IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH,
COURT-I
KOLKATA

CP (IB) No. 1711/KB/2019

In the matter of:

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

Avani Towers Private Limited
[CIN: U7010WB1994PTC)63557]

...Financial Creditor

Versus

Energy Properties Private Limited
[CIN: U45400WB2007PTC115959]

...Corporate Debtor

Order pronounced on: 20 March 2024

Coram:

Shri Rohit Kapoor	**:**	**Member (Judicial)**
Shri Balraj Joshi	**:**	**Member (Technical)**

Appearances (through hybrid mode):

For the Financial Creditor:	Mr. Shaunak Mitra, Advocate Mr. Jitendra Lohia, Resolution Professional
For the Corporate Debtor:	Mr. Ratnanko Banerji, Senior Advocate Mr. D. N. Sharma, Advocate Mr. Kumarjit Banerjee, Advocate Ms. Sharfaa Ahmed, Advocate Mr. Akash Agarwal, Advocate Ms. Ankita Agrahari, Advocate

ORDER

Per Rohit Kapoor, Member (Judicial)

1. This Court convened through hybrid mode.

2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 ***("Code")*** by Avani Towers Private Limited, represented by its Director, Mr. Bhaskar Biswas, authorized through a Board Resolution dated 26 August 2019[1] seeking to initiate Corporate Insolvency Resolution Process ***("CIRP")*** against Energy Properties Private Limited ***("Corporate Debtor").***

3. The Corporate Debtor was incorporated on 02 August 2005, having CIN: U45400WB2007PTC115959. It's registered office is Ramrajatala Station Road LP-482/7/5, Howrah, 711104. Therefore, this Bench has jurisdiction to deal with this petition.

4. The present petition was filed on 30 September 2019 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make a payment of a sum of Rs.10,90,72,565/- (Rupees Ten Crore Ninety Lakh Seventy Two Thousand Five Hundred and Sixty Five only) which is the interest portion @18% p.a. compounded and payable quarterly till 31 August 2019. The date of default has been mentioned as 01 October 2010.

Submission of learned Counsel appearing for the Financial Creditor

5. The learned Counsel submitted that the Financial Creditor had advanced a loan of RsRs.3,50,00,000/- (Rupees Three Crore Fifty Lakh only) in several tranches from 2010 to 2012, pursuant to a Development Agreement dated 16 June 2008. It is submitted that the Corporate Debtor is the owner of the land forming the subject matter of the Development Agreement, the Financial Creditor as the Developer was to make construction and 60% of the constructed area was to be developer's allocation and remaining 40% is owner's allocation.

[1] Annexure A @ Pg. 23-A of CP

6. It is further submitted that against the loan amount, the interest arrives to Rs.10,90,72,565/- (Rupees Ten Crore Ninety Lakh Seventy-Two Thousand Five Hundred and Sixty-Five only).
7. The learned Counsel led us through clause 8 of the Development Agreement wherein in Clause 8.1. it is stated that the Financial Creditor was to keep a sum of Rs.12,00,00,000/- (Rupees Twelve Crore only) as the security deposit with the Corporate Debtor which would not attract interest and would only be payable and refundable in the manner stated in the Third Schedule of the Development Agreement. Clause 8.1. further states that any further sum if advanced by the Financial Creditor to the Corporate Debtor would carry interest at agreed rate of 18% per annum compounded and payable quarterly.
8. Hence, the Development Agreement stipulated two separate transactions, one being on the interest free refundable deposit of Rs.12 Crore and secondly the obligation to pay interest @ 18% per annum compounded and payable on quarterly basis in case of additional loan amount.
9. Ld. Counsel Mr. Shaunak Mitra submitted that although the principal sum of Rs.12Crore and Rs.3.50Crore may not have fallen due but the Corporate Debtor was under the obligation to pay interest on the additional amount given under clause 8.1 on quarterly basis @ 18% per annum compound interest, hence the present claim arises on account of interest payable on such additional/further amount over and above Security Deposit of Rs.12Crore.
10. It is submitted that the Corporate Debtor has defaulted in payment of the interest due, leading to the first default that took place on 01 October 2010 when the interest amount for the quarter ending 30 September 2010 was not paid.
11. The learned Counsel submitted that the Corporate Debtor has acknowledged the receipt of the additional amount of Rs.3.50Crore and admitted that the same was unsecured loan of which the interest would be

paid quarterly. It is further submitted that the Corporate Debtor was unable to pay the interest due to financial difficulty.

