating Authority'), which were referred to `IAMCH' as well as `Petition' pursuant to which 'impugned order' dated 13.05.2022 was issued by the `Adjudicating Authority', (`National Company Law Tribunal', Hyderabad Bench).

The `Appellant' / 'Whitestock Limited' is a 'Financial Creditor' and operated as 'Special Purpose Vehicle' ('SPV') established in `Cyprus' and is beneficially owned by 'State General Reserve Fund'

The 'Respondent' i.e., 'Prajay Holdings Private Limited' ('Corporate Debtor) is engaged in business of 'Construction and Real Estate

Development Activities' having Registered Office in Hyderabad, Telengana. The `Authorised Share Capital' of the `Company' is Rs. 260 crore.

'Mr. Vijay Sen Reddy Dantapalli' is one of the promoters of 'Corporate Debtor' and was earlier 'Chairman & Managing Director' of the said 'Corporate Debtor'.

'Mr. Vijay Sen Reddy Dantapalli' Ex- CMD allegedly persuaded 'Financial Creditor' for making investment in 'Corporate Debtor' for development of project 'Virgin Country'. Project 'Virgin Country' relates to the construction and development of an integrated township, consisting of luxury villas and group housing complexes i.e., 4,248 apartments and 220 units of villas, to be constructed at the 85.9 acre gunta site in the Maheshwaram suburb of Hyderabad.

3. By way of `Investment Agreement' dated 03.08.2011, (hereinafter referred to as "Whitestock Investment Agreement") (in short '**WIA**'), 'Financial Creditor' made investment in Corporate Debtor company. This investment can be summarised in the following manner :-

(a) Subscription to Convertible Debentures issued by 'Corporate Debtor' i.e. Rs. 105.60 crore fully and `Compulsorily Convertible Debentures' (in short '**CCD**'), with `Face Value' of Rs.1000 and carrying a coupon of 11% per annum to be issued to 'Financial Creditor' pursuant to 'WIA'. The conversion date of these `Compulsory Debentures' to `Shares' is the `Eighth Anniversary', from the date of the completion date i.e., 10.08.2011.

(b) Subscription to Rs. 2,82,151/- Equity Shares of INR 10 each at a premium of Rs. 690 per share aggregating to INR 19.46 Crore.

(c) The 'Financial Creditor' had also entered into a `Sale and Purchase Agreement' dated 15.06.2021 relating to 'Corporate Debtor' with 'LB Hyderabad Investments LLC', to purchase by the 'Financial Creditor' from 'LB Hyderabad Investments LLC' of 7,16,265 CCDs of par value Rs. 1000 each, amounting to Rs. 71.62 Crore, carrying a coupon rate, or 10% per annum, along with Purchase of 100 Equity Shares of par value, at a premium of Rs. 690 per share.

(d) Thus, total investment of Rs. 197 Crore was made by the 'Financial Creditor' in the 'Corporate Debtor'.

(e) Effectively, the 'Financial Creditor' holds 22% `Equity Shareholding of the Corporate Debtor'.

4. As per clause 4.1.3 of 'WIA' 'Article of Association' (in short '**AoA**') of 'Corporate Debtor' was altered to set out commercial terms of 'WIA' and to take care `Corporate Governance' related issues. It was made clear that money received from issue of debentures and sale of shares were to be used in accordance with business plan as per Article 65(f) of the 'Articles of Association' of the 'Corporate Debtor'. Any change, in `Business Plan' was required to be made with the consent of the 'Financial Creditor'. This arrangement, also entitled the 'Financial Creditor' to nominate `Two Directors'.

5. The project was to be completed within a period of seven years from the start of construction after getting all due approvals i.e., by 19.02.2019. As per 'WIA', the `Financial Creditor' was entitled to receive coupon payments at 11% per annum commencing from 03.11.2011, during the development period. Furthermore, at the expiry of the development period, all or any portion of the `Outstanding Principal Amounts' that were not re-paid, was to be `converted into Shares, based on a `Conversion Price'.

6. In the original Petition before the 'Adjudicating Authority' (vide C.P. No. 468/241/HDB/2018), the `Financial Creditor' brought out to the notice that the 'Financial Creditor' had not received any `return of investment in any form' and alleged regarding systemic, long standing `mis-management' and `malaise' by the 'Corporate Debtor' was noticed affecting the project and the investment of the 'Financial Creditor' badly. It was further alleged that 'Financial Creditor' was excluded from the management of the affair of 'Corporate Debtor' and was not provided any information including financial statement.

7. Around February, 2015 'Financial Creditor' came to know about adverse financial position of the 'Corporate Debtor'. In the meantime, 'Financial Creditor' on its own appointed PWC to conduct `Independent Audit' and `PWC', despite not getting any corporation from the `Corporate Debtor, gave its report, according to which, many irregularities were pointed out, including payment of Rs. 64.8 crore, which was `unexplained' and

`unauthorised', use of funds for meeting expenses not connected with projects, the interest on `Debentures' (coupon payment) from November, 2012 to 31.03.2017 amounting to Rs. 59.24 Crore has not been paid by the 'Corporate Debtor' to the 'Financial Creditor' and so on.

