

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL
BENCH, NEW DELHI**

Company Appeal (AT) (Ins) No. 504 of 2021

IN THE MATTER OF:

Mr. Zubin Bharucha

S/o Darius Bharucha,
Being the former director of
Bharucha & Motivala Infrastructure Pvt. Ltd.,
Having his office at: 10, Staveley Road,
Near Joes Mess, Pune - 411001

...Appellant

Versus

1. Reliance AIF Management Company Ltd.

A company incorporated under the provisions
Of the Companies Act, 1956,
Having its registered office at:
Reliance Centre, 7th Floor, South Wing,
Off Western Express Highway,
Santacruz (East), Mumbai – 400055

**2. Reliance Nippon Life Asset Management Limited
(Formerly known as Reliance Capital Asset
Management Limited) – PMS Divisions,**

A company incorporated under the provisions
Of the Companies Act, 1956,
Having its registered office at:
Reliance Centre, 7th Floor, South Wing,
Off Western Express Highway,
Santacruz (East), Mumbai – 400055

3. Bharucha and Motivala Infrastructure Pvt. Ltd.

A company incorporated under the provisions
Of the Companies Act, 1956,
Having its registered office at:
Bungalow No. 10, Staveley Road,
Near Joes Mess, Pune - 411001

(Under Corporate Insolvency Resolution Process)
 Represented by its Interim Resolution Professional
 Mr. Kedar Parshuram Mulye,
 Having his office at 1301 Chaitanya
 Residency, Jay Prakash Nagar, Road No. 2,
 Goregaon East, Mumbai – 400 063

... Respondents

Present:

For Appellant: Mr. Arun Srikumar, Ms. Neha Madan,
 Advocates.

For Respondents: Mr. Krishnendu Datta, Sr. Advocate with
 Mr. Amit Agrawal, Ms. Radhika Yadav,
 Ms. Varsha Himatsingka Ms. Sana Jain,
 Advocates for R1 & R2.

J U D G M E N T

(12th April, 2023)

[Per: Dr. Alok Srivastava, Member (Technical)]

This Appeal has been filed under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC') by the Appellant who is aggrieved by the order dated 06.05.2021 of the Adjudicating Authority (National Company Law Tribunal, Court No. V, Mumbai Bench) (in short 'Impugned Order passed in C.P. (IB) No. 4108/MB/2019'). The Appellant is aggrieved by the Impugned Order whereby a Section 7 application filed by the Respondents No. 1 and 2 before NCLT, Mumbai was admitted and Corporate Insolvency Resolution Process (in short 'CIRP') was initiated.

2. In brief, the case of the Appellant is that the Corporate Debtor – Bharucha & Motivala Infrastructure Private Limited (in short 'B & M Infra') had given a Corporate Guarantee as a Co-Obliger in respect of the residential project called 'The Cove' which was being

developed by Lake District Realty Private Limited (in short 'LDRPL' and also 'Issuer Company'). It was developing the project with Pune Kondhwa Realty Private Limited (in short 'PKRPL') on land owned by PKRPL admeasuring a total of 6.7272 ha in village Yeolewadi, Taluka Haveli, District Pune through a Joint Development Agreement entered into between PKRPL with LDRPL on 27.06.2016.

3. The Appellant has further stated that PKRPL executed a Power of Attorney in favour of LDRPL in relation to the development of the project 'The Cove' and according to Joint Development Agreement, LDRPL was entitled to (a) 71.8% of the realization of unsold units (b) 87.1% of realization of allotted premises and (c) 57% of realization of row houses and villas constructed on the said property.

4. The Appellant has further stated that the Issuer Company LDRPL issued Non-Convertible Debentures (in short 'NCDs') to raise funds for the development of the said property and NCDs for Rs. 40,00,00,000/- were to be issued to the Debenture Holders on private placement basis which were subscribed by the R1 and R2 i.e. Reliance AIF Management Company Limited and Reliance Nippon Life Asset Management Limited (formerly known as Reliance Capital Asset Management Limited) respectively.

5. The Appellant has further added that Debenture Trust Deed dated 06.10.2016 was signed by the Debenture Holders with Vistra ITCL Pvt. Ltd. as the Debenture Trustee.

6. The Appellant has added that Series I Debentures were to be redeemed not later than 30.09.2020 and Series II Debentures were to be redeemed not later than 30.09.2021 and for security of repayments, upon insistence of Debenture Holders, a number of

documents were executed which included a 'Deed of Irrevocable and Unconditional Guarantee' by the Issuer Company and PRA Realty Private Limited (which was providing project management services) in favour of the Debenture Trustee and all the security documents are referred as 'Transaction Documents'.

7. It is also stated by the Appellant that R1 subscribed to 13,625 NCDs amounting to Rs. 27,25,00,000/- and R2 subscribed to 1,000 NCDs amounting to Rs. 2,00,00,000/- and project management fees was to be disbursed to the Issuer Company by the Debenture Trustee/Debenture Holders and approximately Rs. 94,27,000/- was disbursed till December, 2016 but thereafter, from January, 2017, the Debenture Holders refused to release the project management fees instalments on the plea that no work was being carried out for the said project on the said property. Noticing delay in release of PM fees instalments, the Issuer Company sent an email dated 17.01.2017 and follow up emails thereafter, whereupon it was asked to submit expenditure statement by the Debenture Holders, which was submitted by the Issuer Company. Thereafter, certain disbursements were made by the Debenture Holders in February and March, 2017.

8. The Appellant has further stated that on the hesitation of the Debenture Holders to release further amounts the Issuer Company inquired of the Debenture Holders whether they continued to be interested in supporting the project and thereafter, a condition for opening of escrow account to deposit monies received from the flat buyers was imposed by the Debenture Holders which was agreed to by the Corporate Debtor.

