

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

AT CHENNAI

(APPELLATE JURISDICTION)

COMPANY APPEAL (AT) (CH) (INS.) NO. 108/2023

(Filed under Section 61 of the Insolvency and Bankruptcy Code, 2016)

Arising out of the Impugned Order dated 14/03/2023 in IA/(IBC)/1465/2022
in CP(IB)/28/07/HDB/2022, passed by the National Company Law
Tribunal, Hyderabad Bench, Hyderabad

In the matter of:

M/s IFCI Limited,
IFCI Tower, 61,
Nehru Place,
New Delhi – 110019
Regional Office at:
Taramandal Complex,
8th Floor, 5-9-13,
Saifabad,
Hyderabad – 500 004.

...Appellant

Versus

1. Sutanu Sinha

(Resolution Professional of IVRCL Chengapalli Tollways Ltd)
4th Floor, Duckback House 41,
Shakespeare Sarani,
Kolkata – 700 017.

...Respondent No. 1

2. Asset Care Reconstruction Enterprise Ltd (ACRE)

(Sole COC Member)
MIHIR, 8-2-350/5/A/24/1
B & 2, Panchavati Colony Road No. 2,
Banjara Hills,
Hyderabad – 500 034.

...Respondent No. 2

Present:

For Appellant : Mr. P.S. Raman, Senior Advocate
For Mr. G. Kalyan Jhabakh
M/s. Surana & Surana

For Respondent No. 1 : Mr. P.H. Arvindh Pandian, Senior Advocate
For Mr. Avinash Krishnan Ravi,
Advocate

For Respondent No. 2 : Mr. Srinath Sridevan, Advocate
For Mr. Arun C. Mohan, Advocate

J U D G M E N T

(Virtual Mode)

[Per: Shreesha Merla, Member (Technical)]

1. This Appeal is preferred by IFCI Limited under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the ‘Code’) against the Impugned Order dated 14/03/2023 passed by the National Company Law Tribunal, Hyderabad Bench - II, Hyderabad in IA(IBC)/1465/2022, whereby the Adjudicating Authority has dismissed the Application filed by the Appellant herein challenging the rejection of its Claim by the 1st Respondent/ the Resolution Professional (RP).

2. Briefly put, the facts as mentioned in the Application, which was dismissed by the Adjudicating Authority, are that IVRCL Limited had won the bid for undertaking Construction, Operation and Maintenance of a Project under ‘National Highway Authority of India’ (“NHAI”) in April 2009, subsequent to

which the concession Agreement dated 25/03/2010 was entered into between NHAI and 'IVRCL Chengapalli Tollways Limited' ("ICTL") for execution of the Project. IFCI agreed to provide financial assistance to the Corporate Debtor through 'Compulsorily Convertible Debentures' ("CCDs") and subsequently the 'Letter of Intent' ("LOI") / 'Sanction Letter', dated 28/09/2010 was issued and the Applicant/ Financial Creditor agreed to subscribe to the CCDs amounting to Rs. 125,00,00,000/- vide a 'Debenture Subscription Agreement' ("DSA") dated 14/10/2011.

3. IFCI, IVRCL and ICTL entered into a Share Buy Back Agreement, dated 14/10/2011, wherein the terms and conditions of the buy back of CCDs subscribed by the Applicant were detailed. The Applicant by exercising this option agreed to buy back Rs. 12.5 Crore CCDs any time between the end of the 3rd year and the 6th year from the date of issue of CCDs and in the event of default on behalf of ICTL, the Applicant would be at liberty to sell the CCDs to a third party. While so, ICTL sought restructuring of the terms of repayment of the CCDs vide letter dated 21/11/2014 and the Applicant had approved restructuring of the CCD Facility, vide letter dated 05/12/2014. ICTL Project has achieved Provisional Commercial Operations on October 2016 and started generating revenue. Still it sought extension of time from NHAI beyond the period mentioned in the Concession Agreement and NHAI, on receipt of the revised premium on Rs. 59.10 crores, granted extension as sought for.

4. On 22/02/2017, ICTL suggested a 'One Time Settlement' ("OTS") and the Applicant agreed to the same, vide letter dated 22/03/2017 on the condition that the amount of Rs. 135 crores shall be paid by 31/03/2017. As there was a default in honouring the terms of OTS, the Applicant addressed a letter dated 19/02/2017 to the ICTL, revoking the Concession granted under restructuring of CCDs and therefore the OTS stood withdrawn. Subsequent to this, Corporate Guarantee of IVRCL was invoked by the Applicant. Subsequently, 'Corporate Insolvency Resolution Process' ("CIRP") was initiated by SBI against IVRCL on 23/02/2018. The Liquidation Proceedings were initiated vide Order dated 26/07/2019. The Applicant had filed its claim for Rs. 663.08 Cores, in relation to IVRCL's Corporate Guarantee Applications against IFCL's Facilities provided to ICTL.

