

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1380 of 2024

(Arising out of Order dated 29.05.2024 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench (Court – II) in IA - 2068 of 2023 in C.P. (IB) - No.360(ND)2021)

IN THE MATTER OF:

Indian Renewable Energy
Development Agency Limited
1st Floor, India Habitat Centre,
East Court Core 4 A,
Lodhi Road, New Delhi - 110003

...Appellant

Versus

1. Waaree Energies Limited
602, Western Edge I,
Western Express Highway
Borivali (East), Mumbai-400066.
2. Taxus Infrastructure and
Power Projects Pvt. Ltd.
Through Mr. Darshan Singh Anand
Resolution Professional
3rd Floor, EG-46, Inder Puri,
New Delhi-110012.

...Respondents

Present:

For Appellant : Mr. Nakul Sachdeva, Mr. Sagar Arora, Mr. Abhinandan Sharma and Mr. Karundeep Singh, Advocates.

For Respondent : Mr. Akshay Sapre, Mr. Abhijeet Swaroop and Ms. Shivani Karmakar, Advocates for R-1.

Mr. I.P.S. Oberoi, Advocate for R-2.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed challenging order dated 29.05.2024 passed by National Company Law Tribunal, New Delhi (Court-II) in IA No.2068 of 2023 in CP (IB) No.360 (ND)/2021. IA No.2068 of 2023 filed

by Respondent No.1 herein was disposed of accepting the claim of Respondent No.1 of a Financial Creditor and restoring its seat in the Committee of Creditors (“**CoC**”). The Appellant aggrieved by the order has come up in this Appeal.

2. Brief facts of the case necessary for deciding the Appeal are:

- (i) The Appellant had sanctioned financial assistance to the Corporate Debtor (“**CD**”) – M/s Taxus Infrastructure and Power Projects Pvt. Ltd. On account of default committed by the CD, the Appellant filed an Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IBC**”).
- (ii) The Adjudicating Authority vide order dated 10.10.2022 admitted Section 7 Application and initiated CIRP against the CD. IRP made a public announcement on 12.10.2022. Respondent No.1 filed its claim in Form-C claiming an amount of Rs.21,45,42,466/-, which included Rs.11,45,42,466 as interest and Rs.10,00,00,000/- as principal amount.
- (iii) In the claim form, Respondent No.1 relied on Arbitral Award dated 31.12.2021. In the claim Respondent No.1 had pleaded that it had funded the CD by subscribing 1,00,000 secured Compulsory Convertible Debentures of face value of Rs.1,000/- each for a period of 65 months. Respondent No.1 did not receive the payment under the Project Agreement,

hence, initiated arbitration proceedings and an Award was given. The copy of the Debenture Subscription Agreement (“**DSA**”) dated 16.10.2012, Shares Pledge Agreement and Promissory Notes were also relied by Respondent No.1 as well as Award dated 31.12.2021.

- (iv) The Resolution Professional (“**RP**”) accepted the claim of Respondent No.1 and permitted Respondent No.1 to participate in the meeting of the CoC as Financial Creditor. Certain objections were raised against the status of Respondent No.1. The RP after obtaining the legal opinion, took the view that on the basis of Arbitration Award, which has not attained finality, Respondent No.1 is not a Financial Creditor. RP on 20.01.2023 filed an Application under Section 34 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) before the Bombay High Court for setting aside the Arbitral Award.
- (v) Aggrieved by the decision of RP to reject the claim of Respondent No.1, Respondent No.1 filed an IA No.2068 of 2023 seeking a direction to accept the Appellant as Financial Creditor, which Application was opposed by RP.
- (vi) The Adjudicating Authority after hearing the parties, disposed of the Application, accepting the claim of Respondent No.1 as Financial Creditor. The Adjudicating Authority held that Applicant – Respondent No.1 is entitled to

participate in the Meeting of CoC. It was held that Arbitral Award being in favour of the Applicant, the claim could not have been rejected. It was held that although the financial instrument in the present case, though coming under the broad term Compulsory Convertible Debenture (“**CCD**”), has an interest component payable in case of default, signifying the Time Value for Money, hence, the same has to be categorized as a ‘Debt’. Aggrieved by which order, this Appeal has been filed.

