National Company Law Appellate Tribunal, New Delhi

Principal Bench

COMPANY APPEAL (AT) (Insolvency) No. 717 of 2020

(Arising out of Order dated 28th January, 2020 passed by National Company Law Tribunal, Hyderabad Bench, Hyderabad in Company Petition (IB) No.-744/7/HDB/2018

IN THE MATTER OF:

Mr. Kolla Koteswara Rao
Having its Registered Office at:
P2, Sy No 423(P) & 425(P) Jedcherla Mandal,
Polepally, Mahbubnager, 509301, T.S. .....Appellant

Versus

1. Dr. S.K. Srihari Raju, S/o S.K.V. Veerabhadra Raju, Aged about 66 years, Occ: Business, R/o Plot No 127 & 128, 4th Floor, Amar Co-operative Society, Near Durgam Cheruvu, Madhapur, Hyderabad 500003, T.S.
Email: drsksraju@gmail.com ...Respondent No. 1

2. Anjaneyulu Sadhu, Son of not known to the Appellant, Occupation I.R.P., Regn. No. IBBI/IPA-001/IP-Poo963/2017-2018/11584, at Ezresolve LLP, 402GB, Technopolis, Chikoti Gardens, Begumpet, Hyderabad 500016 T.S. ...Respondent No. 2

Appellant: **Mr. Aditya Vijaykumar, Mr. Namrata Mohapatra and Mr. Koteshwar Rao Kolla, Advocates.**
Respondents: **Mr. Kailash Nath, PSS for R-1.**
Mr. Mithun Shashank, Advocate for R-1.
Mr. Pankaj Bhagat, (RP) (R2).

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Impugned Order dated 28.01.2020, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) in Company Petition (IB) No. 744/7/HDB/2018 under Section 7 of the Insolvency and Bankruptcy Code,

2016, (in short **'the IBC'**) the Suspended Director of the 'Corporate Debtor' preferred this Appeal under Section 61(1) of the Code, challenging the Order of Admission.

2. The facts in brief are that the 'Corporate Debtor' availed a Financial loan from SBI ('the Lender') to an extent of Rs. 21.50/- Crores for the purpose of setting up a unit for manufacturing bulk drugs, formulation etc. The 'Corporate Debtor' defaulted in repaying the amounts and was classified as an NPA on 30.11.2012. Subsequently, the Lender filed an Application under Section 19 of the RDDB Act with the Debt Recovery Tribunal, Hyderabad on 23.07.2014 for recovery of an amount of Rs. 23.37/- Crores. The Lender and the 'Corporate Debtor' entered into a One-Time Settlement (OTS) on 08.09.2017 for an amount of Rs. 11.70/- Crores. In compliance with the terms of the OTS letter dated 13.11.2017, the first Respondent in Agreement with the 'Corporate Debtor' and on behalf of the 'Corporate Debtor', deposited Rs. 83,60,000/-(5% of the OTS amount) and a further amount of Rs. 1,50,96,000/- (20% of the OTS amount) in December 2017. Subsequently on 10.12.2017, the first Respondent and the 'Corporate Debtor' entered into an Agreement of Sale whereby and whereunder the 'Corporate Debtor' had agreed to sell to the first Respondent the land allotted by Telangana State Industrial Infrastructure Corporation ('TSIIC') together with the structure standing on the property and the plant and machinery, for the same consideration that was agreed between the parties to be the OTS amount payable to the Lender.

3. As per the key terms of the Agreement of Sale, it is stated that the 'Corporate Debtor' shall obtain all the necessary permissions, including obtaining an NOC from TSIIC, the statutory authority, which had allotted the said land to the 'Corporate Debtor'. It is stated that in the event of not obtaining the NOC, (as per Clause 6-A of the Agreement) the 'Corporate Debtor' had to indemnify the first Respondent under Clause 11 of the Agreement by refunding the amount paid together with interest @ 24% per annum. It was averred that as the 'Corporate Debtor' had failed to commence the Project on time, TSIIC informed the 'Corporate Debtor' in February 2018 that the said allotment would be cancelled. As the time under the OTS offer letter dated 13.11.2017 had expired in the month of May, 2018 it was stated that the first Respondent had issued a notice to the 'Corporate Debtor' in October 2018 seeking repayment of the entire amount of Rs. 2.35/- Crores paid to the Lender on behalf of the 'Corporate Debtor' together with interest @ 24% per annum as agreed upon under the Agreement. It was stated that there was no response, an Application under Section 7 was filed by the first Respondent before the Learned Adjudicating Authority.