5. The Applicant addressed the letter dated 12/10/2021 to NHAI appraising the state of affairs of IVRCL in informing its decision to initiate recovery proceedings against ICTL. While so, the Lenders Consortium assigned the debt, amounting to Rs. 1001.47 Crores, including the interest amounting to 'Asset Care Reconstruction Enterprise Limited' (ARCE) for a total amount of Rs. 625 Crores on 10/11/2021.

6. The Applicant filed C.P.(IB) No. 20/2022 on 31/12/2021, whereas ACRE filed C.P.(IB) No. 28/2022 to initiate Insolvency Proceedings against ICTL. The Adjudicating Authority vide Order dated 20/04/2020 admitted

C.P.(IB) No. 28/2022. In furtherance of the Public Announcement dated 25/04/2022, the Applicant had submitted its claim in Form – C on 09/05/2022, but the RP sought clarifications, for which the Applicant furnished additional documents, vide emails dated 17/05/2022, 19/05/2022 and 26/05/2022. The RP issued ‘Express of Interest’ (“EOI”) in Form – G on 08/07/2022 for prospective Resolution Applicants to submit the Plan. The RP has rejected the claim of the Applicant, vide e-mail dated 09/08/2022. The Applicant once again sent e-mail communications dated 24/08/2022 and 30/08/2022, but the RP vide e-mail dated 26/09/2022, once again refused to consider the claims of the Applicant. The RP had uploaded the list of Creditors of ICTL on its website and the claims received upto 20/09/2022. The claim of ACRE was admitted at Rs. 1058,49,99,727/- and ACRE holds 99% of voting rights of the CoC of ICTL.

7. Challenging the decision of the RP, the Applicant / the Appellant herein preferred IA No. 1465 of 2022, but the Adjudicating Authority has dismissed the same observing as follows:

12. In compliance with RBI guidelines, all the important contracts / documents namely (I) Concession Agreement dated 25.03.2010 entered into between NHAIFCI, IVRCL and ICTL- annexure 2 (11) Debenture subscription agreement dated 14.10.2011- annexure 3 (II) Share Pledge Agreement dated 2 L 10.2011 and Share buyback agreement dated 14.10.2011- annexure 5 executed between the parties in this case have treated CCDs as Equity. Respondents have quoted different paras of these documents to prove that CCDs were subscribed as Equity and not as Debt

and the applicant's case is that, although the CCDs were initially treated as 'equity' but they subsequently acquired the nature of 'financial debt' since the conditions under the DSA were not fulfilled.

13. We are of the view that occurrence of default or any other happening, unless it is a part of the conditions of the contract/ agreement or later on agreed between the parties to the contract / agreement, cannot change its very nature from equity to debt, No such term/ condition or such agreement between the parties to change the nature of CCDs was brought to our notice. Therefore, this argument of the applicant is not sustainable.

14. Furthermore, these CCDs cannot acquire the status of debt on default also because interest on CCDs is to be paid by the 'sponsor', viz. the holding company of the CD (IVRCL) and the Corporate Debtor was not under any obligation to pay interest on the borrowing, signifying absence of time value of money to the Corporate Debtor. Respondent no 1. in para (59) of its counter has also elaborated that even after default in the OTS proposal, the payment obligation was on holding company, The relevant para is reproduced as under:

"59. The payment obligation in respect of the CCDs was of IVRCL, can further be seen from the proposal for the OTS made by ICTL to the applicant by its letter dated 22 February 2017 (Refer Annexure 8 to the IA at page no. 129 to 131). The amounts payable under the OTS were to be raised by IVRCL through sale of various assets owned by IVRCL, to an entity called TRIL Roads Private Limited (TRPL). The letter stated that the payment is proposed to be made at one go "on receipt of TRPL sale proceeds ". Therefore, the intent of the parties was clear that monies that IVRCL recovered from the sale of TRPL would service the OTS. This is again consistent with the terms of the Concession Agreement which does not allow ICTL to make any payment except as specifically provided in the waterfall arrangement set forth under Article 31 of the Concession Agreement. "

The applicant has not put forward any evidence to counter this statement.