9. The Appellant has further stated that after a notification dated November, 2017 issued by the Government of Maharashtra, pursuant to a direction of NGT, stopped construction within 100 feet of base of the hill, the Issuer Company had to stop construction leading to delay in the completion of the project due to such hurdles in the execution of the project, which was beyond the control of the Issuer Company, the Issuer Company was trying to effect a deal with a 3rd party developer 'Provident Housing Limited' for completion of the project and the Debenture Holders and Debenture Trustee were in full knowledge of these developments and a Supplementary Memorandum of Understanding was entered into between the Issuer Company and the Provident Housing Limited to complete the project and all along the Debenture Holders were aware of these developments and they through email dated 27.09.2018 communicated their agreement about change in layout plan because of NGT restrictions.

10. The Appellant has further stated that while the Corporate Debtor was earnestly trying to complete the project, and Event of Default notice dated 02.01.2019 was issued by the Debenture Holders followed by another Event of Default notice dated 21.02.2019. Thereafter, a Demand Certificate dated 14.05.2019 was issued by the Debenture Trustee to B & M Infra who was the Co-Obliger, invoking the Guarantee dated 06.10.2016 and calling upon the Respondent No. 3 /B & M Infra to pay an amount of Rs. 37,51,64,939/- to the Debenture Holders and while discussions were taking place between the Debenture Holders, the Issuer Company and Provident Housing Limited for early completion of the project, the Debenture Holders filed a Section 7 application on 11.01.2019 which was admitted vide Impugned Order dated 06.05.2021 and CIRP was initiated against the Corporate Debtor.

11. We heard the arguments put forward by the learned counsels for the rival parties and also perused the record.

12. The Learned Counsel for the Appellant has argued that LDRPL (Issuer Company) issued 14,625 NCDs in October, 2016 which were subscribed by the Respondents No. 1 and 2 who are the Debenture Holders. He has further argued that the issue of debentures is governed by the Debenture Trust Deed (in short 'DTD') and the Corporate Debtor is not the issuer of debentures though it is a signatory to the DTD. He has further argued that the Debenture Trustee - Vistra ITCL Limited is a signatory and party to the DTD whereas the Debenture Holders (Respondents No. 1 and 2) themselves are neither parties nor signatory to the DTD. He has further argued that admittedly the 'Transaction Documents' pertaining to the issue of NCDs also included a Deed of Irrevocable and Unconditional Guarantee 'Deed of Guarantee' and a registered 'Indenture of Mortgage' are part of the Transaction Documents wherein the Corporate Debtor –B & M Infra is a party to these documents but the Debenture Holders are not parties to them.

13. The Ld. Counsel for the Appellant has provided a brief background of the case stating that a Joint Development Agreement was entered into by the Issuer Company-LDRPL with the land owning Company PKRPL for developing the project named 'The Cove', and in November, 2017 which is about one year after the NCDs were issued and subscribed by the Respondents No. 1 and 2 a notification was issued by the Government of Maharashtra purportedly to give effect to an earlier order of NGT which restrained all development activity within 100 feet of the base of any hill, thereby bringing construction activity at the project site of 'The Cove' to a halt. He has further stated that this notification issued by the Government of Maharashtra was found arbitrary by the Hon'ble

Supreme Court vide judgement dated 14.07.2020 and the notification was set aside, but during these proceedings the work at the project site was halted and the project plan had to be revised by the Issuer Company. He has further argued that the delays caused by uncertainty in the regulatory orders was not in the control of the Corporate Debtor but despite the fact that the Debenture Holders were fully aware of reasons of such delay, they issued a demand notice on 02.01.2019 and thereafter, the Debenture Trustee also issued a notice on 21.02.2019 and later a Demand Certificate was also issued by the Debenture Trustee asking the Corporate Debtor (R-3) to pay an amount due to the Debenture Holders on account of occurrence of 'Event of Default'.

14. The Learned Counsel for the Appellant has further argued that no contract or security document was signed between the Corporate Debtor (R-3) and the petitioning Financial Creditors - Respondents No. 1 and 2, who are the Debenture Holders and therefore, no jural relationship exists between them. He has clarified that at the highest, the Debenture Holders are beneficiaries of the trust arrangement and they have no standing in law to enforce the contractual rights of the trustee since Section 59 of the Indian Trusts Act only gives right to a beneficiaries of a trust to institute a suit for execution of the trust and the trust shall be executed by the Court. He has underlined that none of this has been made out by the Debenture Holders to show why the right of the Debenture Trustee under the Debenture Trust Deed have been taken over by the Debenture Holders and further they have not approached any Civil Court for the execution of the Trust Deed for their benefit.

15. The Learned Counsel for the Appellant has also argued that no amounts were ever disbursed to the Corporate Debtor i.e. B & M Infra by the Debenture Holders and therefore, there is no jural

relationship that of a creditor and debtor between the Debenture Holders and the Corporate Debtor as there was no flow of money between them, and therefore, the Corporate Debtor is not a debtor under the provisions of the IBC. He has also added that the Corporate Debtor is admittedly not the issuer of debentures which is the Issuer Company, and merely on the basis of signing of 'Deed of Irrevocable and Unconditional Guarantee' and 'Indenture of Mortgage' it is not correct to give the status of a debtor as required under IBC to the Corporate Debtor. He has also claimed that the rights and remedy available to the Debenture Holders on the occurrence of an 'Event of Default' only accrue under Applicable Law as per clause 18.1 of the DTD and the Applicable Law in the present case will be the Contract Act and the Indian Trusts Act. Further, he has added that clause 18.1(h) of the DTD contemplates a role for the Debenture Trustee in enforcement of other securities and the 'Transaction Documents' which has not been done in the present case. Therefore, the Debenture Holders are not entitled to maintain any petition under IBC claiming to be creditors for the repayment of a financial by the Corporate Debtor. He has added that the argument about locus of the Debenture Holders has been dealt with in the impugned order on the basis of another Judgment of NCLT dated 10.01.2020 in the matter of **'Bennett Property Holdings Company Ltd. vs. Brick Eagle Affordable Housing (CP (IB) 1267/I&B/2019)'** but the fact is that this is a case which was decided entirely on the basis of language of clause 18.2.1 which existed in the Debenture Subscription Agreement of the parties in the Bennett Property Holding case and no general statement of law can be presumed from the order in that case which can be applied in the present case.