8. The 'Financial Creditor' also alleged issues relating to post-dated cheques, fictitious Board Meeting and unlawful alteration to 'Board of Directors'. The ` Financial Creditor' came to know that one of the Shareholder of the 'Corporate Debtor', Viz., Mrs. Hymavathi Reddy Dantapalli and signatory to 'WIA', filed a Petition before the 'Adjudicating Authority' in CP No. 119/24/HDB/2018.

The `Financial Creditor' had earlier filed a CP No. 468/241/HDB/2018 under Section 241 & 242 of the Companies Act, 2013 against the 'Corporate Debtor' (i.e. Respondent), (its Parent Entity, Subsidiary, Directors, Promoters and purported Additional Directors/ Directors), before the `Adjudicating Authority'.

The 'Adjudicating Authority' vide order dated 24.12.2021 in the Company Petitions filed under Section 241 of the Companies Act, 2013, in the CP No. 468/241/HDB/2018 filed by the 'Financial Creditor' against the 'Corporate Debtor', referred the matter for mediation to `IAMCH'.

Also the 'Financial Creditor' filed Company Petition bearing CP (IB) No. 17/7/HDB/2021 under Section 7 of the I & B Code, 2016. However, the ` Adjudicating Authority' vide its 'impugned order' dated 13.05.2022 referred the `Section 7 Application' of the I & B Code, 2016 also for mediation to IAMCH.

9. Aggrieved by this reference for `Mediation', present `Appeal' is filed before this 'Appellate Tribunal'.

Appellant's Submissions:

10. Learned Counsel for the Appellant gave chronological series of events of the case, roles of Financial Creditor, Corporate Debtor investment made and broad terms and conditions for the same, this `Tribunal' had already noted in the preceding paragraphs. The `Appellant' had subscribed to and purchased (from LB Hyderabad Investments I LLC) around 2,82,151 equity shares and 12,44,265 `compulsorily convertible debentures' (CCDs") of the Respondent company, through the `Investment Agreement' dated August 03, 2011 (Investment Agreement") and the `Sale and Purchase Agreement' dated June 15, 2011 ("Sale and Purchase Agreement"). The Appellant holds 22% equity shareholding in the Respondent company.

11. The Learned Counsel for the Appellant stated that they had instituted a Company Petition under Sections 241 and 242 of the Companies Act, 2013 against the `Corporate Debtor', its Parent Entity, Subsidiary, Directors, Promoters and purported Additional Directors / Directors before the ` Adjudicating Authority' as per C.P. No. 468/241/HDB/2018 ("Section 241 Petition").

The grievances of the `Financial Creditor' in the Section 241 Petition were, inter alia, the exclusion of the Appellant from the governance of the Respondent company, non-service of `notices' of `Board' / Shareholders' Meetings upon the Appellant and its Nominee Director and `siphoning off of funds' to the `parent company' of the `Corporate Debtor', etc.

The Learned Counsel stated that the `Corporate Debtor' had defaulted in the payment agreed upon coupons (interest) @ 11% and @ 10% to the `Financial Creditor' due to this, the `Financial Creditor' initiated the 'Corporate Insolvency Resolution Proceedings' (in short 'CIRP') against the `Corporate Debtor' under `Section 7 of the I & B Code, 2016 before the `Adjudicating Authority' in C.P. No. 17/7/HDB/2021 ("Insolvency Petition"). The amount in default at this stage, was Rs. 274.26 crore i.e. `Principal', along with `Unpaid Accrued Interest'/ `Coupons' with respect to `CCDs' held by the `Financial Creditor'. Through the 'impugned order' dated 24.12.2021, `Adjudicating Authority' referred the proceedings under Section 241 Petition for mediation before 'IAMCH'.

The Learned Counsel laid emphasise that this `Mediation Proceedings of company affairs have no bearing on the Insolvency Petition. The Learned Counsel further argued that despite Appellant's vehemently opposing the reference of the Section 7 Application for `Mediation', the `Adjudicating Authority' passed an order dated 13.05.2022, directing the Appellant and Respondent herein, for `Mediation' in the `Insolvency Petition' proceedings under Section 7 of the I & B Code, 2016.

Being aggrieved, the `Financial Creditor' challenged the 'impugned order' dated 13.05.2022 in present `Appeal'. The Learned Counsel for the Appellant alleged that the `Adjudicating Authority' has failed to appreciate the difference between the proceedings initiated by the `Financial Creditor' against the `Corporate Debtor' under Sections 241 and 242 of the Companies Act, 2013 vis-a-vis under Section 7 of the I & B Code, 2016.

12. Under the `Sale and Purchase Agreement' and the `Investment Agreement', the `Appellant' was more as `Shareholder' whose legal rights were being violated, and also alleged Operational Mismanagement by the `Corporate Debtor' under Section 241 & 242 of the Companies Act, 2013, whereas in Section 7 Application of the I& B Code, 2016 the `Appellant' was in the role as `Financial Creditor' and that the `Adjudicating Authority' had not appreciated these two different roles of the `Appellant' and separate remedies available under separate sections of the different `Act' and `Code'.