3. We have heard learned Counsel for the Appellant, learned Counsel for Respondent No.1 as well as learned Counsel for RP.

4. Learned Counsel for the Appellant challenging the order of Adjudicating Authority submits that there was no provision for redemption of the CCDs under the DSA. The transaction of conversion into equity shares was not a ‘financial debt’. The DSA does not support any mechanism for the redemption of the CCDs and it only provided for compulsory conversion into equity. It is submitted that the Adjudicating Authority committed error in holding the transaction as a ‘financial debt’. The investment had no time value of money, which is *sine qua non* under Section 5 sub-section (8) of the IBC. It is submitted that even if the failure to redeem the CCD was considered as an event of default, it is in the form of damages or penalty for breach of terms of DSA and the said payment in the form of penalty, in no manner, can be construed as a financial debt in terms of Section 5, sub-section (8). It is submitted that

Arbitral Award cannot be relied for classification of the claim amount as financial debt. The Arbitral Award has already been challenged under Section 34 of the Arbitration Act by the RP, which is pending consideration. DSA provided for a compulsorily and mandatorily conversion of the CCDs into equity shares within a period of 65 months from the date of allotment. Respondent No.1 issued a letter dated 08.12.2017 prior to maturity date, seeking repayment or in alternative conversion of the CCDs into equity shares. On the date of issuing the said letter Respondent No.1 had only option to seek conversion of CCDs into equity and it could not have asked for repayment. Learned Counsel for the Appellant however submits that Resolution Plan of the CD had already been approved with 76.50% vote share of the Appellant and the Respondent, who has 23.50% vote share has abstained from vote.

5. Learned Counsel appearing for Respondent No.1 refuting the submissions of learned Counsel for the Appellant submits that debenture is a 'financial debt' as defined under Section 5, sub-section (8) of the IBC. The CD has obtained financial assistance from Respondent No.1 under the DSA, which is a mode of taking money. The learned Counsel for Respondent No.1 submits that transaction contained a financial debt, since by debenture, financial assistance was extended by Respondent No.1 to the CD by DSA dated 16.10.2012, which was entered between the parties. Learned Counsel for Respondent No.1 submits that the very definition of CCD as contained in Clause-1, mentions that the debenture are compulsory convertible debentures into equity shares of the Company

at the option of the Investor as per the terms of DSA. When the option was given to the Investor, the true nature of the transaction is treated to be optionally convertible debenture. The learned Counsel for Respondent No.1 has referred to Clause 7 of the DSA, which mentions 'Event of Default' and Clause 8, which contemplates payment of interest from due date @ 24% per annum. It is submitted that the DSA has a time value of money and was a financial debt. Respondent No.1 by letter dated 08.12.2017 called upon the CD to repay the amount of 15,63,86,301/- comprising of Rs.10 crores as principal amount and Rs.5,63,86,301/- towards interest. When the CD failed to convert the debenture into equity or make the payment to Respondent No.1 became entitled for the return of the amount with interest and initiate arbitration proceedings. The Arbitral Award dated 31.12.2021 was issued in favour of Respondent No.1 for an amount of Rs.10 crores along with interest @ 24% per annum. The Arbitral Award crystalized the rights of Respondent No.1 under the DSA. The mere fact that RP has filed an Application under Section 34 of the Arbitration Act, cannot be a ground to reject the claim of Respondent No.1 as financial debt. CIRP commenced subsequent to the Award, which was delivered in favour of Respondent No.1. Initially, Respondent No.1 was accepted as Financial Creditor and was allowed to participate in the CoC and was allocated 23.50% vote shares and it was subsequently, the RP changed his position and rejected the claim of Respondent No.1, leading Respondent No.1 to file IA No.2068 of 2023.