16. The Learned Counsel for the Appellant has further added that an 'English Mortgage' has been created to secure the dues of the Issuer Company which are liable to be paid to the Debenture

Holders and clause 5 of the Mortgage Deed recognizes the power of the Debenture Trustee to enforce the mortgage on the occurrence of any 'Event of Default' including their sale and clause 8 of the Debenture Trust Deed contains a covenant that enables the Debenture Trustee to make reconveyance of the mortgage property to the Issuer Company only on proof of payment of the NCDs and thus the mortgage is indeed an English Mortgage within the meaning of Section 58(e) of the Transfer of Property Act. He has thus claimed that the English Mortgage in the present case has to be enforced by the Debenture Trustee where the Debenture Trustee has secured the title of the mortgage property by way of a security and in the present case it has not called on the Issuer Company to redeem the mortgage or the mortgaged property has been reconveyed to the Issuer Company and therefore, so long as the right/title of the mortgage property vests only in the Debenture Trustee and has not been reconveyed to the Debenture Holders there is no question of the Debenture Holders to enforce the English Mortgage. In this, he has referred to the Judgment of NCLT, Mumbai in the case of **'Beacon Trusteeship Ltd. Vs. Neptune Ventures and Developers Pvt. Ltd. (CP (IB)993/MB/C-IV/2020)'** decided on 07.10.2021 where the true effect of an English Mortgage has been correctly considered and such a ratio laid down in the Beacon Trusteeship case has not been considered in the present impugned order where even though the creation of an English Mortgage is noted there is no consideration of the Corporate Debtor's argument that such a mortgage precludes existence of any default until the mortgage is attempted to be enforced.

17. The Learned Counsel for the Respondents No. 1 and 2 has argued that the contesting Respondents are the Debenture Holders of the NCDs issued by a group company of the Corporate Debtor, namely, LDRPL which is the Issuer Company of the NCDs, and the Corporate Debtor and the Issuer Company have duly signed the

Debenture Trust Deed on 06.10.2016 as also that the Corporate Debtor has signed and executed the 'Deed of Irrevocable and Unconditional Guarantee' on 06.10.2016. He has argued that upon default of payment which was due to the Debenture Holders, a Demand Certificate dated 14.05.2019 was issued by the Debenture Trustee to the Corporate Debtor and hence the existence of 'debt' and occurrence of 'default' is not disputed in the present case. He has further argued that a Debenture Holder is a Financial Creditor under Section 5(8)(c) of the IBC and the debt which exists pursuant to the Debentures is also a 'financial debt' within the meaning of the provision of IBC. He has thus claimed that a guarantee issued in relation to repayment of debentures is a 'financial debt' and consequentially any person to whom such 'financial debt' is owed is a financial creditor. He has added that it is not the Appellant's case that monies are owed to any other person/entity then the Respondents No. 1 and 2 which fact has been admitted in the rejoinder by the Appellant.

18. The Learned Counsel for the Respondents No. 1 and 2 has referred to the judgment of Hon'ble Supreme Court in the matter of **'M/S Orator Marketing Pvt. Ltd. vs M/S Samtex Desinz Pvt. Ltd.'** dated 26.07.2021 and in **'Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors [(2019) 8 SCC 416]'** to buttress his argument that a Debenture Holder is also a Financial Creditor under the provisions of IBC and the Debenture Holders can claim repayment of a debt on the basis of such a relationship of financial creditor and corporate debtor.

19. The Learned Counsel for the Respondents No. 1 and 2 has placed reliance on the judgment in the case of **'Anuj Jain Vs. Axis Bank Limited (2020) 8 SCC 401'** to contend that even in that case there was no disbursal of monies by the Corporate Debtor but such

an argument was rejected and further the case of the Anuj Jain dealt with a mortgage and not a guarantee whereas in the present case the Corporate Debtor is Corporate Guarantor and Co-Obliger. He has claimed that in the case of a guarantee, the disbursal is guaranteed and is to be treated as a financial debt under Section 5(8)(c) and 5(8)(i) which is in accordance with judgment of this Tribunal in the matter of **'Budhpur Buildcon Pvt. Ltd. Vs Abhay Narayan Manudhane, CA (AT) (Ins) No. 589 of 2021'**.

20. The Learned Counsel for the Respondents No. 1 and 2 has contended that the provision of DTD or the Deed of Guarantee do not restrict the Debenture Holders from initiating legal action under the applicable laws and the rights of the Debenture Holders to file an application under Section 7 of the IBC is a statutory right available to them on financial creditors. He has claimed that the appointment of Debenture Trustee does not restrict the rights of the Debenture Holders and the Debenture Trustee is appointed by the Issuer Company and not the Debenture Holders in accordance with Rule 18(1)(c) of the Companies (Share Capital and Debentures) Rules, 2014 where a trustee is appointed by the Issuer Company of Debentures. He has further contended that a Debenture Trustee is required to protect the rights and interest of Debentures Holders but that does not take away the rights of the Debenture Holders to claim repayment of the amount due to them on the basis of Debentures. In this, he has referred to the Debenture Trust Deed wherein the Debenture Holders are expressly mentioned at many places in clauses 3.1 and 3.2 the disbursement of monies by the Debenture Holders has been stated explicitly and it is also stated in clauses 8.1 and 8.2 that monies are owed to the Debenture Holders and is to be repaid to them and further TDS certificate in respect of deduction of TDS on amounts payable was also to be furnished to the Debenture Holders as per clause 10 of the DTD. He has further claimed that the right of Debenture Holders to take action under applicable laws has been kept intact as per clause 18.1 of the DTD and action to be

taken by the trustee is without prejudice to the rights and remedies available to the Debenture Holders. He has clarified that the Corporate Debtor had signed the Debenture Trust Deed not only as a security provider, but he standing with same footing as the Issuer Company as co-obligor in the Debenture Trust Deed. Further, it is stated that the Debenture Holders had agreed to subscribe to debentures pursuant to a guarantee issued by the Corporate Debtor which is mentioned in recital 3 of DTD, and also in clause 2 the corporate debtor acting as a guarantor and co-obliger has undertaken to repay the monies to the Debenture Holders. Moreover, the Corporate Debtor had also undertaken to make payments to Debenture Holders upon issuance of a Demand Certificate by the Debenture Trustee which is incorporated in clause 4 of the DTD which has been done in the present case.