4. While admitting the Section 7 Application, the Learned Adjudicating Authority observed as follows;

> *"**14.** It is clear from the above that Hon'ble Apex Court has held that Section 5(8)(f) is of a wide import being a residuary provision. Further in Para 86 of the same judgement Hon'ble Supreme Court made it clear that wider words have been deliberately used in a residuary provision, to make the scope of the definition of 'financial debt' subsume matters which are not found in the other sub-clauses of Section 5(8).*

Thus, Hon'ble Supreme Court has held that the 'financial debt' under the Code is very wide and includes all such transactions that involves commercial effect of borrowing. In the instant case, the amounts were paid by the Petitioner to the Lender of the Corporate Debtor, on behalf of the Corporate Debtor. Pursuant to such payments only an Agreement of sale was executed between parties, which ultimately failed due to denial of permission by TSIIC to the Corporate Debtor to transfer the impugned land. Thus, as per the Agreement, the Corporate Debtor had to return the amount paid on its behalf by the Petitioner, with interest as agreed upon between parties, indicating time value of money. Therefore, we are of the considered view that the Petitioner herein squarely falls within the definition of 'Financial Creditor' under Section 5(7) of the Code and the contention of the Corporate Debtor fails.

15. *The other contention of the Corporate Debtor that no proper notice served on the Corporate Debtor by the Petitioner is to be considered in the light of the legal position that there is no requirement of a demand notice to be served before filing a Petition under Section 7 as is the case with an Operational Debt. Therefore, this contention cannot be taken to be a ground for rejection of the instant application.*

16. *In view of the discussions in the foregoing paragraphs this Adjudicating Authority is satisfied that the Petitioner herein is a Financial Creditor to the Corporate Debtor. The Corporate Debtor has not disputed the receipt of the impugned amounts including interest, but has only taken a legal argument, which has found to be not acceptable by this Adjudicating Authority. On the other hand, the Petitioner has established the existence of a Financial Debt which the Corporate Debtor was liable to pay, but failed to do so. Considering these facts and circumstances, this Adjudicating Authority is inclined to admit the instant Petition."*

(Emphasis Supplied)

Submissions of the Learned Counsel for the Appellant:

5. Learned Counsel appearing for the Appellant vehemently contended that the first Respondent does not fall within the meaning and definition of a

'Financial Creditor'; that the first Respondent did not disburse the money against 'consideration of time value for money', that the word 'disbursed' assumes special importance which the Learned Adjudicating Authority had failed to appreciate; that at the time of 'disbursal', the amount was not paid for 'time value of money'; because had the property eventually culminated into a Sale, the money would not have accrued interest and would not have been payable. Learned Counsel placed reliance on Paragraph 71 of ***'Pioneer Urban Land and Infrastructure Ltd. & Anr.' V/s. 'Union of India & Ors.' 2019 (8) SCC 416*** in which the Hon'ble Supreme Court has defined 'time value for money' *"today's value of a payment or a stream of payment amount 'due and payable' at same specified future date, discounted by a compound interest rate of discounted rate"* and argued that the Learned Adjudicating Authority has erred in including the subject transactions as inclusive under the definition of 'Financial Debt'; that 'Financial Debt' cannot be read to encompass any debt of whatsoever nature and in support of his contention relied on Paragraph 41.1 in ***'Anuj Jain, IRP for Jaypee Infratech Ltd.' V/s. Axis Bank Ltd. & Ors.' in CA 8512 and 8527 of 2019.***