6. Learned Counsel for RP also contended that Arbitral Award cannot be basis for accepting the claim of Respondent No.1 as Financial Creditor. The learned Counsel for RP submits that Award cannot be treated as an order of Court or Tribunal. It is submitted that legal status of CCD is in nature of equity and cannot be accepted as debt.

7. We have considered the submissions of learned Counsel for the parties and have perused the records. The learned Counsel for the parties have relied on various judgments in support of their respective submissions, which shall be noticed hereinafter.

8. Before we enter into respective submissions of the parties, certain clauses of Debenture Subscription Agreement dated 16.10.2012 need to be noticed to find out the real nature of transaction reflected by DSA. The DSA states that Issuer is in the business of developing power projects and infrastructure projects in various part of India. It also noticed that issue requires surplus capital to fund its various new projects. Clauses-E and F of DSA are as follows:

“E. With a view to expand its business operations and to achieve the desired growth objectives, the Issuer requires surplus capital to fund its various new projects. For that purpose, the Issuer intends to raise an amount of Rs.100,000,000/- (Rupees One Hundred Million only) by issuing 100,000 (Number of) compulsorily convertible debentures (‘ CCDs’).

F. The Investor, desirous of investing in the Company, is willing to subscribe to 1,00,000 (One Lakh) CCDs as issued by the Company at the face value of Rs1.,000/- per (Indian Rupees One Thousand only)

CCD with ail Aggregate Investment Amount of Rs. 100,000,000/- (Indian Rupees One Hundred Million only).”

9. Section 5, sub-section (8), which defines the ‘financial debt’, contains an inclusive definition and the amount raised by definite means including by debentures, are included in the definition of ‘financial debt’.

Section 5, sub-section (8) (c) is as follows:

“5(8) “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–

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

10. ‘Debenture’ is defined in Companies Act, 2013 in Section 2, sub-section (30), which is as follows:

“2(30) “debenture” includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not;”

11. The definition of ‘debenture’ is ‘evidencing a debt’ as the definition of debenture itself suggest. Thus, by issuing debenture, the Issuer has raised money for its capital and on plain reading of definition of ‘financial debt’, the debentures are fully covered under Section 5, sub-section (8) (c).

12. The question, which needs to be answered is as to whether there is time value of money in respect of the debt, which is reflected by debenture. For answering the above question, we need to notice certain

other clauses of the DSA. Clause 1.1 of the DSA is a definition clause in which ‘Compulsorily Convertible Debentures’ is defined as follows:

“Compulsorily Convertible Debentures., shall refer to the debentures issued by the Company and allotted to the Investor as per the applicable laws of the Act, and which are compulsorily convertible into equity shares of the Company at the option of the Investor as per terms of this Agreement.”

13. The above definition indicates that debentures are compulsorily convertible into equity shares of the Company **at the option of the Investor**. Clause 3.2 deals with ‘Conversion’, which is as follows:

“3.2 Conversion

The CCDs shall be compulsorily and mandatorily convertible into Equity Shares of the Company within a period of 65 Months from the date of allotment of the CCDs to the Investor ("Long Stop Date") as per this Agreement.”

14. Clause 4.1 again provides that Investor shall have the option to convert the CCDs into equity shares of the Company by giving one month notice. Clause 4.1 and 4.2 are as follows:

“4.1. The Investor shall have the option to convert the CCDs into Equity Shares of the Company by giving I (one) month notice ("Conversion Notice") in writing to the Company.

4.2 Notwithstanding anything contained in Clause 4.1, the maximum duration for conversion of the CCDs into Equity Shares shall not exceed beyond the Long Stop Date.