21. The Learned Counsel for the Respondents No. 1 and 2 has finally argued that the Respondents No. 1 and 2 as the Debenture Holders are the Financial Creditors within the meaning of the IBC and the responsibilities / obligations of the Corporate Debtor are clearly enumerated in the Debenture Trust Deed and the Deed of Guarantee and nowhere expressly or impliedly the rights of the Respondents No. 1 and 2 as the Debenture Holders to take recourse of provision of law regarding repayment of NCDs has been restricted. He has further argued that any instrument cannot restrict the statutory right conferred upon the Debenture Holders as the Financial Creditors and invoke the provision of the IBC under Section 7.

22. The issues that arise for consideration in this Appeal are as follows:-

(i) Whether the Debenture Holders, namely, the Respondents No. 1 and 2 are Financial Creditors in the light of the provisions of the IBC

and the Debenture Trust Deed and Deed of Irrevocable and Unconditional Guarantee?

(ii) Whether the Debenture Holders can claim the repayment on account of Event of Default under Section 5(8) of the IBC and the Appellant is a Corporate Debtor under the provisions of the IBC?

23. At the outset we note the Rule 18(1)(c) of the Companies (Share Capital and Debentured) Rules, 2014, which is as follows: -

“18 (1) The company shall not issue secured debentures, unless it complies with the following conditions, namely:—

x x x

(c) the company shall appoint a debenture trustee before the issue of prospectus or letter of offer for subscription of its debentures and not later than sixty days after the allotment of the debentures, execute a debenture trust deed to protect the interest of the debenture holders; and”

24. From a perusal of the above stipulation it is clear that the appointment of a debenture trustee is a requirement of the relevant rules for protecting the interest of the debenture holders.

25. We first look at the issue of whether the Debenture Holders are the Financial Creditors as defined in the IBC. Section 5(8)(c) and Section 5(8)(i) of the IBC are as follows:-

“Section 5: Definitions.

5. In this Part, unless the context otherwise requires,—

(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;

xx xx xx xx

(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;”

26. We further look at the definition of Financial Creditor in Section 5(7) of the IBC, which lays down that ‘Financial Creditor’ is a person to whom a ‘financial debt’ is owed and also includes a person to whom such debt has been legally assigned or transferred to.

27. Now coming to the issue whether the Debenture Holders can be considered ‘Financial Creditor’ as defined under the IBC. We note that the DTD is entered into between various parties viz. LDRPL (Issuer Company), Mr. Rustom Darius Bharucha, Mr. Zubin Darius Bharucha, Bharucha & Motivala Infrastructure Pvt. Ltd. and PRA Realty (India) Pvt. Ltd. and Vistra ITCL (India) Limited (The Debenture Trustee). Out of these parties, Bharucha & Motivala Infrastructure Pvt. Ltd. and PRA Realty (India) Pvt. Ltd. are the Guarantors and Co-Obligors of the issued NCDs as is laid down in the Debenture Trust Deed. The paragraphs 10, 11 and 12 of the Recital of the DTD are as follows:-

“10. With a view to raising debt for the purposes as more particularly described hereinafter, the Company being duly empowered by its memorandum of association and articles of association and pursuant to the authority granted by the resolution of the Board of Directors of the Company passed at its meeting held on 10th September, 2016 and authority granted by the resolution passed by the Shareholders in their meeting held on 15th September, 2016, (certified true copies of said resolutions are attached herein as Schedule AF) intends to issue, by way of a private placement, Debentures (as hereinafter defined) to the Debenture Holders in one or more tranches in the manner provided herein and in the Transaction Documents (as hereinafter defined).

11. Upon the request made by the Company and each of the other Security Providers to the Debenture Holders and relying upon the representations, warranties, covenants, securities, undertaking and indemnities provided by the Company and the other Security Providers under this Deed and the Transaction Documents, the Debenture Holders have decided to invest in the Company by subscribing to Series I Debenture and Series II Debentures each issued by the Company up to an aggregate amount of Rs. 40,00,00,000/- in the Company in a private placement basis (Transaction) in the manner and on the terms and conditions provided herein and other Transaction Documents. The subscription by the Debenture Holders is subject to the fulfilment of the Conditions Precedent as specified herein, to the satisfaction of the Majority Debenture Holders.

12. The NCDs shall be issued in dematerialised form and will be subject to the provisions of the Depositories Act, 1996 and rules notified by the Depository viz. NSDL (as defined hereinafter) from time to time.”

28. Further, Corporate Guarantee and Debenture Holders are defined in clause 1-Definitions of the DTD is as follows: -

“Corporate Guarantee means the irrevocable and unconditional guarantee to be executed by the Co-Obliger in favour of Debenture Trustee for the benefit of Debenture Holders as a security for the Debenture Outstandings in the form annexed hereto and marked as Schedule D.

Debenture Holder(s) means Reliance Capital Limited and/or, Reliance Nippon Life Asset Management Limited and/or Reliance Capital AIF Trustee Company Pvt. Ltd. and/or Reliance AIF Management Company Limited (Including any of their group companies, associates, affiliate, nominees or transferees) or the persons to whom the Company shall circulate the Offer Letter and which persons have agreed to subscribe to the Debentures and shall include their successors and assigns, nominees from time to time and shall also mean and include all such

persons to whom the Debentures are, transferred from time to time and all persons whose names appear in the register of beneficial owners, where such Debentures are held in dematerialised form.”

29. Clause 3.1 of the DTD provides for issuance of NCDs to the Debenture Holders in accordance with the terms and conditions of the DTD. Further clause 3.4, which is about disbursement of the amount by Debenture Holders for subscription of NCDs, states as follows:-

“3.4 It is clarified that the Debenture Holders shall disburse the Debentures Subscription Amount, directly into the Debenture Payment Account in accordance with the provisions of this Deed”.