13. Learned Counsel further alleged that while the issues and reliefs sought for by the `Financial Creditor in Section 241 Petition under the Companies Act, 2013, was with respect to return of funds siphoned off by the `Corporate Debtor', `Financial Creditor's participation in Corporate Debtor's management, etc., the reliefs sought in the `Insolvency Petition' are with respect to the `Financial Debt', due to the `Financial Creditor', with respect to the `Principal Amount' invested and `unpaid interest accrued', on the `Coupons', payable on the `CCDs', held by the `Financial Creditor' with

the `Corporate Debtor' which were due and not paid, thus, the `Default', took place in terms of Section 7 of I & B Code. The `Adjudicating Authority' failed to appreciate this difference and had wrongly recorded that there was a nexus between the `amounts claimed' as `Financial Debt' in the `Insolvency Petition' and that in the Section 241 Petition.

14. The Learned Counsel submitted that as per settled law, only options available to the `Adjudicating Authority', while adjudicating a petition under Section 7 of the I & B Code, 2016 are: -

(a) to admit the petition under Section 7(5)(a) of the I & B Code, 2016 where there is debt due and remains unpaid and default occurred.

or

(b)to reject the petition under Section 7(5)(b), where there is no debt.

15. The Learned Counsel stated that I & B Code, 2016 being a complete code in itself, does not provide for an `Adjudicating Authority' to undertake any other course of action, except two choices available under Section 7(5) of the I & B Code, 2016. In this connection, the Learned Counsel cited the decision of the Hon'ble Supreme Court of India in ***E.S. Krishnamurthy vs. Bharath Hi-Tech Builders (P) Ltd***., (2022) 3 SCC 161 (at para nos. 30 to 32), which also followed the ratio given in ***Innoventive Industries Ltd, vs. ICICI Bank***, (2018) 1 SCC 407.

The `Adjudicating Authority' is enjoined, under Section 7 of the I & B Code, 2016 to verify `Default' that has occurred or otherwise, within 14 days from the receipt of the Section 7 application, based on records and evidence, furnished by the `Financial Creditor', together with the Application.

The Learned Counsel assailed the 'impugned order' dated 13.05.2022, and stated that 'impugned order' is an overreach on the part of the `Adjudicating Authority'.

The Learned Counsel stated that the `Adjudicating Authority' cannot compel the Parties to settle a dispute and the I & B Code, 2016 does not envisage for such action, which has been reiterated in plurality of decisions.

16. The Learned Counsel stated that in view of catena of Judgments of Hon'ble Supreme Court of India, the need for `judicial intervention' or `innovation' from the `Adjudicating Authority' should be bare minimum without disturbing the basic tenets of the I & B Code, 2016.

The Learned Counsel for the Appellant relied upon the judgment of the Hon'ble Supreme Court of India in ***E.S. Krishnamurthy vs. Bharath Hi-Tech Builders (P) Ltd***., (2022) 3 SCC 161.

17. Learned Counsel further relied upon the judgment of Hon'ble Supreme Court of India passed in ***Pratap Technocrats (P) Ltd. vs. Monitoring Committee of Reliance Infratel Ltd.,*** (2021) 10 SCC 623 and ***Arun Kumar Jagatramakavs. Jindal Steel & Power Ltd.,*** (2021) 7 SCC 474. In addition, Learned Counsel cited the judgment of this Appellant Tribunal (Chennai Bench) in ***Drip Capital Inc. vs. Concord Creations (India) P.***

Ltd., (2021) 229 Comp. Cas. 638 (NCLAT). The relevant para of this Judgment is herein under:-

> *"29. It is to be pointed out that the 'Adjudicating Authority' in the impugned order had observed that the Respondent was not an 'Insolvent Company' and that it was of the considered view that Respondent should be given some more time to repay the debt etc. had directed the Respondent / Corporate Debtor to repay the balance debt or the amount as settled with the Appellant within a period of six months failing which the Appellant / Petitioner would be at liberty to file a fresh petition for admission, which in the considered opinion of this Tribunal is in negation of the principles laid down at paragraph 30 of the judgement of the Hon'ble Supreme Court in Innovative Industries Ltd. Vs. ICICI Bank (2018) 1 SCC page 407. Therefore, this Tribunal holds that the Adjudicating Authority had exceeded its jurisdiction by taking the defense of the Corporate Debtor, especially in the absence of any 'Reply' or objections projected by the Corporate Debtor. Consequently, this Tribunal interferes with the impugned order, since it suffers from patent legal infirmities. The instant Appeal succeeds."*

18. The Learned Counsel contended that by action of the `Adjudicating Authority' referring parties in Section 7 of I & B Code, 2016 proceedings for `Mediation' under Section 442 of the 'Companies Act, 2013' was incorrect. The Learned Counsel mentioned that power of the `Adjudicating Authority' to refer for `Mediation' is limited, to the proceedings under the `Companies Act, 2013', and no such power to refer matter for mediation under I & B Code, 2016 are available to the said Authority. The Learned Counsel also

mentioned that the 'impugned order' is also in violation of Section 238 of the I & B Code, 2016.

19. The Learned Counsel took umbrage of the judgment of this `Appellate Tribunal' (Principal Bench) in ***Sodexo India Services Pvt. Ltd. vs. Chemizol Additives Pvt. Ltd.,*** (2021) SCC OnLine NCLAT 18. In this case `Adjudicating Authority' had passed the 'impugned order' without obtaining express consent of the `Parties'.