12. The learned Counsel led us through the confirmation of accounts[2] for the period of 01 April 2012 to 31 March 2013 dated 01 April 2013, wherein the Corporate Debtor has signed the same.
13. Thereafter the learned Counsel referred to a letter dated 31 March 2014 wherein the Corporate Debtor has stated the "*since the project has not taken off for various reason even after more than 5 ½ years of signing development agreement, we are not in position to make provision for interest for the time being on the additional part of security deposit received by you."*
14. Thereafter, the learned Counsel led us through several communications[3] between the Financial Creditor and Corporate Debtor wherein the Corporate Debtor has acknowledged the debt and default of the Corporate Debtor.
15. It is further submitted that the Corporate Debtor has deducted TDS at 18% compounded interest rate from 2010-11 to 2013-14.
16. The learned Counsel submitted that the financial statements of the Corporate Debtor for 2013-2014, under the nature of transaction the heading "interest paid on Loan Taken" reflects the acknowledgement on the part of the Corporate Debtor.
17. From the financial year 2014-2015 onwards, the Corporate Debtor stopped making further provisions for interest in the financial statements, but the security deposit has been mentioned as loan.
18. The learned Counsel led us through the balance sheet of the Corporate Debtor for the financial year 2017-18 wherein the Corporate Debtor has acknowledged that:

    "(ii) The company has taken a loan from Avani Towers Private Limited amounting Rs.5,54,24,439/- (including interest payable amounting to

[2] Annexure F @page 41 of the C.P.
[3] Pp. 43-44 of the C.P

Rs.2,04,24,439/-) as on 31.03.2017. Since the project has been delayed for over 7 years the company is unable to pay interest on such unsecured loan hence the management has taken the decision that interest shall not be provided for the year on and after 01.04.2014 ant he company has intimated in writing, to the lender in this regard."

19. Thus the learned Counsel emphasized that the Corporate Debtor has continuously acknowledged and admitted the fact that the loan amount of Rs.3.50 Crore was separate and independent of the security deposit amount of Rs.12 Crore.

20. The learned Counsel placed reliance on ***Orator Marketing Private Limited v. Samtex Desinz Private Limited***[4] in support of his contention that having made such admission, debt and default stand admitted. It is well settled that any amount given for financial accommodation having time value of money will be considered as financial debt.

21. It is further submitted that the claim in the petition is within the period of limitation. After the date of default viz, 1 October 2010, default continued every quarter for failure to pay interest. The Corporate Debtor has acknowledged the debt in its balance sheets from the financial years 2013-14 onwards. The learned Counsel submitted that it is well settled that even if an acknowledgement if accompanied by refusal to pay the same would still be acknowledgement within the meaning of Section 18 of the Limitation Act, 1963. In support of his contention, the learned Counsel placed reliance on ***Panchayat Samiti, Itawa v. Jeevan Fertilizer & Chemical Company Pvt. Ltd.***[5]**.**

22. The learned Counsel placed reliance on the judgment passed by the Hon'ble NCLAT in ***Base Realtors Private Limited v. Grand Realcon Private Limited***[6] and submitted that the claim for interest alone is maintainable

[4] (2023) 3 SCC 753
[5] 1992 SCC OnLine Raj 184
[6] C.A.(AT)(Ins.) No. 882 of 2022

under Section 7 of the Code is maintainable even if principal amount has not fallen due.

23. The Financial Creditor has placed the following documents on record:

    a. Copies of Bank Statements annexed as Annexure D to the Company Petition;

    b. Copies of Audited Financial Statements of the Corporate Debtor for the Financial years 2013-14, 2017-18 and audited balance sheet for the financial year 2014-15 annexed as Annexure J and Annexure K of the Company Petition.

24. The Financial Creditor has proposed the name of Mr. Mahesh Chand Gupta, registration number IBBI/IPA-001/IP-P01489/2018-2019/12304, as the Interim Resolution Professional of the Corporate Debtor. The proposed Interim Resolution Professional has given his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy [Application to Adjudicating Authority] Rules, 2016 along with a copy of registration[7].