30. Clauses 8.6(b) & (d) which are relevant about principal payment of the redemption amount and ensuring a pre-tax IRR to the Debenture Holders by the Issuer Company are as follows:-

“8.6(b) Notwithstanding anything to the contrary stated herein, the Company shall, in addition to the principal amounts outstanding, be liable to pay a Redemption Premium to ensure that the Debenture Holders receive a pre-tax IRR of 21.67%,...

8.6(d) Upon redemption of the NCDs, if the Company does not pay the Redemption Amount to Debenture Holders, the Debenture Holders and the Debenture Trustee shall be entitled to exercise any of their rights as set out in the Transaction Documents and the Security shall be enforceable in the manner set out in the Transaction Documents.”

31. Further clause 8.12(a), which is regarding ‘Payments’, states as follows:-

“All payments shall be made to the Debenture Holders, whose name(s) are registered in the Register of Debenture Holders on the applicable record date.”

32. Further clause 17 of the DTD outlines the ‘Event of Default’ in clause 17.1.1 lays down as follows:-

“Any failure by the Company and/or any of the Security Providers to perform or comply with the terms, conditions, undertakings, obligations and covenants of the Transaction Documents.”

33. It is also clear from clause 17.1 that Debenture Trustee shall inform about the same to the Debenture Holders and declare an ‘Event of Default’ upon instructions of the majority Debenture Holders. Further, clause 18.1 lays down ‘The Consequences of an Event of Default’ whereby the Debenture Trustee shall if so directed by the majority Debenture Holders be entitled to exercise the right of calling upon the Company to pay to the Debenture Holders the accrued and unpaid interest or outstanding principal amount of NCDs. Clause 18.1(c) provides that the Debenture Trustee if directed by the Debenture Holders in writing shall be entitled to enforce all or any of the Security but there is no prejudice to the rights and remedies of the Debenture Holders under Applicable Law, which have also been defined in clause 1 definitions as any Indian Statute, Laws, Acts of the State Legislature or Indian Parliament among other laws and legal instruments.

34. It is clear from clause 3.4 that the Debenture Holders shall pay the amount of subscription for the NCDs and from clause 8.12(a) that all due payments shall be made to the Debenture Holders. Significantly, clause 8.6(d) stipulates that Debenture Holders and the Debenture Trustee shall be entitled to exercise any of their rights as set out in the Transaction Documents and the Security shall be enforceable in the manner set out in the

Transaction Documents. Thus the rights as set out in Transaction Documents are separately available for enforcement to the Debenture Holders and Debenture Trustee. Clause 18.1(c) lays down that the rights given to the Debenture Trustee are available to the Debenture Holders for enforcing the Securities. Significantly, the Corporate Debtor is a Co-obligor too, and it undertakes all the obligations that are falling on the Issuer Company of the NCDs.

35. We now look at the “Deed of Irrevocable and Unconditional Guarantee” (in short “Deed of Guarantee”) entered into between B & M Infra and PRA Realty (India) Pvt. Ltd (both as “the Guarantors” who have ‘jointly and severally, absolutely, irrevocably and unconditionally agree and guarantee” the covenants of the Deed), Vistra ITCL (India) Limited (“Debenture Trustee”) and LDRPL (“the Company”) as a confirming party. In this Deed of Guarantee, B & M Infra and PRA Realty India Pvt. Ltd. are collectively referred to a Guarantors who have jointly and severally signed the Deed of Guarantee).

36. The recital of this Deed of Guarantee clearly states that upon a request made by the Issuer Company and the other Security Providers to the Debenture Holders, the Debenture Holders have decided to invest in the Issuer Company up to an amount of Rs. 40,00,00,000/- by subscribing to NCDs and the Guarantee is being issued by the Guarantors in follow up to the issue of NCDs. Recital 4 of this Deed of Guarantee is particularly noticed in this regard which is as follows:-

“4. In consideration of the Debenture Holders agreeing to subscribe to the NCDs in terms of the Debenture Trust Deed and the Transaction Documents, the Guarantors have agreed to issue and execute this Guarantee, the terms and conditions whereof are more particularly set out hereinafter, in favour of the Debenture Holders as security for the payment, repayment and reimbursement, as the

case may be, of the Debenture Outstanding and the performance by the Company, the Mortgagor and the other Security Providers of their obligations under the Transaction Documents”.

37. Further, Recital 4 of the “Deed of Guarantee” notes as follows:

“4. In consideration of the Debenture Holders agreeing to subscribe to the NCDs in terms of the Debenture Trust Deed and the Transaction Documents, the Guarantors have agree to issue and execute this Guarantee, the terms and conditions whereof are more particularly set out hereinafter, in favour of the Debenture Trustee acting f0or, on behalf of and for the benefit of the Debenture Holders as security for the payment, repayment and reimbursement, as the case may be, of the Debenture Outstandings, and the performance by the Company, the Mortgagor and the other Security Providers of their obligations under the Transaction Documents.”

38. Further, Clause 2 of the ‘Deed of Guarantee’ which are as follows:-

“2. The Guarantors do and each of them both hereby hereby jointly and severally guarantee, as primary obligors and not merely as sureties, to the Debenture Trustee (acting for an on behalf of and for the benefit of the Debenture Holders), the payment, repayment and reimbursement (as the case may be), of the Debenture Outstanding and the performance by the Company, the Mortgagor and the other Security Providers of their obligations under the Transaction Documents and all other sums payable by the Security Providers to the Debenture Holders (the Obligations) and hereby guarantee, assure and undertake, as continuing security for the due performance and compliance of the Obligations, that in the event of failure on the part of the Company, the Mortgagor and the other Security Providers in complying with the Obligations, the Guarantors shall comply with such Obligations, including in the case of any payment to any of

the Debenture Trustee and/or the Debenture Holders which had fallen due is not paid, whether at scheduled maturity or on acceleration or otherwise, then the Guarantors shall unconditionally and irrevocably pay, on demand from time to time by the Debenture Trustee, and no later than two days of receipt of such demand, the amounts equivalent to the amounts fallen due for appropriation towards the Debenture Outstandings and all other sums payable by the Security Providers to the Debenture Trustee and/or the Debenture Holders (as the case may be) under the Debenture Trust Deed and/or any other Transaction Documents.