CCDs into Equity Shares shall not exceed beyond the Long Stop Date”

15. Clause 7 deals with 'Event of Default'. Clause 7.1 contains 17 sub-clauses, containing events or circumstances, under which event of default occurs. One of the circumstances triggering the event of default is Clause XVI, which is "failure to redeem one or more debentures by the Company in accordance with this Agreement." Clause 8 provides for 'Remedies on an event of default'. Clause 8 and 8.1 are as follows:

"8. REMEDIES ON AN EVENT OF DEFAULT

8.1 Upon the occurrence of one or more Event. of Default, the Debentures and the amounts payable towards redemption thereof, fees, costs, charges, expenses and other monies whatsoever stipulated in the Transaction Documents payable. by the Company or the Promoters shall forthwith become payable by the Company, the Security shall become enforceable and the Debenture Holder shall be entitled to exercise its rights in accordance with this Agreement and the Transaction Documents in relation to such Security and otherwise under Applicable Law. The Debenture Holder shall have the right to require the Promoters or any of them to purchase its Debentures. In addition, in case of default by the Company in repaying or paying amounts on the due date, the Company shall pay on the defaulted amounts, interest from the due date for payment until payment or repayment, at Twenty Four (24%) per cent per annum. However, in the event the Company redeems the Debentures in accordance with the debenture return formula within 30 days from the date of the. Occurrence of the Event of Default, the Debenture Holder shall not enforce the Security."

16. In the present case, letter dated 08.12.2017 was given by Respondent No.1 to the CD, requesting the CD, demanding payments of Rs.15,63,96,301/- under the DSA. Further, the amounts were called for arising out of Equipment Supply Agreement. Paragraph 2 of the letter dated 08.12.2017, which is relevant in the present case, is as follows:

“2. By this communication, we record that you are liable and accordingly, are hereby called upon to repay to us, an amount of INR 15,63,86,301/- (Rupees Fifteen Crores Sixty Three Lacs Eighty Six Thousand Three Hundred and One Only) under the Debenture Subscription Agreement dated 16th October 2012 entered into between us for financing the said Project ("DSA"), comprising INR 10,00,00,000/- being the principal amount advanced by us and INR 5,63,86,301 (Rupees Five Crore Sixty Three Lacs Eighty Six Thousand Three hundred and One Only) towards interest thereon calculated at the rate of 11% from October 16, 2012 to November 30, 2017. In the alternative, and/ or failing which, we call upon you to convert the 1,00,000 Debentures of Face value Rs. 1000/- each issued to us under the DSA into such number of fully paid up equity shares of Taxus as would constitute 49.93% of its paid up equity capital in accordance with clause 4 thereof. In that regard, you are liable for obtaining the necessary approvals and permissions, if any required for conversion of the debentures into such equity shares.”

17. Respondent No.1's case is that despite letter given on 08.12.2017, neither the payments were made nor conversion into equity was allowed, hence, triggering event of default. Various clauses of DSA indicate that

Investor has option to request for conversion of CCD into equity, which option was to be exercised within a period of 65 months from the date of allotment. Respondent No.1 has also by the letter noticed above, asked for payment of amount with interest. Event of default occurred, since even after the letter issued by Respondent No.1 neither payment was made nor debentures were converted into equity shares, which entitled Respondent No.1 to claim 24% interest per annum as per Clause 8.1. When we look into the relevant clauses of DSA as extracted above, it clearly proves that the transaction had a time value of money and clearly comes within the meaning of 'financial debt' as defined in Section 5, sub-section (8).

18. Learned Counsel for the Appellant has relied on judgment of this Tribunal of Chennai Bench in ***Company Appeal (AT) (CH) (Ins.) No.108 of 2023 in M/s. IFCI Ltd. vs. Sutanu Sinha and Anr.*** and judgment of the ***Hon'ble Supreme Court in IFCI Ltd. vs. Sutanu Sinha and Ors. (2023) SCC OnLine SC 1529***. In the judgment of the Chennai Bench in ***IFCI Ltd.***, point fell for consideration was, as to whether the fully convertible debentures is to be treated as 'equity instrument' or as 'debt'. When we look into the judgment, it is clear that Appellate Tribunal has examined various clauses of Debenture Subscription Agreement. The finding of this Tribunal in the facts of that case was that CCDs are in the nature of 'Equity Instruments' and do not fall within the definition of 'Financial Debt'. This Tribunal in paragraph 33 concluded as follows:

“33. This Tribunal is of the earnest view that in the facts of the attendant case, the CCDs are in the nature of ‘Equity Instruments’ and do not fall within the definition of ‘Financial Debt’ as defined under Section 5(8) of the Code. For all the foregoing reasons, this Company Appeal (AT) (CH) (Ins) No. 108/2023 fails and is accordingly dismissed. No Order as to Costs.”