Submission of learned Senior Counsel appearing for the Corporate Debtor

25. The learned Senior Counsel submitted that as part of the obligations under the terms of the Development Agreement, a refundable security deposit of Rs. 12,00,00,000/- together with the option of a further sum of Rs. 3,00,00,000/- was to be made by the Financial Creditor. While the sum up to Rs. 12,00,00,000/- was to be interest free, the further sum up to the maximum of Rs. 3,00,00,000/- (enhanced to Rs. 3,50,00,000/- mutually by the parties by conduct), if deposited as part of the security deposit was to carry interest @ 18% compounded quarterly[8]. The repayment of the refundable security deposit was linked with performance milestones

[7] Annexure M @ Pp. 146-149 of the C.P.
[8] Clauses 8.1-8.2 of Development Agreement @ Pp. 49-50 of the C.P.

stipulated in Part II of the Third Schedule[9] of the Development Agreement. It is pertinent to note that it is a matter of record that the additional advances up to Rs. 3,00,00,000/- was to form part of the security deposit. The Development Agreement also provided for a specific mechanism for repayment of Security Deposit together with accrued interest in the event of a default in repayment in accordance with Third Schedule, Part II by adjustment of owners' allocation.[10]

26. It is further submitted that the Development Agreement has not been performed, the Financial Creditor who is the developer, has breached the Development Agreement and whereas the Financial Creditor blames the non-development of the premises on the Corporate Debtor.

27. It is further submitted that the Financial Creditor is a related party of the Corporate Debtor within the meaning of section 5(34)(j) of the Code being a shareholder holding 40% of the equity share capital of the Corporate Debtor

28. The learned Senior Counsel referred to clauses 8.1. and 8.2 of the Development Agreement and submitted that the defaulted amount is solely on account of interest and formed part of the "Security Deposit" within the meaning of Development Agreement, and submitted that as per the Development Agreement, the security deposit is performance security by the developer and claim for refund of security deposit is, thus, a contractual claim the repayment of which is contingent upon completion of the performance and hence not enforceable by this Adjudicating Authority.

29. The learned Senior Counsel placed reliance on ***Chillara Kalyan & Ors. v. Berggruen Estate Projects Pvt. Ltd.***[11] with reference to the nature and character of the Security Deposit.

[9] Part II, Third Schedule of Development Agreement @ p. 66 of the C.P.
[10] Clause 8.3 of Development Agreement @ Pp. 49-50 of the C.P.

[11] O.S.A.Nos.199 and 116 of 2018; dated 31st July, 2018

30. Hence, the security deposit does not fall under the purview of financial debt under section 5(8) of the Code. The learned Senior Counsel placed reliance on the judgment of this Adjudicating Authority passed on 31 January 2023 in ***Primarc Projects Pvt. Ltd. v. Nilanchal Estates Pvt. Ltd.***[12]**,** and the judgment of Learned NCLT, Mumbai Bench passed in ***Magnate Industries LLP v. Safal Developers Pvt. Ltd.***[13] wherein it has been held that held that "Security Deposit" under a development agreement is not in the nature and character of a "financial debt" within the meaning of the Code.

31. It is further submitted that the Development Agreement stipulated that on completion of the development works at the subject premises was a requirement for the payback of the "Security Deposit." There is no ongoing obligation on the part of the Corporate Debtor to repay the "Security Deposit" in the present or the future due to the disputes surrounding the non-commencement of construction at the subject premises despite the expiration of the five years as mentioned above and the applicant developer's abandonment of the Development Agreement. These disputes have not been adjudicated by an appropriate contractual forum, and the consequences of the developer's actions on the obligations of the parties.

32. The provisions of the contract alone must be examined in order to determine the nature of and the procedure for repaying the "Security Deposit."