6. Learned Counsel for the Appellant contended that it is settled law that a 'Financial Creditor' is a person who is directly engaged in the functioning of the 'Corporate Debtor', involved right from the beginning in assessing the viability of the 'Corporate Debtor', would be engaged in the restructuring of the loan as well as the reorganization of the 'Corporate Debtor' business when there is Financial stress; that the 'Financial Creditor', by its own direct

involvement in a financial existence of the 'Corporate Debtor', acquires a unique position, entrusted with the task of ensuring the sustenance and growth of the Company and mere disbursal of a loan with the disbursement of interest would not qualify the person to be a 'Financial Creditor'. The money was not utilized by the second Respondent but was paid to the Lender in terms of the covenants in the Agreement to Sell; since utilization of money by the 'Corporate Debtor' was a *sine qua non,* the fact that the money was not utilized by the 'Corporate Debtor' itself implies that the disbursal does not fall within the realm of 'Financial Debt'; that there is no 'date of default' in the Application and hence it ought to have been dismissed as non-maintainable; that the second Respondent did not make any 'Profit' by way of this 'Transaction' and therefore, the 'Transaction' cannot be said to have a 'Commercial effect of borrowing' and therefore was not in the nature of a 'Financial Debt'.

7. It is further submitted that no 'Notice' was issued prior to filing of the Section 7 Application and that the first Respondent did not implead Dr. Mrs. Krishnaveni, though some of the amount was admittedly paid by her and hence the petition was bad for non-joinder of parties.

Submissions of the Learned Counsel for the first Respondent:

8. Learned Counsel for the first Respondent strenuously argued that a 'Financial Debt' is a 'debt', against 'consideration for time value of money', and 'debt' includes a 'claim' which is a Right to Payment or a Right to Remedy for breach of contract; that in the present case though money has been paid under an Agreement of Sale, the same was paid by the first

Respondent to the Lender Bank on behalf of the 'Corporate Debtor' which was to be repaid by the 'Corporate Debtor' alongwith interest in the event the transaction did not materialize and hence it is in the nature of a debt which is disbursed for the 'time value of money'; that a Right to Payment accrued to the 'Financial Creditor' in terms of Clause 11 of the Agreement, as the Corporate Debtor could not procure the NOC from TSIIC, a requisite, for transfer of the said land by the 'Corporate Debtor' in favor of the 'Financial Creditor' and hence the 'Corporate Debtor' has to repay the amounts paid by the 'Financial Creditor' to the Lender on its own behalf alongwith interest; that the present transaction is for transfer of assets of the 'Corporate Debtor' and falls within the definition of 'transaction' as defined under Section 3(33) that there is no requirement to issue notice to 'Corporate Debtor' for default under Section 7 of the Code and even otherwise the first Respondent delivered a proper notice to the 'Corporate Debtor'; that the Learned Adjudicating Authority has rightly relied on the ratio laid down by the Hon'ble Supreme Court in ***'Pioneer Urban Land and Infrastructure Ltd. & Anr.' (Supra),*** wherein the Hon'ble Supreme Court dealt with in detail Section 5(8)(f) of the Code and observed that Section 5(8)(f) is a 'Residuary Provision' which is "catch all in nature" and further went on to hold that amounts that are 'raised under' 'transactions', not covered by any of the other clauses, would amount to a 'Financial Debt', if they had the 'commercial effect of borrowing'.

9. Learned Counsel for the first Respondent submitted that the Hon'ble Supreme Court has clarified that any 'debt' which has a 'commercial effect of

borrowing', though that was not the intent of the transaction at the time of lending, would be classified as a 'Financial Debt'.