39. Further, Clause 4 of the “Deed of Guarantee” very clearly places the obligation on the Guarantors for the payment of the amount mentioned in the Demand Certificate, which is as follows:-

“4. The Guarantors agree and undertake that they shall without any demur, delay or protest and on first demand and no later than two days of receipt of a demand certificate in writing in the format annexed as Schedule I (Demand Certificate) from the Debenture Trustee demanding payment of the amount mentioned therein, make payment of such amount to the Debenture Holders, towards the Obligations, as per the demand certificate.”

40. Thus a reading of the recitals 2, 3 & 4 and clauses 2 and 4 of the ‘Deed of Irrevocable and Unconditional Guarantee’ makes it clear that the Guarantors have jointly and severally undertaken without any demur, delay or protest and on first demand and no later than two days of the receipt of a demand certificate in writing from the Debenture Trustee demanding payment of the amount mentioned therein make payment of such amount to the Debenture Holders.

41. A conjoint reading of the above-mentioned recitals and clauses of the “Debenture Trust Deed” and the “Deed of Irrevocable

and Unconditional Guarantee” makes it clear that the Debenture Holders, who have subscribed to the NCDs for the benefit of the Issuer Company, have the right to receive payments after the issue of Demand Certificate by the Debenture Trustee and the Guarantors have jointly and severally undertaken to make such payment/reimbursement to the Debenture Holder on the issue of the Demand Certificate by the Debenture Trustee.

42. The Learned Counsel for the Respondents has relied upon a decision of Hon’ble Calcutta High Court in the matter of **‘Calcutta Safe Deposit Co., Ltd. Vs. Ranjit Mathuradas Sampat, 1970 SCC Online Cal 59’** which holds that debenture holders are ‘creditors’ who have the right to present a petition for winding up of the company, which is akin to a petition for insolvency resolution:-

“23. In any event, a special right has been given to the debenture holders and they would be deemed to be the creditors within the meaning of Clause (b) of Sub-section (1) of Section 439 of the Companies Act, 1956. This new definition of the word 'creditors' has been introduced by the 1956 Act and accordingly the debenture holders' right to present a petition for winding up has been recognised by the statute.”

43. The Learned Counsel for the Appellant has cited the judgment of Hon’ble Supreme Court in the matters of **Anuj Jain (Supra)** and **Phoenix ARC Pvt. Ltd. Vs. Ketulbhai Ramubhai Patel, (2021) 8 SCC 32’** to claim that a party that provides a mortgage or pledges shares as security is not a Corporate Debtor and therefore, is not liable to repay the Financial Debt claimed by the Financial Creditors. The relevant observations in the two judgments are as follows:-

Extract from Anuj Jain (Supra)

“50. A conjoint reading of the statutory provisions with the enunciation of this Court in Swiss Ribbons (supra), 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 reorganisation 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 stakeholders 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 its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor.

51. Indisputably, the debts in question are in the form of third party security; said to have been given by the corporate debtor JIL so as to secure the loans/advances/facilities obtained by JAL from the respondent-lenders. Such a ‘debt’ is not and cannot be a ‘financial debt’ within the meaning of Section 5(8) of the Code; and hence, the respondent-lenders, the mortgagees, are not the ‘financial creditors’ of the corporate debtor JIL.”

Extract from Phoenix ARC Pvt. Ltd. (Supra)

“36. This Court held that a person having only security interest over the assets of corporate debtor, even if falling within the description of ‘secured creditor’ by virtue of collateral security extended by the corporate debtor, would not be covered by the financial creditors as per definitions contained in sub-section (7) and (8) of Section 5. What has been held by this Court as noted above is fully attracted in the present case where corporate debtor has only extended

a security by pledging 40,160 shares of GEL. The appellant at best will be secured debtor qua above security but shall not be a financial creditor within the meaning of Section 5 sub-sections (7) and (8)."

44. Both the above judgments are distinguishable on the ground that in the Anuj Jain case (Supra) the Corporate Debtor has given property in mortgage and therefore, he is not considered a debtor liable to repay the debt claimed by the Financial Creditors. In the case of **Phoenix ARC Pvt. Ltd. (Supra)** the Corporate Debtor has only extended the security in the form of pledge shares and whereas in the present case the Corporate Debtor is a Guarantor and Co-Obliger for the Debentures held by the Debenture Holders and therefore, the liability of the Corporate Debtor in the present case is direct which is in accordance with the stipulations in the Deed of Irrevocable and Unconditional Guarantee and the Debenture Trust Deed.

45. The Learned Counsel for the Appellant has also cited the judgment of Hon'ble Supreme Court in the matter of **'New Okhla Industrial Development Authority v. Anand Sonbhadra, (2023) 1 SCC 724'** wherein the essential requirements for attracting Section 5(8) of the IBC has been laid down and it is laid down that there has to be a debt and also a disbursement of the Financial Debt to the Corporate Debtor. As has been held by the Hon'ble Supreme Court in the matter of **Pioneer Urban Land and Infrastructure Limited & Anr. (Supra)** Debenture Holders are considered Financial Creditors and therefore, the factum of Debenture Holders holding a Financial Debt within the meaning of Section 5(8) of the IBC is unquestionable.

46. The Learned Counsel for the Respondent has also referred to judgment of NCLT, Mumbai in **'Bennett Property Holdings Company Ltd. vs. Brick Eagle Affordable Housing (CP (IB) 1267/I&B/2019)'** to claim that debt subscription agreement is as

would as a loan agreement as has been held in para 24 of this judgment. As has been noted above in various judgments cited earlier in this judgment, the Debenture Holders are Financial Creditors within the meaning of Section 5(8) of the IBC and the Corporate Debtor who has Co-obligor and Guarantor of the loan holds responsibility and obligations to repay the debts as is laid down in clauseof the Deed of Irrevocable and Unconditional Guarantee and therefore, the jural relationship between the Debenture Holders as the Financial Creditor and the Corporate Debtor as Guarantor cum Co-obligor is clearly established.