33. The applicant has made it clear that it intends to carry out the Development Agreement and exercise its rights under it, depending on it. It has also requested that the term "development rights" be included as an asset in the applicant's information memorandum. The learned Senior Counsel placed reliance on **Victory Iron Works Ltd. v. Jitendra Lohia & Anr.**[14]**.**

[12] C.P. (IB) No. 595/KB/2019, Order dt. @ prs. 29-30, pp. 9-10
[13] C.P. (IB) No. 1167/MB-IV/2020, Order dt. 06.10.2021 @ prs. 8 (c), pp.46-47; pr. 9, pp. 48-49.
[14] Civil Appeal Nos. 1743 of 2021 and 1782 of 2021, Judgment dt. 14.03.2023 @ prs. 12 (vii) and 15

34. Furthermore, the Hon'ble Supreme Court upheld the Development Agreement, ruling among other things that the Financial Creditor's possession of the subject premises must be protected for the performance of the development rights in accordance with the terms of the Development Agreement; the Financial Creditor is precluded from asserting that the Security Deposit is due and payable because the Development Agreement must still be fulfilled by the Financial Creditor upon the completion of the Financial Creditor's CIRP.

35. The learned Senior Counsel submitted that there is no default within the meaning of section 3(12) of the Code as the Financial Creditor has not performed his obligations within the stipulated timeframe. Therefore, any claim of "default" is premature and misguided.

36. The learned Senior Counsel placed reliance on ***Indus Biotech Private Ltd. v. Kotak India Venture (Offshore) Fund & Others***[15]**,** and submitted that the Adjudicating Authority should ascertain if there is a default and has to be satisfied if there is a default.

37. It is submitted that the Financial Creditor has treated even the interest component of the additional security deposit of Rs. 3.50 Crore, either as "deposit against joint venture" and/or capitalised inventory under the heads of "project work in progress" and "other current assets" up to FY 2018-19, thereby rebutting any claim for such amounts to be payable quarterly. The learned Senior Counsel led us through **"Note 10-Inventories"** of Balance Sheet of Applicant for FY 14-15[16], FY 2015-16; FY 2016-17; FY 2017-18; FY 2018-19[17] wherein the entire Rs. 18.61 Crores (approx.), consisting of Rs. 12 Cr.+ Rs. 3.50 Cr.+ Rs. 3.10 Cr. in accrued interests up to FY 2013-14, has been capitalized as inventory.

[15] 2021 SCC OnLine SC 268
[16] Pg. 139 of C.P
[17] Pp. 31, 51, 72, 92 of Reply Affidavit.

38. It would be evident from the above that, irrespective of the wordings of clause 8.1 of the Development Agreement, the parties have by their subsequent conduct altered the terms of the Development Agreement pertaining to the Security Deposit by enhancing the additional sum from 3,00,00,000/- to 3,50,00,000, and have never treated the accrued interest on the sum of Rs. 3,50,00,000/- (the interest baring component of the SD) to be payable quarterly. Accordingly, the Applicant is estopped from contending otherwise. In support of his contention, the learned Senior Counsel placed reliance on ***Godhra Electricity Company Ltd. v. State of Gujarat***[18]**.**

39. The learned Senior Counsel referred to the Ledger of the Corporate Debtor wherein no interest has been provisioned by the Corporate Debtor after FY 13-14. The sum of Rs. 1.067 Crore as interest has been reflected on the ledger for FY 14-15 despite the Corporate Debtor not having submitted TDS for FY 14-15.

40. The learned Senior Counsel placed reliance on ***J.K. Engineering Pvt. Ltd. v. ANE Industries Pvt. Ltd.***[19] and submitted that deposit of TDS till FY 13-14 by the Corporate Debtor does not constitute an admission of a default in any manner.

41. It is further submitted that the Company Petition is barred by limitation as the date of default has been specified as 01 October 2010 and the interest on the additional security deposit has not been provisioned by Corporate Debtor w.e.f. FY 2014-15 and not booked by Applicant w.e.f. FY 2015-16. As such, even according to the Applicant's own case, there couldn't have been any default post FY 2015-16.

42. The learned Senior Counsel submitted that the limitation of three years under Article 137 of the Limitation Act, 1963 is triggered upon "default",

[18] (1975) 1 SCC 199 @ prs. 11-18
[19] G.A. 2522 of 2016 (C.S. 213 of 2016

which under the definitional scheme of the IBC cannot be a continuing event, reliance has been placed on ***Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries (P.) Ltd.***[20]***, Vashdeo R. Bhojwani v. Abhyudaya Co-operative Bank Ltd. & Anr.***[21]