Submissions of the second Respondent/Resolution Professional:

10. Learned Counsel appearing for the Resolution Professional submitted that there is no provision in the entire IBC, 2016 or its Rules and Regulations which mandates service of advance notice by a 'Financial Creditor' prior to instituting a Petition under Section 7 of the Code, that the Agreement to Sell envisages that the 'Financial Creditor' shall make the payment of consideration directly to the Lender towards the amount payable under the OTS and no amount shall be payable directly to the 'Corporate Debtor', there is no Iota of doubt that there was a standing instruction by the 'Corporate Debtor Company' to deposit the amount directly to the bank on its behalf; that Clause 16 shall be applicable in a case where a Clause/covenant in the Agreement is unworkable and in the present case the entire Agreement is a nullity if the 'Corporate Debtor Company' failed to either get NOC or sell the land. Learned Counsel placed reliance on Section 32 of the Indian Contract Act, 1872, in support of his contention that the Contingent Contract mandatorily requires NOC from TSIIC and since the first limb of the Contract dated 10.12.2017 is impossible to perform as the allotment was cancelled, the same is void *ab initio;* that Section 35 of the Indian Contract Act, 1872, is squarely applicable as the 'Corporate Debtor' had failed in performing its reciprocate promises and cannot now seek shelter stating that the 'debt' which has the 'commercial effect of borrowing' is not a 'Financial Debt'.

Assessment:

11. The main point for consideration in this Appeal is:-

- Whether the amounts paid by the first Respondent on behalf of the 'Corporate Debtor' to the Lender Bank for compliance of the terms of the OTS would fall within the definition of 'Financial Debt' under the Code.
- Whether the first Respondent being a 'Purchaser' under an Agreement to Sell, executed pursuant to an OTS can claim to be a 'Financial Creditor' as defined under Section 5(7) of the Code.

12. At this juncture, we find it pertinent to reproduce the relevant definitions as defined in the Code;

> *"Section 5(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes:*
>
> > *(f) any amount raised under any other transaction, including any forward sale on purchase agreement, having the commercial effect of a borrowing:*
>
> *Section 3(33) "transaction" includes an Agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor.*
>
> *Section 3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.*
>
> *Section 3(6) "claim" means:*
>
> > *a right to payment, whether or not such right is reduced to judgement, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*

> *right to remedy for breach of contract under any law for the time being in force, if such breaches give rise to a right to payment, whether or not such right is reduced to judgement, fixed, matured, un-matured, disputed, undisputed, secured or unsecured;*

13. The admitted facts in brief are:-

- The 'Corporate Debtor' was allotted an industrial land by TSIIC to setup a bulk drug unit, for which the 'Corporate Debtor' availed facility from the Lender Bank, SBI for an amount of Rs. 21.50/- Crores, but on account of default in repayment, the loan account was classified as an NPA on 30.11.2012.
- A One-Time Settlement Agreement dated 30.11.2017 was entered into between the Lender and the 'Corporate Debtor' for an amount of Rs. 11,73,22,501/-, the terms of which stipulate that 20% of the OTS would have to be deposited within 12.12.2017 and the balance amount within 6 months' from 13.11.2017.
- The 'Corporate Debtor' and the Respondent entered into an Agreement of Sale on 10.12.2017 whereunder, the 'Corporate Debtor' agreed to sell to the first Respondent the land allotted by TSIIC together with the structure and plant and machinery in consideration of the first Respondent paying the OTS amount.
- The first Respondent paid an amount of Rs. 2,34,65,000/- on behalf of the 'Corporate Debtor' to the Lender.

- As per the terms of the Agreement to Sell the 'Corporate Debtor' ought to obtain all necessary permissions including NOC from TSIIC and in the event, the 'Corporate Debtor' had failed to do so, under Clause 11 of the Agreement, the 'Corporate Debtor' had to indemnify the 'Financial Creditor'.
- TSIIC cancelled the allotment vide letter dated 09.02.2018 and the OTS offer letter expired on May 2018.
- A Notice was issued by the first Respondent to the 'Financial Creditor' in October, 2018 seeking repayment of the amount of Rs. 2.35/- Crores paid by the first Respondent to the Lender on behalf of the 'Corporate Debtor' alongwith interest @ 24% per annum.