20. The Learned Counsel for the Appellant vehemently opposed the action of the `Adjudicating Authority' for referring the Petition for `Mediation'. The Learned Counsel stated that the Learned Counsel appearing for the `Financial Creditor' opposed for `Mediation' and insisted upon the `Hearing' and `Disposal' of the Section 7 of the I & B Code, 2016 application. Despite such an opposition, the `Adjudicating Authority' was perforced to refer the matter to `Mediation' against the wishes of the `Financial Creditor'.

The Learned Counsel while winding up his argument, has made a fervent plea to set aside the 'impugned order' dated 13.05.2022, passed by the `Adjudicating Authority' and to allow the present `Appeal', in the `interest of justice'.

Respondent's Submissions:

21. The Learned Counsel for the Respondent argued that the Appellant has treated as if it involves only a pure question of law w.r.t. Tribunal's

power to encourage parties under Section 7 of the I & B Code, 2016, to settle the dispute through `Mediation'.

The Learned Counsel submitted that as per the settled law, that timelines specified under Section 7 of the I & B Code is directory and not mandatory.

The Learned Counsel further highlighted that recently in ***Vidarbha Industries Power Limited v Axis Bank Limited***, 2022 SCC Online SC 841, the Supreme Court of India, held as follows:

> "*We are clearly of the view that the Adjudicating Authority (NCLT as also the Appellate Tribunal (NCLAT) fell in error in holding that once it was found that a debt existed and a Corporate Debtor was in default in payment of the debt there would be no option to the Adjudicating Authority(NCLT) but to admit the petition under Section 7 of the I & B Code, 2016*"

22. The Appellant had moved a Company Petition in CP.No.468/241/HDB/2018 and the `Adjudicating Authority' vide 'impugned order' dated 24.12.2021 referred case to IAMCH for `Mediation', admittedly, with the consent of both sides.

23. In the said 'impugned order' dated 24.12.2021 in Para Nos.5, 12 and 13, the `Adjudicating Authority' had given full background and clear reasons for referring the case for `Mediation' to `IAMCH'. The Learned Counsel pleaded that the Appellant being a `Shareholder' with 22% `Equity' cannot come to the `Adjudicating Authority' for initiating the `CIRP' against the

`Corporate Debtor'. The Learned Counsel stated that `CCD' are liable to be converted into Equity Shares and if the Appellant is aggrieved by any failure to convert the CCDs into Equity Shares, he may seek `Arbitration' or `Resolution' of `dispute' as per Agreement and cannot proceed under I & B Code, 2016.

24. The Learned Counsel cited the case of ***Vijay PalGarg & Ors. Vs. Pooja Bahry (Liquidator in the matter of Gee Ispat Private Limited***, by its decision dated 04.02.2020.

> *"42. As per Section 60(1) of 'I & B' Code, the 'National Company Law Tribunal' is an Adjudicating Authority, possessing concurrent jurisdiction under the Companies Act and also under the I&B Code, 2016."*

25. This Hon'ble Appellate Tribunal had held that as per Section 60(1) of I & B Code, the `National Company Law Tribunal' is an `Adjudicating Authority', possessing concurrent jurisdiction under the Companies Act and also under the I & B Code, 2016.

26. The Learned Counsel assailed the `Appeal' and stated that the `Appellant' failed to establish that it suffers from any legal grievance and also that the 'impugned order' dated 13.05.2022 is not final order disposing of the Section 7 Application. The Learned Counsel concluded his pleadings by stating that the `Appeal' deserves to be dismissed with costs.

Findings

27. Heard Learned Counsel for the `Parties' and also perused record available along with Written Submissions filed by the `Parties'. Several issues have been raised in the `Appeal' which are required to be deliberated upon before coming to final conclusion. Based on `Appeal', averments made by both the Learned Counsels, following issues needs to be decided:-

(i) Whether there was a debt due of which default was committed by the Corporate Debtor entitling the Financial Creditor to file an Application under Section 7 of the I & B Code, 2016.

(ii) Whether, petitions made under Section 241 & 242 of the 'Companies Act, 2013', can be equated with Application filed under Section 7 of the I & B Code, 2016.

(iii) Whether, the `Adjudicating Authority' can refer Application proceedings under Section 7 of I & B Code, 2016 for mediation under Section 442 of the 'Companies Act, 2013'.

28. It will be necessary for us to take issue by issue discussion and we shall proceed accordingly in subsequent discussion;

Issue No.(i) **Whether there was a debt due of which default was committed by the Corporate Debtor entitling the Financial Creditor to file an Application under Section 7 of the I & B Code, 2016?**

(a). To understand whether in the present appeal the debt existed which were not paid resulting into default for admission under Section 7 of I & B

Code, 2016, we need to see the exact definition/ provisions in the I & B Code, 2016.