43. The learned Senior Counsel submitted that mere reflection of amounts under the head of "long term borrowings" without there having been any "default" does not constitute an "acknowledgement" under section 18 of the Limitation Act, 1963. To constitute an "acknowledgement", the reflection must be of a present subsisting liability to pay the debt. In the absence of a default, an entry in the balance sheet does not create a new right/ cause of action. To support his contention, the learned Senior Counsel placed reliance on ***Asset Reconstruction Company (India) ltd. v. Bishal Jaiswal & Anr.***[22]

44. The amounts reflected in the balance sheet are qualified and without provisioning of interest on the books of the corporate debtor, and as such, the same cannot constitute an unequivocal "acknowledgement" under Section 18 of the Limitation Act, 1963, which stands to be ascertained on a case-to-case basis on facts of each case.

45. In construing whether an entry or a statement in the balance sheet constitutes an acknowledgement, the balance sheet has to be construed as a whole and the true intention of the parties have to be found.

46. As such, the statements made in the Financial Statement of the Corporate Debtor cannot be seen in isolation and seen as creating a new, standalone right to sue or cause of action, neither can it be taken to be an unequivocal acknowledgment of any present and subsisting liability, where the balance

[20] (2020) 15 SCC 1
[21] (2019) 9 SCC 158
[22] 2021 SCC OnLine SC 321

sheet of the Corporate Debtor clearly does not admit the interest to be payable quarterly.

Rejoinder to the submissions of the Corporate Debtor

47. The main contention of the Corporate Debtor is that the Development Agreement dated 16 June 2008 is unregistered and unstamped and cannot be relied upon. In reply to such contention, the learned Counsel has submitted that the Development Agreement is only being relied on to demonstrate the agreement for loan liability and payment of interest, which is admitted by Corporate Debtor. No stamping or registration is required for such purpose. The Development Agreement is adequately stamped on nonjudicial stamp paper of Rs. 100/-.
48. In any case, when the Development Agreement was signed in 2008, it was covered by residual entry 5(e) of the West Bengal modification to section I of the Stamp Act, which provides for a non-judicial stamp duty of only Rs 10/-. At that time, there was no specific provision for stamping a Development Agreement.
49. The learned Counsel placed reliance on ***Messers Larica Estates Limited v. Enameinagar Development Corporation Limited***[23], ***Sri Bimal Chandra Roy v. Smt Sobha Ghatak & Anr.***[24] ***and Md. Rafique v Rahima Khatoon and Ors.***[25] and submitted that the subsequent amendment brought in West Bengal in 2012 making stamp duty payable specifically on Development Agreement i.e. newly inserted clause 5(f)] has no retrospective effect.
50. The learned Counsel further emphasized on the fact that the validity of the same Development Agreement has been upheld by the Hon'ble Supreme Court in a detailed judgement and order dated 14 March 2023, in a separate proceeding concerning the Financial Creditor and Corporate Debtor.
51. The Corporate Debtor has contended rely on a decision of ***Primarc Projects (supra)***. The learned Counsel submitted that the said judgment is of no relevance to the instant case because the claim in our case specifically arises

[23] 2013 SCC OnLine Cal 9146
[24] A.P. No. 927 of 2017
[25] CO 1055 of 2017

out of a separate and independent loan transaction principal amount of Rs.3.50 crore on which interest is to be paid quarterly.

Analysis and Findings

52. Heard the learned Counsel appearing for the Financial Creditor and the learned Senior Counsel appearing for the Corporate Debtor and perused the record.

53. The Corporate Debtor has raised two objections:

    a. Whether the Financial Creditor can claim the amount without fulfilling its obligation under the Developers Agreement?

    b. Whether the amount claimed falls under the purview of financial debt?

    c. Whether the debt is barred by limitation?

54. Dealing with the contention that the Financial Creditor did not fulfill its duties under the Development Agreement and hence the Corporate Debtor is not liable to make any payment and there is no default. We would like to seek reliance on para 15 of the judgment passed by the Hon'ble NCLAT in the matter of ***State Bank of India v. N.S. Engineering Projects Private Limited***[26] which is reproduced below:

> *15. The Hon'ble Supreme Court has had occasion to examine the contours of Section 7 Application. The Hon'ble Supreme Court in Innoventive Industries Limited vs. ICICI Bank and Anr.- (2018) 1 SCC 407 had noted the Scheme of Section 7 of the Code and also contrasted it with the Scheme under Section 8 and 9. Paragraphs 28 and 29 of the judgment of the Hon'ble Supreme Court is as follows:*

[26] CA(AT)(Insolvency) 978, 1000 and 1039 of 2022

"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. 29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code".