14. At the outset, we do not find any illegality or infirmity in the observation made by the Learned Adjudicating Authority that issuance of Notice prior to Section 7 Application is not mandatory as per the provisions of the Code as noted by the Hon'ble Supreme Court in ***'Innoventive Industries Ltd.' Vs. 'ICICI Bank and Anr.' (2018) 1 SCC 407.*** Further, the first Respondent has got issued a legal Notice in October, 2018 prior to filing of the Section 7 Application and the same has not been denied by the Appellant herein. With regard to the second objection raised by the Appellant that Dr. Mrs. Krishnaveni has not been made a party and therefore, the Petition ought to have been dismissed for non-joinder of parties cannot be sustained as it can be seen from the 'Agreement of Sale' that it is executed only between the Appellant and the first Respondent and

there is no privity of contract with the said Dr. Mrs. Krishnaveni and therefore, we hold that she is not a necessary party to adjudicate this matter.

15. For better understanding of the clauses in the Agreement, relied upon by the Appellant, they are reproduced as hereunder:-

> ***I. Agreement to Sell***
>
> *"1. The Vendor here in agreed to sell and the Purchaser herein agreed to purchase the Schedule Property, structures standing theron, together with the plant and machinery standing on the Scheduled Property (together referred to as "assets"), subject to a good and marketable title being made in respect thereof to and the Scheduled Property, structures and the plant machinery being found to be free from all encumbrances, attachments, charges and other claims and demands except for the loan transaction as stated above, for a total sale consideration of Rs. 10.50 Cr /- (Rupees. Ten Crore and Fifty Lakhs only), subject to the terms and conditions hereunder contained. The Purchaser has made a payment of an amount of Rs. 83.60 Lakhs (Rupees Eighty-Three Lakhs and Sixty Thousand only) on 31-10-2017, to the Lender (SBI) vide. HDFC cheque no. 000026 towards the initial payment of 5% of the Ledger outstanding for the purpose of making application for the OTS, and the same shall be treated as an advance payment towards the sale consideration for the purchase of assets.*
>
> 2. *The Purchaser shall make the payment of the consideration directly to the Lenders towards the amount payable under the OTS by the Vendor, and no amount shall be payable directly to the Vendors. The consideration for the Purchase of the Scheduled Property, structures together with the plant and machinery standing theron shall move to Lender, from the Purchaser, at the instance of the Vendor"…..*
>
> ***V. Indemnity***
>
> *"12. In case of failure on the part of the Vendor to execute and register and sale deed in favor of the Purchaser in spite of the Purchaser intimating the Vendor, the Purchaser shall be entitled to seek all*

> *such remedies, including moving the court of law for specific performance of this Agreement against the Vendor. The Purchaser shall also be entitled for refund of amount along with 24% of interest p.a. from the date of payment along with the amounts specified in Clause 10 above".*
>
> *(Emphasis Supplied)*

16. It is evident that though money has been paid under an Agreement to Sell, it is seen that the same was paid by the first Respondent to the Lender Bank only on behalf of the 'Corporate Debtor' and furthermore in the event of the failure on the part of the 'Corporate Debtor' to adhere to the terms of the Agreement, the said consideration amount was to be repaid by the 'Corporate Debtor' alongwith interest in the event the transaction did not materialize. It is seen from the record that a Right to Payment accrued to the first Respondent in terms of Clause 11 of the Agreement.

17. The Hon'ble Supreme Court in ***'Pioneer Urban Land and Infrastructure Ltd. & Anr.' (Supra)*** while dealing with the scope of Section 5(8)(f) of the Code held as follows;

> *"75. And now to the precise language of Section 5(8)(f). <u>First and foremost, the Sub-clause does appear to be a Residuary Provision which is "catch all" in nature. This is clear from the words "any amount" and "any other transactions" not covered by any of the other clauses, would amount to a financial debt if they had the commercial effect of a borrowing.</u> The expression "transaction" is defined by Section 3(33) of the Code as follows:*
>
> > *(33) "transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;*
>
> *As correctly argued by the Learned Additional Solicitor General, <u>the expression "any other transaction" would include an arrangement in writing for the transfer of funds to the corporate debtor and</u>*

would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay installments at various stages of construction, so that they themselves then fund the project either partially or completely.

76. Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing. We were referred to Collins English Dictionary & Thesaurus (Second Edition, 2000) for the meaning of the expression "borrow" and the meaning of the expression "commercial". They are set out hereinbelow:

> *borrow-vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard. to lend. 4. (intr) Golf. To putt the ball uphill of the direct path to the whole: make sure you borrow enough.*
>
> *commercial.-adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser: commercial television. 3. having profit as the main aim: commercial music. 4. (of chemicals, etc.) unrefined and produce in bulk for use in industry. 5. a commercially sponsored advertisement on radio or television.*

77. A perusal of these definitions would show that even though the Petitioners may be right in stating that a "borrowing" is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression "borrow" is wide enough to include an advance given by the home buyers to a real estate developer for "temporary use" i.e. for use in the construction project so long as it is intended by the Agreement to give "something equivalent" to money back to the home buyers. The "something equivalent" in these matters is obviously the flat/apartment. Also of importance is the

> *expression "commercial effect". "Commercial" would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is "raised" under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have "commercial" interests in the same – the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would in fact, be subsumed within Section 5(8)(f) even without adverting to the explanation introduced by the Amendment Act.*

18. The Hon'ble Supreme Court in the aforenoted Judgement has clearly held that sub-Clause (f) of Section 5(8) is a 'Residuary Provision' which is "catch all in nature". It is observed that amounts that are raised in transactions would amount to a 'Financial Debt' if they had 'a commercial effect of borrowing'. Apex Court further went on to elaborate in Para 86 of the Judgement that;

> *"noscitur a sociis being a mere rule of construction cannot be applied in the context of Section 5(8) of the Code as it is clear that wider words have been deliberately used in a Residuary Provision, to make the scope of the definition of "Financial Debt" subsume matters which are not found in the other sub-Clause of Section 5(8). Further, in Para 82 of the Judgement, the Apex Court rejected the argument that clauses (a) to (i) of Section 5(8) of the Code must all necessarily reflect the fact that a Financial Debt can only be a 'Debt' which is disbursed against the consideration for the time value of money, and that the expression "and includes" speaks of subject-matters which may not necessarily be reflected in the main part of the definition".*

19. The aforenoted Clauses enumerated in Para 13, specify that the first Respondent *shall make the payment of the consideration directly to the Lenders towards the amount payable under the OTS by the 'Corporate Debtor'.* The consideration for the purchase of the Scheduled Property structure together with the plant and machinery standing thereon shall move to the Lender from the first Respondent, at the instance of the 'Corporate Debtor'. Hence, it is seen from the aforenoted clauses that the Agreement to Sell *emanates* from the One Time Settlement entered into between the 'Corporate Debtor' and the Lender Bank and it is only *in lieu* of the consideration paid by the first Respondent to the Lender Bank on behalf of the 'Corporate Debtor', that the Agreement of Sale for the subject property was executed. Therefore, the contention of the Learned Counsel appearing for the Appellant that the money *was not utilized by the 'Corporate Debtor',* but paid to the Lender and as the utilization of money by the 'Corporate Debtor' is a *sine qua non* and therefore, the 'debt' does not fall within the definition of 'Transaction' as defined under Section 3(33) or under 'Financial Debt' as defined under Section 5(8)(f), is untenable. A combined reading of Sections 5(8), 3(33), 3(11) and 3(6) together with the admitted fact that the amount was paid by the first Respondent on behalf of the 'Corporate Debtor' to the Lender Bank *pursuant to the time bound OTS Settlement* and further Clause 12 of the Agreement to Sell stipulates that the 'Corporate Debtor' shall refund the amount with 24% interest per annum in case of failure on their behalf to execute and register the sale deed, establishes that the 'debt' in the instant case satisfies the threefold criteria:-

a) 'disbursal'
b) 'time value of money'
c) 'commercial effect of borrowing'

and therefore the ratio laid down by the Hon'ble Apex Court with respect to 'Financial Debt' in ***'Pioneer Urban Land and Infrastructure Ltd. & Anr.' (Supra)*** is squarely applicable to the facts of this case.