The debt has been defined in Section 3 (11) of I & B Code, 2016 which is as under: -

> *"3(11). "**debt**" means a <u>liability or obligation in respect of a claim which is due from any</u> person and <u>includes a financial debt</u> and operational debt;"*

Since, the term `Claim' is mentioned in above definition of `Debt', we need to refer to definition of `Claim' under Section 3(6) of I & B Code, 2016, which as under: -

> *"3(6). "**claim**" means-*
>
> *(a) <u>A right to payment</u>, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*
>
> *(b) <u>Right to remedy for breach of contract</u> under any law for the time being in force, <u>if such breach gives rise to a right to payment</u>, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"*

The Financial Creditor and Financial Debt is also defined under Section 5(7) & Section 5(8) of the I & B Code, 2016, which as under: -

> *"(7) "**financial creditor**" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;*

*(8) "**financial debt**" means a <u>debt alongwith interest</u>, if any, which is <u>disbursed against the consideration for the time value of money</u> and includes—*

(a) money borrowed against the payment of interest;

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

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

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

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

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

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

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

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in

clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

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

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

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

Similarly, `Default' is also defined under Section 3(12) of I & B Code, 2016, which as under: -

> *"3(12). "**default**" means <u>non-payment of debt when whole or any part or instalment</u> of the amount of debt has <u>become due and payable and is not [paid]</u> by the debtor or the corporate debtor, as the case may be;*
>
> *[emphasis supplied]*

29. The `Financial Creditor' had subscribed to and purchased around 2,82,151 `Equity Shares' and 12,44,265 `Compulsorily Convertible

Debentures' (**"CCDs")** of the `Corporate Debtor', through the `Investment Agreement' dated 03.08.2011 (**"Investment Agreement")** and the `Sale and Purchase Agreement' dated 15.06.2011 **("Sale and Purchase Agreement").** Financial Creditor holds 22% equity shareholding in Corporate Debtor. Financial Creditor was entitled to receive Coupons (interest) at the rate of 10% and 11% per annum on the CCDs held in the Respondent company. The Financial Creditor alleged that no payment was made by the Corporate Debtor and therefore the Financial Creditor filed CP (IB) No. 17/7/HDB/2021 under Section 7 of the I & B Code, 2016 and Rule 4 of the I & B Code, 2016 (Application to Adjudicating Authority Rules, 2016). In the said application, total outstanding default amount on the date of filing the application was shown as Rs. 274,26,60,573.71/- and documents evidencing `financial debts' were annexed in the said application and relevant date of default was also indicated. The Financial Creditor further mentioned that audited financial statements of the Corporate Debtor including FY ending 31.03.2019 consistently acknowledge liability of amount payable.

30. Therefore, it is clear to us that financial arrangement made between the Financial Creditor and the Corporate Debtor clearly falls in definition of `Debt', `Financial Debt' and `Default'. Therefore, the Financial Creditor had right to move an `Application' filed under Section 7 of the I & B Code, 2016.

31. The `Adjudicating Authority' in the 'impugned order' dated 13.05.2022, instead of accepting or rejecting the Application after establishing facts that `Debt' was due, remained unpaid and `Default' took place, preferred to refer the `Application' under Section 7 of the I & B Code to `IAMCH' for `Mediation'. In the said 'impugned order' dated 13.05.2022 in Para - 9 onward the `Adjudicating Authority' recorded;

> *"…we found that the amount claimed as financial debt has nexus, to the Investment Agreement executed between the parties on 03.08.2011; besides the Sale Purchase Agreement dated 15.06.2021 which was stated to be the basis for the Applicant herein for the investment in the Corporate Debtor. Admittedly, the matters where in the Applicant herein relied on Investment Agreement and the Sale & Purchase Agreement supra, (CP No. 468/241/HDB/2018 and CP No. 466/241/HDB/2018) have already been referred to IAMC for mediation by an order of this Tribunal dated 24.12.2021."*

Accordingly, the `Adjudicating Authority' instead of taking decision as per I & B Code, 2016, chose to refer Section 7 `Application' to `IAMCH' for `Mediation' under Section 442 of the 'Companies Act, 2013'.

32. Admittedly, the `Corporate Debtor' has not brought anything on record refuting that `Debt' was not due or was paid and no `Default' took place. The `Adjudicating Authority' in the 'impugned order' dated 13.05.2022 has also not refuted the claim of the `Financial Creditor'. We

also note that in the various agreements, the coupon rate (interest) was pre-specified @ 11% and 10% which were required to be paid. Due to default on payments, which obviously is more than Rs. 1 crore to satisfy the threshold limit as stipulated in I & B Code, 2016, there was suitable cause for initiating `CIRP' proceeding against the `Corporate Debtor' under Section 7 of the I & B Code, 2016. As a result of the Respondent company defaulting in the payment of these coupons (interest) to the Appellant, the Appellant instituted `CIRP' against the `Respondent' under Section 7 of the I & B Code, 2016. It is settled law that role of the `Adjudicating Authority' has been clearly elaborated under I & B Code, 2016. The `Adjudicating Authority' is required to admit the Petition under Section 7(5)(a) of the I & B Code, 2016 where the `Debt' is due and was not paid. Alternatively, the `Adjudicating Authority' under Section 7(5)(b) can reject the `Petition' if there was no `Debt'. This is to be done within 14 days from the receipt of Petition under Section 7 based on records made available.

33. The Learned Counsel for the Respondent highlighted that recently in ***Vidarbha Industries Power Limited v Axis Bank Limited***, 2022 SCC Online SC 841, the Supreme Court of India, held as follows

> "*We are clearly of the view that the Adjudicating Authority(NCLT as also the Appellate Tribunal (NCLAT) fell in error in holding that once it was found that a debt existed and a Corporate Debtor was in default in payment of the debt there would be no option to the Adjudicating Authority(NCLT) but to admit the petition under Section 7 of the I & B Code, 2016*".