Further in Para 16 of the same judgement, it has been inter-alia mentioned that :

16. The Hon'ble Supreme Court in the above case has observed that the moment Adjudicating Authority is satisfied that default has occurred, the Application must be admitted, unless it is incomplete.

55. In view of the above judgment, the contention of the Corporate Debtor cannot be accepted.

56. Let us now deal the second issue i.e. whether realization of interest falls under the purview of Financial Debt. In order to do so let us first review the definition of financial debt as envisaged under section 5(8) of the Code which reads as under:

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

(a) money borrowed against the payment of interest;
(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument; Company Appeal (AT) (Ins) No.1064 of 2020;
(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
(e) receivables sold or discounted other than any receivables sold on non-recourse basis;
(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
Explanation.—For the purposes of this sub-clause,—
(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]
(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;"

57. The issue before us is whether interest alone would constitute a financial debt. This issue has been squarely addressed by the Hon'ble NCLAT in ***Base Realtors*** (supra) wherein the Hon'ble NCLAT has held that an "*application filed under section 7 of the Code could be maintained in respect of the component of interest which became due and payable, without asking for the principal amount which has not yet become due and payable*."

58. We would like to rely on the observation of the Hon'ble Supreme Court in ***Orator Marketing*** (supra) wherein it has been observed that

> *"23. Furthermore, sub-clauses (a) to (i) of Sub-section 8 of Section 5 of the IBC are apparently illustrative and not exhaustive. Legislature has the power to define a word in a statute. Such definition may either be restrictive or be extensive. Where the word is defined to include something, the definition is prima facie extensive."*

59. Hence, the claim of interest alone can be considered as financial debt.

60. The learned Senior Counsel has relied on ***Primarc Projects (supra)*** and ***Magnate Industries LLP*** (supra) thereby contending that refundable "Security Deposit" under a development agreement is not in the nature and character of a "financial debt" within the meaning of the Code as the Development Agreement is unstamped.

61. With respect to this contention, we would like to place reliance on the judgment of the Hon'ble NCLAT in ***Hiren Meghji Bharani v. Shankeshwar Properties Pvt. Ltd. and Anr***.[27] wherein the Hon'ble NCLAT has held that

> *"17. We heavily rely on the Apex Court's latest Judgement in Curative Petition (C) No. 44 of 2023 in Review Petition (C) No. 704 of 2021 in Civil Appeal No. 1599 of 2020 in which seven judge bench acknowledges and adopts the revised legal stance on the enforceability of unstamped arbitration agreements in the case "IN RE INTERPLAY BETWEEN ARBITRATION AGREEMENTS UNDER THE ARBITRATION AND CONCILIATION ACT 1996 AND THE INDIAN STAMP ACT 1899", the relevant portion is as follows:*
> *" ...*
> *M. Conclusions*
> *224. The conclusions reached in this judgment are summarised below:*

[27] C.A> (Ins.)(AT.) No. 446 of 2023; (2023) ibclaw.in 822 NCLAT

a. Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered void or void ab initio or unenforceable;
b. Non-stamping or inadequate stamping is a curable defect;
c. An objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The concerned court must examine whether the arbitration agreement prima facie exists;
d. Any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal; and
e. The decision in NN Global 2 (supra) and SMS Tea Estates (supra) are overruled. Paragraphs 22 and 29 of Garware Wall Ropes (supra) are overruled to that extent……"

18. It has been clearly brought out in the above judgement of the Apex Court that Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act and such agreements are not rendered void or void ab initio or unenforceable and further Non-stamping or inadequate stamping is a curable defect and therefore as claimed by the Appellant unstamped "confirmation and undertaking" doesn't make the whole process illegal if this document is not even relied upon as an evidence.

22. The admission of liability in the balance sheet of Respondent No.1, the part payments made by Respondent No.1 to Financial Creditor from time to time and NeSL sufficiently demonstrates the admission of liability by Respondent No.1, even without relying upon "confirmation and undertaking" dated 24.09.2015.