19. An Appeal was filed by the IFCI Ltd. before the Hon’ble Supreme Court. The Hon’ble Supreme Court in the first paragraph itself has noted that hybrid nature of documents has come into existence by evaluation of commerce. Paragraph 1 of the judgment is as follows:

“Commerce has evolved. The documents forming the base of commerce have also evolved and created a hybrid nature of documents. Thus, what was earlier labelled as a debenture, now has hybrid versions such as partly convertible debentures, optionally convertible debentures and compulsorily convertible debentures (CCDs). We may note that traditionally debentures were treated as a floating security with a covenant for payment on a specified date.

20. While noticing the facts of the case, the Hon’ble Supreme Court in paragraph 6 has observed as follows:

“6. It will be noticed from the aforesaid that the fundamental principal for rejecting the debt claim was that in view of the appellant having invested the amount as per the compulsorily convertible debentures, the same was to be treated as equity. The compulsorily convertible debentures had been approved as equity under the financial package for the concession agreement dated March 25, 2010 and were towards the part of equity of the project cost approved by the National Highways Authority of India having a debt equity ratio. There was never any re-categorization of com-

pulsorily convertible debentures from equity to debt. The lenders' consortium had also approved the term of compulsorily convertible debentures as equity. The endeavour of the appellant to challenge the position of the resolution professional vide I.A. No. 1465 of 2022 did not succeed in terms of an order dated March 14, 2023 [*IFCI Ltd. v. Sutanu Sinha*, (2024) 248 Comp Cas 179 (NCLT).] , the said order relied upon the judgment of this court in *Narendra Kumar Maheshwari v. Union of India* [1990 Supp SCC 440.] . It would be useful to extract that part of the judgment which has also been extracted in the impugned order of the National Company Law Appellate Tribunal (NCLAT) as under:

“A compulsory convertible debenture does not postulate any repayment of the principle. The question of security becomes relevant for the purpose of payment of interest on these debentures and the payment of principle only in the unlikely event of winding up. Therefore, it does not constitute a ‘debenture’ in its classic sense. Even a debenture, which is only convertible at option has been regarded as a ‘hybrid’ debenture. Any instrument which is compulsorily convertible into shares is regarded as an ‘equity’ and not a loan or debt.”

(emphasis supplied)”

21. The special feature in the Debenture Subscription Agreement, which fell for consideration has been noticed. It is useful to notice paragraphs 16 and 17 of the judgment, which are as follows:

“**16.** The debenture subscription agreement clearly defines ICTL as the special purpose vehicle while IVRCL is the sponsor company and IFCI is the lender. In terms of clause 2.4, the rate of interest/coupon rate of 11 per cent. per annum, payable quarterly, is applicable till either the buy-back of all the compulsorily convertible debentures (an option available to the borrowers) or conversion of compulso-

ly convertible debentures into equity. The liability is of the sponsor company for making coupon payments and not of the SPV/ICTL. Further, under clause 2.8, the buy-back is also an arrangement inter se the sponsor company and IFCI. The conversion into equity takes place as per clause 2.9 and the put option as per clause 2.11. It would suffice to reproduce clause 2.9 which reads as under:

“2.9 Conversion into equity

In the event of default of payment of return or buy-back of 12.50 crore compulsorily convertible debentures in two tranches anytime between the end of the 3rd year and 6th year from the date of issue of compulsorily convertible debentures giving an effective transaction IRR (including processing charges payable by the sponsor company) of 15.50 per cent. per annum. If it is exercised anytime between 3rd and 5th year, else, a rate of 15 per cent. per annum, would be applicable between the 5th and 6th year from the date of subscription/first disbursement (including upfront interest payable by the sponsor company), the outstanding compulsorily convertible debentures, along with the differential interest, defaulted amount, etc. would automatically get converted into equity shares of the ICTL at a price on par with the promoters of ICTL, i.e., at a premium of Rs. 90 per share at the end of 6 years from the date of issue (i.e., in case both the call and the put options are not exercised by the sponsor and the IFCI respectively or, at an earlier date as per other terms of this agreement).”