Taking note of the above cited judgment, we find that the present case and its facts and circumstances are not exactly same or similar circumstances.

34. There are several judgments of the Hon'ble Supreme Court of India including ***E.S Krishnamurthy vs. Bharath Hi-Tech Builders (P) Ltd.*** *(2022) 3 SCC 161 (at para nos. 30 to 32)* and above judgment as noted from the submissions of the `Financial Creditor', the role of the `Adjudicating Authority' under Section 7 of I & B Code, 2016, which limit role of `Adjudicating Authority'.

> *"30. Sub-section (5) of Section 7 is comprised in two parts: clause (a), which is the first part, empowers the Adjudicating Authority to admit the application where it is satisfied that: (i) a default has occurred; (ii) the application under sub-section (2) is complete; and (iii) no disciplinary proceeding is pending against the proposed resolution professional; clause (b), which is the second part, empowers the Adjudicating Authority to reject the application where it is satisfied that: (i) default has not occurred; or (i) the application under sub-section (2) is incomplete; or (iii) a disciplinary proceeding is pending against the proposed resolution professional. Under sub-section (7), the Adjudicating Authority has to communicate its order of acceptance or rejection to the financial creditor and the corporate debtor or the financial creditor, as the case may be. In accordance with sub-section (6), the CIRP process commences from the date of the admission of the application under sub-*

section (5). Thus, a time-limit for the completion of the CIRP within a period of 180 days [under sub-section (1) of Section 12, subject to a further extension under sub-section (3)] commences from the date of the admission of the application to initiate the process.

31. On a bare reading of the provision, it is clear that both, clauses (a) and

(b) of sub-section (5) of Section 7, use the expression "it may, by order" while referring to the power of the Adjudicating Authority. In clause (a) of sub-section (5), the Adjudicating Authority may, by order, admit the application or in clause (b) it may, by order, reject such an application. Thus, two courses of action are available to the Adjudicating Authority in a petition under Section 7. The Adjudicating Authority must either admit the application under clause (a) of sub- section (5) or it must reject the application under clause (b) of sub-section (5). The statute does not provide for the Adjudicating Authority to undertake any other action, but for the two choices available.

32. In Innoventive Industries 12, a two-Judge Bench of this Court has explained the ambit of Section 7 I & B Code, 2016, and held that the Adjudicating Authority only has to determine whether a "de fault" has occurred i.e. whether the "debt" (which may still be disputed) was due and remained unpaid. If the Adjudicating Authority is of the opinion that a "default" has occurred, it has to admit the application unless it is incomplete. Speaking through Rohinton F. Nariman, J., the Court has observed: (SCC pp. 438-39, paras 28 & 30)

*"*28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the*

Explanation to Section 7(1), a default is in respect of a financial debt owed to "any" financial creditor of the corporate debtor-it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor a in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part I1, particulars of the proposed interim resolution professional in Part I11, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the Adjudicating Authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the Adjudicating Authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the Adjudicating Authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the Adjudicating Authority is satisfied that a default has

Occured, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the Adjudicating Authority. Under sub-section (7), the Adjudicating Authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has f occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the Adjudicating Authority that the Adjudicating Authority may reject an application and not otherwise."

35. From the records available before us, averments including written submissions by Counsel for both the `Parties', legal provisions under I & B Code, 2016 and settled case laws, we find that prima-facie there was `Debt' of more than 1 crore which was admittedly not paid resulting into `Default' and thereby meeting the requirement of Section 7 of I & B Code, 2016. The `Adjudicating Authority' should have taken into consideration and taken decision on admissibility or otherwise of Petition filed before the `Adjudicating Authority' in CP (IB) No. 17/7/HDB/2021, as per law rather

than referring for `Mediation' to `IAMCH' was done in Section 241 Application. The `Adjudicating Authority' had referred to `Application' filed under Section 422 of the Companies Act, 2013.

36. We, therefore, are not in a position to agree to ratio of the `Adjudicating Authority' on this aspect of referring the `Application' filed under Section 7 of the I & B Code, 2016 for `Mediation' under Section 422 of the Companies Act, 2013.

Issue No.(ii) **Whether, petitions made under Section 241 of the 'Companies Act, 2013' can be equated with Application filed under Section 7 of the I & B** Code**, 2016.**

(a) Before examining above issues, we need to refer to the relevant section 241 & 242 of the Companies Act, 2013 as well as Section 7 of the I & B Code, 2016. In Chapter XVI "Prevention of Oppression and Mismanagement", Section 241 prescribes application to Tribunal for relief in cases of Oppression etc. whereas, Section 242 defines powers of Tribunal w.r.t Chapter XVI regarding "Preventions of Oppression and Mismanagement".

(b) Learned Counsel for the Appellant has brought out that a Company Petition in CP No. 468/241/HDB/2018 was filed before the `Adjudicating Authority' complaining about oppression and mismanagement. Petitions were based on several grievances including exclusion of the Appellant from governance of the Corporate Debtor,

non-service of notice of Board/Shareholders Meeting and Siphoning of funds to the Corporate Debtor's parent company etc.