47. On the other hand, the Learned Counsel for the Respondent has cited the judgment in the matter of **‘M/S Orator Marketing Pvt. Ltd. vs M/S Samtex Desinz Pvt. Ltd., (2021) SCC OnLine SC 513’** in which the relevant portion is as follows:

“14. In Pioneer Urban Land and Infrastructure Ltd. Vs. Union of India⁴, this Court speaking through Nariman, J. referred to several earlier judgments including Innoventive Industries Ltd. (supra) and Swiss Ribbons Pvt. Ltd. (supra) and held that even individuals who were debenture holders and fixed deposit holders could also be financial creditors who could initiate the Corporate Resolution Process.

15. The definition of ‘financial debt’ in Section 5(8) of the IBC cannot be read in isolation, without considering some other relevant definitions, particularly, the definition of ‘claim’ in Section 3(6), ‘corporate debtor’ in Section 3(8), ‘creditor’ in Section 3(10), ‘debt’ in section 3(11), ‘default’ in Section 3(12), ‘financial creditor’ in Section 5(7) as also the provisions, inter alia, of Sections 6 and 7 of the IBC.

18. The eligibility of a person, to initiate the Corporate Insolvency Resolution Process, if questioned, has to be adjudicated upon consideration of the key words and expressions in the aforesaid Section and other related provisions.”

48. The Learned Counsel for the Respondent has also cited the judgment of Hon'ble Supreme Court in '**Pioneer Urban Land and Infrastructure Limited & Anr. (Supra)**' which is as follows :-

"41. Shri Shyam Divan relying upon Nagpur Improvement Trust and Anr. v. Vithal Rao and Ors. (1973) 1 SCC 500 at paragraph 26 and Subramanian Swamy v. Director, Central Bureau of Investigation and Anr. (2014) 8 SCC 682 at paragraphs 44, 58 and 68 argued that the object of the amendment is itself discriminatory in that it seeks to insert into a "means and includes" definition a category which does not fit therein, namely, real estate developers who do not, in the classical sense, borrow monies like banks and financial institutions. According to him, therefore, the object itself being discriminatory, the inclusion of real estate developers as financial debtors should be struck down. We have already pointed out how real estate developers are, in substance, persons who avail finance from allottees who then fund the real estate development project. The object of dividing debts into two categories under the Code, namely, financial and operational debts, is broadly to sub-divide debts into those in which money is lent and those where debts are incurred on account of goods being sold or services being rendered. We have no doubt that real estate developers fall squarely within the object of the Code as originally enacted insofar as they are financial debtors and not operational debtors, as has been pointed out hereinabove. So far as unequals being treated as equals is concerned, home buyers/allottees can be assimilated with other individual financial creditors like debenture holders and fixed deposit holders, who have advanced certain amounts to the corporate debtor. For example, fixed deposit holders, though financial creditors, would be like real estate allottees in that they are unsecured creditors. Financial contracts in the case of these individuals need not involve large sums of money. Debenture holders and fixed deposit holders, unlike real estate holders, are involved in seeing that they recover the amounts that are lent and are thus not directly involved or interested in assessing the viability of the corporate debtors. Though not having the expertise or information to be in a position to evaluate feasibility and viability of resolution plans, such individuals, by virtue of being

financial creditors, have a right to be on the Committee of Creditors to safeguard their interest. Also, the question that is to be asked when a debenture holder or fixed deposit holder prefers a Section 7 application under the Code will be asked in the case of allottees of real estate developers – is a debt due in fact or in law? Thus, allottees, being individual financial creditors like debenture holders and fixed deposit holders and classified as such, show that they within the larger class of financial creditors, there being no infraction of Article 14 on this score.”

49. Both the above judgments consider the Debenture Holders as Financial Creditors, in the facts that are quite similar to the facts of the present case wherein the Debenture Holders (Respondents No. 1 and 2) are the Financial Creditors who are owed debt by the Corporate Debtor in accordance with the “Deed of Irrevocable and Unconditional Guarantee” and the “Debenture Trust Deed” whereby the Corporate Debtor as Co-Obligor has guaranteed repayment of due amounts to the Debenture Holders.

50. We also consider the argument of the Learned Counsel for the Appellant who has claimed, while citing the judgment of Hon’ble Supreme Court in the matter of **‘Vidarbha Industries Power Limited v. Axis Bank Limited, (2022) 8 SCC 352’**, that it is not obligatory on the part of the Adjudicating Authority to pass orders for initiation of CIRP on mere existence of a debt and default. The cited portion of the judgment is as follows :-

“77. On the other hand, in the case of an application by a Financial Creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the Adjudicating Authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor. The Adjudicating Authority may in its discretion not admit the application of a Financial Creditor.”

51. We note the above judgment and are of the opinion that it is distinguishable on the basis of the fact that the observation of Hon'ble Supreme Court is that the Adjudicating Authority may in its discretion not admit the application but it would depend on all the relevant facts and circumstances of the case and the overall financial health and viability of the Corporate Debtor. In the facts of the case as argued by both the parties, it is evident that the project has suffered for variety of reasons and its progress is hindered, yet the financial creditors cannot be put to disadvantage on this ground, and initiation of CIRP becomes necessary to for repayment of the financial debt owed to the financial creditors. Therefore, the discretion has to be exercised in favour of the financial creditors who, in the present case, are the Debenture Holders.

52. The Learned Counsel for the Respondent has also placed reliance on a decision of this Tribunal in the case of **'Ascot Realty Pvt. Ltd. Vs. Ajay Kumar Agarwal & Ors., 2020 SCC Online NCLAT 732'** which is as follows, to claim that guarantors are not liable to repay financial debt:-

"19. We proceed to refer to the Judgement of Hon'ble Supreme Court of India in the matter of "Anuj Jain" on which both the parties are relying on the basis of their arguments.