23. Adjudicating Authority has, thus come to a conclusion that there is a financial debt, there is a default basis other documents and no reliance whatsoever nature has been placed on the confirmation and undertaking dated 29.09.2015. Since Adjudicating Authority has not relied upon that and have come to a conclusion that there is a debt and default and demand notice which is not disputed and accordingly concluded that sufficient reasons exists for Section 7 CIRP proceedings. The plea of the Appellant, to claim that the unstamped agreement/instrument in question cannot be admitted into evidence under the provisions of the Maharashtra Stamp Act, as a defense, cannot render the corporate insolvency resolution process ("CIRP") non-maintainable, when there exists other material on record to prove existence of default in payment of debt. On this count, we therefore, cannot find any fault in the orders of the Adjudicating Authority."

62. Hence, even if we do not consider the Development Agreement, the Corporate Debtor has acknowledged the debt in its letters dated 10 July 2015[28], Note 4[29] of the Financial Statement for the 2013-2014 wherein under the heading "Note 4- Long Term Borrowings, Unsecured Loan- From Associate reflects an amount of Rs.55,424,439/-. The same amount is shown as long-term borrowings for the Financial Year 2014-2015[30] as well. which corroborates with Note 17 (3)(ii) of the Financial Statement for the Financial Year 2017-2018 which stated that following:

> *"(3)(iii) The company has taken a loan from Avani Towers Private Limited amounting Rs.5,54,24,439/- (including interest payable amounting Rs.2,04,24,439/-) as on 31.03.2017. Since the project has been delayed for over 7 years the company is unable to pay interest on such unsecured loan hence the management has taken the decision that interest shall not be provided on or after 01.04.2014 and the company has intimated in writing to the lender in this regard."*

63. Therefore, even while keeping aside the Development Agreement, there are several documents to establish that there is a debt between the Financial Creditor and the Corporate Debtor and the Corporate Debtor is in default of payment of the debt. The amount claimed does vary from the amount acknowledged in the documents mentioned above, but this Adjudicating Authority is only required to be satisfied if there is a debt and default and that the amount in debt is above the threshold limit, which is there in the said Company Petition.

64. Hence, the debt and default has been established, let us now consider if the said Petition is barred by limitation. The first date of the default is stated to be 01 October 2010, hence the period of limitation ends on 01 October 2013. The Corporate Debtor has acknowledged the accounts on 01 April 2013[31].

[28] Page 43 of the C.P.
[29] Page 78 of the C.P.
[30] Pp 115, 120 of the C.P.
[31] Annexure F at Page 41 of the C.P.

Thereafter, the Corporate Debtor has further acknowledged that the interest is due in the Financial Statements for the financial years 2013-2014, 2014-2015, 2017-2018. The Company Petition was filed on 30 September 2019.

65. We would like to rely on the judgment of the Hon'ble Supreme Court in ***State Bank of India v. Krishidhan Seeds Pvt. Ltd.***[32] wherein the Hon'ble Supreme Court held:

> *"11. An acknowledgement in a balance sheet without a qualification can be relied upon for the purpose of the proceedings under the IBC. This principle also emerges from the decision in* ***Asset Reconstruction Company*** *(supra), which noted the decisions in* ***Sesh Nath Singh*** *(supra) and* ***Laxmi Pat Surana*** *(supra). This Court held:*
>
> > *"35. A perusal of the aforesaid sections would show that there is no doubt that the filing of a balance sheet in accordance with the provisions of the Companies Act is mandatory, any transgression of the same being punishable by law. However, what is of importance is that notes that are annexed to or forming part of such financial statements are expressly recognised by Section 134(7). Equally, the auditor's report may also enter caveats with regard to acknowledgments made in the books of accounts including the balance sheet. A perusal of the aforesaid would show that the statement of law contained in Bengal Silk Mills, that there is a compulsion in law to prepare a balance sheet but no compulsion to make any particular admission, is correct in law as it would depend on the facts of each case as to whether an entry made in a balance sheet qua any particular creditor is unequivocal or has been entered into with caveats, which then has to be examined on a case by case basis to establish whether an acknowledgment of liability has, in fact, been made, thereby extending limitation under Section 18 of the Limitation Act."*
>
> *12. The decisions in* ***Sesh Nath Singh*** *(supra),* ***Laxmi Pat Surana*** *(supra) and* ***Asset Reconstruction Company*** *(supra) have subsequently been followed in numerous decisions of this Court delivered by two-Judge Benches, namely: (i)* ***Dena Bank v C. Shivakumar Reddy****; (ii)* ***State Bank of India v Vibha Agro Tech Limited****; (iii)* ***Devas Multimedia Private Ltd. v Antrix Corporation Ltd. and Another****; and (iv)* ***SVG Fashions Pvt. Ltd. (Earlier Known As SVG Fashions Ltd.) v***