20. As regarding the argument of the Learned Appellant Counsel that there was no 'Profit' involved, it is only because of the One-Time Settlement entered into between the Lender Bank and the 'Corporate Debtor', that the 'Corporate Debtor' had benefitted in terms of waiver of interest, payment of a lesser amount of Rs. 11.70/- Crores as against the ledger outstanding amount of Rs. 16.72/- Crores and therefore it has to be safely construed that the 'Corporate Debtor' has benefitted/profited from the said transaction.

21. Now, we address ourselves to the contention of the Learned Counsel for the Appellant that there is no involvement or direct engagement of the first Respondent in the affairs of the Company of the 'Corporate Debtor' and therefore cannot be termed as a 'Financial Creditor'. The Learned Counsel placed reliance on the Principle laid down by the Hon'ble Supreme Court in ***'Anuj Jain, IRP for Jaypee Infratech Ltd.' (Supra)*** and drew our attention to the following Paras:-

> ***"50.*** *A conjoint reading of the statutory provisions with the enunciation of this Court in Swiss Ribbons[2], leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression "financial creditor" is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in*

restructuring of the loan as well as in reorganization of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholder, namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying the debts and to attend on its other obligations. Protection of the rights of all other stakeholder, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor.

50.1. *Keeping the objectives of the Code in view, the position and role of a person having only security interest over the assets of the corporate debtor could easily be contrasted with the role of a financial creditor because the former shall have only the interest of realizing the value of its security (there being no other stakes involved and least any stake in the corporate debtor's growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in rejuvenation, revival and growth of the corporate debtor. Thus understood, it is clear that if the former i.e. a person having only security interest over the assets of the corporate debtor is also included as a financial creditor and thereby allowed to have its say in the processes contemplated by Part II of the Code, the growth and revival of the corporate debtor may be the casualty. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution."*

22. In the aforenoted case, ***'Anuj Jain, IRP for Jaypee Infratech Ltd.' (Supra)*** the 'Corporate Debtor' Jai Prakash Infrastructure Ltd. (JIL) mortgaged some of its assets in favor of the Lender Banks/Financial Institutions for loans advanced to the Parent Company Jai Prakash

Associates Infrastructure Ltd. (JAL) thereby constituting third party security. The borrower and the security provider bore a parent and Subsidiary relationship. In this third party security, the Creditor has not disbursed any funds to the person creating the security, but instead has disbursed the funds to the Parent entity of the 'Corporate Debtor'. One of the issues in that case was whether the Respondents (Lenders of 'JAL') could be recognized as 'Financial Creditors' of the 'Corporate Debtor JIL' on the strength of the mortgage created by the 'Corporate Debtor', as collateral security of the 'debt' of its holding Company 'JAL'. The Hon'ble Supreme Court held that such Lenders of 'JAL', on the strength of the mortgages in question, may fall in the category of the Secured Creditors, but such mortgages being neither towards any facilities or advance to the 'Corporate Debtor' nor towards protecting any facility or the security of the 'Corporate Debtor', it cannot be stated that the 'Corporate Debtor' owes them any 'Financial Debt' within the meaning of Section 5(8) of the Code and hence such Lenders of 'JAL' do not fall in the category of 'Financial Creditors' of the 'Corporate Debtor JIL'. The facts are distinguishable in the instant case as the disbursal of funds was by the first Respondent to the Lender Bank on behalf of the 'Corporate Debtor' in pursuant to an OTS Settlement. There is no parent subsidiary relationship involved in this present matter. The loan was advanced to the Corporate Debtor and the amounts were disbursed by the first Respondent to the account of the 'Corporate Debtor'. For reasons cited in Para 19, we are of the considered view that the debt in question is a 'Financial Debt'. It was also pleaded that the specific intention of the first Respondent was to take over

the land with the structures and the plant and machinery so as to commence the business for which purpose the land was initially allotted by TSIIC. Hence, it can be safely construed that the first Respondent cannot be said to be having only a security interest over the assets of the 'Corporate Debtor'. Keeping in view the facts of the attendant case, we are of the considered opinion that the 'debt' is a 'Financial Debt' and the first Respondent a 'Financial Creditor'.

23. In the result, for all the aforenoted reasons, this Appeal fails and is accordingly dismissed. No order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
26th March, 2021

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