20. In the matter of Anuj Jain, the Corporate Debtor - JIL had mortgaged properties as collateral securities towards the loans and advances which had been made by the lender banks and financial institutions to holding Company JAL. Para - 2.2 of the Judgement (we are referring to Judgement as reported in Manupatra) reads as under:-

"2.2. For what has been indicated in the introduction, it is evident that two major issues would arise in these appeals. One, as to whether the transactions in question deserve to be avoided as being preferential, undervalued and fraudulent, in terms of Sections 43, Company Appeal (AT) (Ins) No.658 of 2020 45 and 66

of the Code; and second, as to whether the respondents (lender 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."

Hon'ble Supreme Court in Para - 12.4 noted:-

"12.4. The provisions contained in Sections 124, 126 and 127 of the Indian Contract Act, 1872 shall also have bearing on the issues at hand and hence, the same may also be noted as follows:-

"124. "Contract of indemnity" defined.- A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

126. 'Contract of guarantee', 'surety', 'principal debtor' and 'creditor' - A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

127. Consideration for guarantee.- Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee."

Thus, it was noticed that Section 127 of the Indian Contract Act provides that anything done, or any promise made for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee."

53. The Learned Counsel for the Respondents has relied upon the following decision of this Tribunal in the matter of **'Budhpur Buildcon Pvt. Ltd. Vs Abhay Narayan Manudhane, CA (AT) (Ins) No. 589 of 2021'** in support of his argument that the subscription

towards debentures carry a 'time value for money' and therefore such amounts are 'financial debts'. We find strength in his argument. The relevant portion of the cited judgment is as follows:

“m. All the above citations reflect one thing categorically Creditor to the Debtor purely in the form of release of fund as a “borrowing” and must have a “time value of money”. The method may be different but the nature must be borrowing and in extended terminology even the liability in respect of guarantee is also covered. There must be a “Financial Debt” which is owed by the other side i.e. the Debtor. It should be amply clear that the CD owe the “Financial Debt” to the Creditor. There is a difference between the levy of liquidated damages or penal interest for default and the financial debt per se. Hence, we cannot borrow unrelated concept from unrelated judgments to prove that wherever a word “interest” is there it means corresponding to a “Financial Debt” and we accordingly confirm that “Financial Debt” will always carry an interest towards time value of money. However, interest per se in any business contract cannot be termed to make the “debt” as a “Financial Debt”, if it is in the nature of liquidated damages or in the nature of penal interest, which is a result of compensation for breach of contract which is stipulated for penalty. Hence, while examining the case, whether the Appellant is a Financial Creditor or not we are now arriving at a conclusion based on above said discussions both on law & on facts and the citations produced by the parties, some of which have been explicitly cited as above reveals that the Appellant is not a “Financial Creditor” and hence, we are upholding the order of the Adjudicating Authority”

54. The Learned Counsel for the Respondent has also cited a judgment of the Hon'ble Supreme Court in the matter of **'E.S. Krishnamurthy & Ors. Vs. Bharath Hi-Tech Builders Pvt. Ltd., (2022) 3 SCC 161'** which is as follows:-

“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 (supra), a two-judge Bench of this Court has explained the ambit of Section 7 of the IBC, and held that the Adjudicating Authority only has to determine whether a “default” 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 Justice Rohinton F Nariman, the Court has observed:

“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 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 II, particulars of the proposed interim resolution professional in Part III, 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 occurred, 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.

xx xx xx xx

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 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.” (emphasis supplied)

55. We note that the above judgment very cogently explains the conditions under which a section 7 application has to be considered by the Adjudicating Authority. We are of the clear opinion that in the present case the Adjudicating Authority has looked at the

relevant aspects of 'financial debt' and 'default' before passing the relevant order for admission of the section 7 application filed by the respondents.

56. In the light of the recitals and various clauses of the "Deed of Irrevocable and Unconditional Guarantee" and the "Debenture Trust Deed" and the facts of this case, we find that an 'Event of Default' notice was first sent by the Debenture Holders on 02.01.2019 and another 'Event of Default' notice was sent on 21.02.2019 where after the 'Demand Certificate' dated 14.05.2019 was issued by the Debenture Trustee to B & M Infra which was the Respondent No. 3 in the Section 7 petition invoking the Guarantee dated 06.10.2016 and calling upon B & M Infra to pay to the Debenture Holders an amount of Rs. 37,51,64,939/-. It is thus clear that in accordance with clause 4 of the Deed of Guarantee the Guarantors have to pay to the Debenture Holders the amount stated in the Demand Certificate once an Event of Default has been declared under the Debenture Trust Deed. Therefore, in accordance with clause (i) of Section 5(8), B & M Infra is liable to pay the amount claimed as Financial Debt on account of the "Deed of Guarantee" given by it both as a Guarantor and Co-obligor. Therefore, we come to the inescapable conclusion that B & M Infra (R-3) is the Corporate Debtor with regard to the Section 7 application filed by the R-1 and R-2 as Financial Creditors.

57. We therefore answer the first issue as follows: the Debenture Holders, namely, Respondents No. 1 and 2 are the Financial Creditors of the Corporate Debtor - B & M Infra in the light of the provisions of the IBC.

58. Further, the issue whether the Debenture Holders can claim repayment with regard to the amount mentioned in the demand certificate as a Financial Debt is squarely answered in Clause 4 of the Deed of Irrevocable and Unconditional Guarantee of which B &

M Infra and Vistra ITCL are co-signees since the demand certificate has been issued by the Debenture Trustee on 14.05.2019, a conjoint reading of the Debenture Trust Deed and Deed of Guarantee clearly establishes that the amount claimed in demand certificate is to be paid directly to the Debenture Holders by Respondent No. 3, who is the Corporate Debtor within the provisions of the IBC.

59. On the basis of aforementioned detailed discussion, we are of the clear view that the Adjudicating Authority has not committed any error in admitting the section 7 application filed by the respondents. We, therefore, find no reason to interfere with the Impugned Order.

60. The appeal being devoid of merit is dismissed with no order regarding cost.

[Justice Rakesh Kumar]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi
12th April, 2023

Sheetal