> "….As per Section 241 (1)- *Any member of a company who complains that-*
>
> *(a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or"*

(c) Whereas Section 7 of the I & B Code, 2016 provides for initiation of \`Corporate Insolvency Resolution Process' by the \`Financial Creditors'. As per Section 7(5) of the I & B Code, 2016, the \`Adjudicating Authority' has been delegated power to decide about default or otherwise;

> *"5) Where the Adjudicating Authority is satisfied that days of the complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application;*
> *b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed Resolution Professional, it may, by order, reject such application: Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority."*

(d) From the above, it is clear that Section 241 of the 'Companies Act, 2013 ' is entirely for different purpose which entitles aggrieved party due to oppression and mismanagement to file Application before the Tribunal and the Tribunal power are prescribed under Section 242 of the Companies Act, 2013. Whereas, Section 7 of the I & B Code, 2016 is purely regarding initiation of CIRP for default of debt of more than Rs. 1 crore by the Corporate Debtor and the power to the Tribunal (Adjudicating Authority) has been defined in Section 7(5) quoted above.

(e) The purpose of Section 241 of the 'Companies Act, 2013' cannot be equated with Section 7 of the I & B Code, 2016. Similarly, the powers of the Tribunal under Section 242 of the Companies Act, 2013 w.r.t oppression and mismanagement are quite comprehensive in comparison to Section 7 which grants limited powers to the `Adjudicating Authority' of either acceptance or rejection of the claims made by the `Financial Creditor' based on details of claims along with evidence produced by him.

(f) As such we find that the petitions made under Section 241 of the 'Companies Act, 2013' cannot be equated with Application filed under Section 7 of the I & B Code, 2016 and the `Adjudicating Authority' is required to treat these petitions on a separate footing as per law and take decision accordingly.

(g) We, therefore, find that `Adjudicating Authority' erred in tagging the Application filed under Section 7 of I & B Code, 2016 with Application filed under Section 241 of the Companies Act, 2013 and referring for mediation to IAMCH. We find that the act of `Adjudicating Authority' to refer the Application under Section 7 of I & B Code, 2016 for mediation was beyond jurisdiction of `Adjudicating Authority' as granted under I & B Code, 2016. We also do not find in this case any scope which allows discretion to `Adjudicating Authority' as per ratio grant in *Vidarbha Industries Power Limited (Supra)*

Issue No. (iii) **Whether, Adjudicating Authority can refer Application proceedings under Section 7 of I & B Code, 2016 for mediation under Section 442 of the 'Companies Act, 2013'.**

(a) We have already seen powers of Adjudicating Authority under Section 7(5) of the I & B CODE, 2016 while discussing Issue No. (ii) above. To reiterate the powers of Adjudicating Authority is limited to decide on the records available including evidence of default to either admit CIRP or reject the same within 14 days of the receipt of application. We are conscious of Hon'ble Supreme Court of India Judgment in ***Vidarbha Industries Power Limited v Axis Bank Limited***, 2022 SCC Online SC 841, the Supreme Court held as follows

> "*We are clearly of the view that the Adjudicating Authority(NCLT as also the Appellate Tribunal (NCLAT) fell in error in holding that once it was found that a debt existed and a Corporate Debtor was in default in payment of the debt there would be no option to the Adjudicating Authority(NCLT)*

> *but to admit the petition under Section 7 of the I & B* Code *2016".*

(b) However, the circumstances and facts of the above cited case is not similar to appeal before us. In *Vidarbha Industries Power Limited* case, one appeal was pending before the Hon'ble Supreme Court of India and if that appeal would have come in favour of *Vidarbha Industries Power Limited,* they could have paid all the debt dues. However, in the present case it is squarely for `Adjudicating Authority' to decide about the claim of default of Financial Creditor and there was no material basis for any alternative remedy other than as stipulated under Section 7(5) of the I & B Code, 2016 to `Adjudicating Authority'.

(c) Only plea taken by Respondents is that a similar case on the same facts having commonality of issues is already pending with IAMCH and therefore Section 7 Application under I & B Code, 2016 could also be referred to `IAMCH' for `Mediation'.

(d) The `Adjudicating Authority' after going through the pleadings of both the Appellant and the Respondent w.r.t. remedies available under Section 7 of the I & B Code and Section 442 of the "Companies Act, 2013", noted in Para 13 of the 'impugned order' dated 13.05.2022 as herein under :-

> "*Needless to emphasise that mediation when successful lay the disputes to rest finally hence parities need to be encouraged for resolving their differences and disputes through mediation".*

(e) This `Tribunal' notes that the `Adjudicating Authority' has referred 442 i.e. 'Mediation and Conciliation Panel'. He has adverted to the ingredients of sub-section 2 & 3 of the Section 442 of the 'Companies Act, 2013', which are as hereunder :-

> *"442. (2) Any of the parties to the proceedings may, at any time during the proceedings before the Central Government or the Tribunal or the Appellate Tribunal, apply to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, in such form along with such fees as may be prescribed, for referring the matter pertaining to such proceedings to the Mediation and Conciliation Panel and the Central Government or Tribunal or the Appellate Tribunal, as the case may be, shall appoint one or more experts from the panel referred to in sub-section (1).*
>
> *(3) The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may, suo motu, refer any matter pertaining to such proceeding to such number of experts from the Meditation and Conciliation Panel as the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, deems fit."*

(f) There are several judgments on similar subject especially w.r.t referring the matter for an `Arbitration'.