[32] Civil Appeal No. 910 of 2021; (2022) ibclaw.in 40 SC

Ritu Murli Manohar Goyal and Another. *Besides the above decisions, there is a more recent decision of a three-Judge Bench of this Court in* ***Rajendra Narottamdas Sheth and Another v Chandra Prakash Jain and Another****, where, speaking for the Bench, Justice L Nageswara Rao held:*

> *"25. We have already held that the burden of prima facie proving occurrence of the default and that the application filed under Section 7 of the Code is within the period of limitation, is entirely on the financial creditor. While the decision to admit an application under Section 7 is typically made on the basis of material furnished by the financial creditor, the Adjudicating Authority is not barred from examining the material that is placed on record by the corporate debtor to determine that such application is not beyond the period of limitation. Undoubtedly, there is sufficient material in the present case to justify enlargement of the extension period in accordance with Section 18 of the Limitation Act and such material has also been considered by the Adjudicating Authority before admitting the application under Section 7 of the Code. The plea of Section 18 of the Limitation Act not having been raised by the Financial Creditor in the application filed under Section 7 cannot come to the rescue of the Appellants in the facts of this case. It is clarified that the onus on the financial creditor, at the time of filing an application under Section 7, to prima facie demonstrate default with respect to a debt, which is not time-barred, is not sought to be diluted herein. In the present case, if the documents constituting acknowledgement of the debt beyond April, 2016 had not been brought on record by the Corporate Debtor, the application would have been fit for dismissal on the ground of lack of any plea by the Financial Creditor before the Adjudicating Authority with respect to extension of the limitation period and application of Section 18 of the Limitation Act."*

13. In view of the above decisions, the position of law has been set at rest. Neither the NCLT nor the NCLAT had the benefit of adjudicating upon the factual controversy in the context of the decisions of this Court. The principles which emerge are that:

(i) The provisions of Section 18 of the Limitation Act are not alien to and are applicable to proceedings under the IBC; and

(ii) An acknowledgement in a balance sheet without a qualification can furnish a legitimate basis for determining as to whether the

period of limitation would stand extended, so long as the acknowledgement was within a period of three years from the original date of default."

66. Taking note of the abovementioned judgment and acknowledgements made by the Corporate Debtor, the Company Petition has been filed within the period of limitation.

67. The present petition made by the Financial Creditor is complete in all respects as required by law. The Petition and the submissions establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time.

68. In the light of the above facts and circumstances, it is, hereby ordered as follows:-

    a. The application bearing ***CP (IB) No. 1711/KB/2019*** filed Avani Towers Private Limited, the Financial Creditor, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against ***Energy Properties Private Limited***, the Corporate Debtor, is ***admitted***.

    b. There shall be a moratorium under section 14 of the IBC.

    c. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

    d. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

e. Mr. Mahesh Chand Gupta, registration number IBBI/IPA-001/IP-P01489/2018-2019/12304, email id: mcgupta90@gmail.com, phone no. 9831046652, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

f. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The Directors, officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. There shall be no future opportunities in this regard.

g. The Interim Resolution Professional is expected to take full charge of the Corporate Debtor, its assets and its documents without any delay whatsoever. He is also free to take police assistance in this regard, and this Court hereby directs the concerned Police Authorities to render all assistance as may be required by the Interim Resolution Professional in this regard.

h. The IRP/RP shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.

i. The Financial Creditor shall deposit a sum of ***Rs 3,00,000/- (Rupees Three Lakh only)*** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

j. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.

k. Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

69. **CP (IB) No. 1711KB/2019** to come up on **23-04-2024 f**or filing the periodical report.

70. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

This order is pronounced on the 20th day of March, 2024.

GGRB_LRA