17. The aforesaid clause thus provides for automatic conversion into equity shares of ICTL on the relevant date for which there is no dispute, i.e., November 9, 2017.”

22. The Hon'ble Supreme Court further noticed that the Appellant was provided security under the debentures subscription agreement but the obligations are of the sponsor company. In paragraph 20 of the judgment, following has been observed:

“20. A reading of all the aforesaid leads to a conclusion that the appellant was provided security under the debentures subscription agreement but the obligations are of the sponsor company. That being the position, it is difficult for us to appreciate how the obligation is of the SPV, i.e., ICTL. Unless the debt is of the ICTL, the appellant cannot seek a recovery of the amount on the basis of being a creditor of the SPV ICTL.”

23. The judgment of this Tribunal as well as of the Hon'ble Supreme Court was rendered looking to the nature of transaction and relevant clauses, which was involved in the said case and for finding out the real nature of transaction, we need to focus on the clauses of DSA of the present case.

24. Learned Counsel for the Appellant has relied on judgment of this Tribunal in ***Company Appeal (AT) (CH) (Ins.) No.163 of 2023 – Shubham Corporation Pvt. Ltd. vs. Mr. Kotoju Vasudeva Rao and Anr.***, where this Tribunal had occasion to consider the Debenture Subscription Agreement, which came for consideration. In the above case, debentures were to be automatically converted into equity shares at the end of 10 years from the date of allotment, if option not exercised earlier by the Appellant. After noticing the relevant clauses of DSA, which were under consideration, in paragraph 8.10 this Tribunal had observed:

“8.10 The perusal of the relevant clauses of the DSA, Annexure A of the DSA and the Debenture Certificate clearly shows that the only obligation of the Corporate Debtor was to issue shares in exchange of the said debentures. These debentures are not interest bearing and are Zero Coupon CCDs. As per the DSA, the debentures have to be compulsorily converted into shares and do not carry any obligation towards repayment of the original debt. The Appellant, through the DSA dated 02.03.2020 and issue of CCD Certificate dated 31.03.2020, had voluntarily and contractually given up any right whatsoever to receive repayment of principal or interest. It is now entitled only to receive shares at end of tenure, or earlier, if it so opts. The Corporate Debtor was admitted into CIRP on 16.09.2022, much after the extinguishment of right of repayment of the Appellant under DSA dated 02.03.2020 and issue of Debenture Certificate on 31.03.2020.”

25. This Tribunal after relying on the judgment of Chennai Bench in **IFCI Ltd.** and the judgment of Hon’ble Supreme Court in **IFCI Ltd.** (supra) has come to the conclusion that compulsory convertible debentures held by the Appellant were equity instrument and the order of the Adjudicating Authority was not interfered with.

26. From the judgments relied by the parties as noticed above, it is clear that for finding nature of transaction, the documents entered between the parties are the best guide to find out nature of debt, as to whether there was time value of money or not. When we look into the clauses of DSA pertaining to the present case, we are of the considered opinion that the transaction, which was entered between the parties has time value of money and the redemption of debenture was also

contemplated and conversion of debenture was operational at the option of Investor. The Issuer has raised the amount by issuance of debenture, which was clearly a 'financial debt' within the meaning of Section 5, sub-section (8). In view of the foregoing discussions and conclusions, we do not find any good ground to interfere with the order of the Adjudicating Authority, allowing the Application of Respondent No.1. There is no merit in the Appeal. The Appeal is dismissed. There shall be no order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

NEW DELHI

6th December, 2024

Ashwani