(i) As per the decision in ***Sodexo India Services Pvt. Ltd. vs. Chemizol Additives Pvt. Ltd.,*** (2021) SCC OnLine, NCLAT 18, under Section 442 cannot refer the parties to arbitration or mediation for the proceedings pending under the Code. Once the `Default' is established, the `Adjudicating Authority' (`National Company Law Tribunal') does not have the power to refer the `Parties' to an `Arbitration', since it becomes an in-rem insolvency proceedings. The relevant portion of this Judgement is herein under:-

"5. Our attention has also been invited to some observations made by the Adjudicating Authority in paragraph 10, which reads as under:—

"10. .... Therefore, the Respondent Company prima facie appears to be solvent Company so as to resolve the issue of outstanding amount in question. The NCLT is conferred power, even to refer the matter pending before it, to Mediation and Conciliation, U/s 442 of the Companies Act, 2013. The Adjudicating Authority being NCLT, U/s 60(1) of the Code, can suo motto refer the matter to either Mediation and Conciliation or to Arbitration to settle the dispute. Since, this already Arbitration clause is available in the Agreement in question, the Petitioner can be permitted to invoke Arbitration clause in respect of the issue in question."

6. The Adjudicating Authority appears to have made observation in regard to the Corporate Debtor being a solvent company, ignoring the fact that it was alleged to have committed default in respect of operational debt that it owed to the Appellant- Operational Creditor and which it had failed to pay, in response to admission notice served upon it by the Operational Creditor. The Adjudicating Authority was concerned with the *insolvency resolution qua the operational debt, which the Corporate Debtor owed to the Operational Creditor. It was immaterial whether it was solvent or insolvent qua other creditors. The I&B Code would not permit the Adjudicating Authority to make a roving enquiry into the aspect of solvency or insolvency of the Corporate Debtor except to the extent of the Financial Creditors or the Operational Creditors, who sought triggering of Corporate Insolvency Resolution Process.*

7. The Adjudicating Authority clearly landed in error by observing that the course adopted by it was warranted on the principle of ease of doing business, ignoring the fact that such course was not available to it, ease of doing business only being an objective of the legislation viz. I&B Code along with other objectives specified in the preamble, which are sought to be achieved through CIRP process.

8. For the aforesaid reasons, we are unable to persuade ourselves to go along and support the impugned order. The Appeal is allowed and impugned order is set aside. The Adjudicating Authority is directed to pass an order of admission in respect of the Application filed by the Appellant-Operational Creditor under Section 9 of the I&B Code within two weeks of communication of this order. However, the Adjudicating Authority shall be at liberty to provide an opportunity to the Respondent-Corporate Debtor to settle the claim of Appellant-Operational Creditor."

(ii) This Appellate Tribunal in the case of Mrs. Nandhitha Vedam vs. M/s. Udhyaman Investments Pvt. Ltd. & Anr., passed an order dated 31.07.2018 in Company Appeal (AT) (Insolvency) No. 166 of 2018 which has also held that `Existence of an Arbitration Agreement' is no ground to oppose an `Application' filed by a `Financial Creditor' under Section 7 of the I & B Code, 2016.

The relevant portion of the order passed by this `Hon'ble Appellate Tribunal' are as follows:-

> *"2. Learned Senior Counsel appearing on behalf of the Appellant submitted that there was an existence of dispute between the 'Corporate Debtor' and the 'Financial Creditor' and the matter was referred for Arbitration. But no such ground can be taken for opposing an application under Section 7, though such ground can be taken if application would have been preferred under Section 9 of the 'I&B Code'.*
>
> *3. In the present case, as we find that there is a debt and the 'Corporate Debtor' defaulted in payment of debt to the 'Financial Creditor'. The application being complete, we hold that the Adjudicating Authority rightly admitted the application. We find no ground to interfere with the impugned order dated 12th March, 2018. The appeal is accordingly dismissed. No cost."*

(g) The `Adjudicating Authority' had referred the `Parties' in Section 7 Application of I & B Code, 2016 proceedings, for `Mediation' under Section 442 of the Companies Act, 2013. As a matter of fact, this `Tribunal' had already noted that power of the `Adjudicating Authority', (`National Company Law Tribunal'), under Section 442 of the Companies Act, 2013 is limited to the proceedings under the Companies Act, 2013, but not in the matter related to I & B Code, 2016. Hence, this `Tribunal', without any hesitation, holds that the `impugned order' dated 13.05.2022, in main C.P. (IB) No. 17/7/HDB/2021, passed by the `Adjudicating Authority', (`National Company Law Tribunal', Hyderabad Bench), is not inconformity with the I & B Code, 2016, and the same is clearly unsustainable in `Law', and sets aside the same in furtherance of substantial cause of justice. Consequently, the `Appeal' succeeds.

Result:

In view of the aforesaid deliberations and reasons, the instant Comp. App (AT) (CH) (Ins.) No. 271 of 2022 is allowed. No costs.

The `Adjudicating Authority' (`National Company Law Tribunal', Hyderabad Bench), is directed to pass suitable orders in respect of the `Application' filed by the `Appellant', under Section 7 of I & B Code, 2016, in accordance with law.

The connected pending Interlocutory Applications, if any, are Closed.

[Justice M. Venugopal]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

Simran