15. *The applicant has already claimed its dues in the liquidation of IVRCL on account of guarantee of IVRCL in the instant case which has already been admitted. Applicant has put its reliance on Case Law, CA (AT) 1186 of 2019 at NCLAT Delhi in EARC Ltd vs Gwalior Bypass Projects Ltd in which it is decided that FC can proceed against the principal borrower as well as Corporate Guarantor at the same time, either in CIRPs or file claims in both CIRPs. But, in this case, the basic point before deciding on multiplicity of claim is to decide whether being a CCD holder it can be treated as Corporate Debtor or not.*

16. *To put emphasis that CCD can be treated as Debt and in turn CCD holder can be treated as Financial Creditor, the applicant has placed its reliance on case laws, SREI Multiple Asset Investment Trust Vs. IDBI Bank Ltd and others, Company Appeal (AT) (Ins) No.593 of 2020 (SREI), Hon'ble NCLAT and SGM Webtech Pvt Ltd vs Boulevard Projects Pvt Limited.*

In SGM webtech, Hon'ble NCLAT has held that if at the time of winding up or admission of a case under IBC , if the debentures are not matured and not convertible for the period of redemption is not complete , they shall be treated as debentures and the consequence is , it will remain as debt . The conditions of this case are not applicable here as the CCDs in this case got matured before admission into CIRP. The applicant has also submitted some other case laws but most of them pertain to OCD or debentures and not to CCD which are entirely different in nature from these financial instruments.

17. *Respondents have mainly relied on Hon'ble Supreme Court judgement "(1990 9supp) Supreme Court Cases 440" in Narendra Kumar Maheshwari vs Union of India and others. The relevant portion of said judgement is reproduced below:*

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

This judgement of Hon'ble Supreme Court and RBI guidelines as referred above are almost on the same lines and give ample clarification that CCDs are to be treated as Equity because there is no option of repayment here and the only option is to convert them into equity. In the present case also put option was available to applicant to convert these CCDs into equity which they did not prefer to exercise.

18. *Considering all the above points, Case Laws and RBI guidelines we are of the view that Compulsory Convertible Debentures subscribed by the applicant are to be treated as Equity and not as Debt. Having settled this question, the petition deserves to be dismissed, hence dismissed and the application is disposed of accordingly.*

8. The Learned Senior Counsel for the Appellant vehemently contended that the CCDs are not to be treated as ‘Equity’, but infact should be treated as ‘Debt’ and that the Adjudicating Authority has erroneously relied on the ‘RBI Master Directions’ on ‘Foreign Investment in India’. This ‘Master Direction’ pertains to instructions issued on Foreign Investments in India and it’s related aspects under

the FEMA. The details and explanations contained in this ‘Master Direction’ with respect to ‘Equity Instruments’ must be construed within the context of ‘Foreign Direct Investments’ (“FDI”) in India and cannot be stretched to cover cases with no element of Foreign Investment. In fact, the Corporate Debtor in its Financial statements for the years FY 2016-17, 2017-18, 2018-19 and 2019-20 has recorded the said CCDs as Debentures under the head ‘*Other Financial Liabilities*’.

9. The Learned Counsel placed reliance on the Judgment of Hon’ble ITAT, Bangalore, dated 25/07/2019 in which the Appellate Tribunal has addressed to the issue as to whether the CCDs are Debt or Equity and observed as follows:

“We would like to observe that such circular in the context of FDI policy of RBI is in a different context i.e. regarding future re-payment obligations in convertible foreign currency and to have control over such future re-payment obligations, the RBI is exercising strict and control so that such future re-payment obligations does not go beyond a point and since in the case of fully convertible debentures, there is no future re-payment obligation, the same was considered as equity for the purpose of FDI policy. In our considered opinion, any definition of any term is to be considered keeping in mind the context in which such definition was given. This definition of convertible debentures given by RBI is in the context of FDI policy to exercise control on future re-payment obligations in convertible foreign currency.”

10. The Learned Senior Counsel also argued that the Adjudicating Authority has wrongly placed reliance on the Judgment of the Hon'ble High Court in **'Narendra Kumar Maheshwari Vs. Union of India & Ors.'** (1990) to conclude that any Instrument that is compulsorily convertible into shares, must be regarded as 'Equity' and not 'Debt' or 'Loan'. It is submitted that this Judgment of the Hon'ble Supreme Court is in the context of a 'Public Interest Litigation' ("PIL") that has challenged that the grant of consent by the 'Controller of Capital Issues' ("CCI") and the observation made therein cannot be used to interpret the nature of CCDs in the context of this Code. Both **'Narendra Kumar Maheshwari V. UOI & Ors.'** (1990 (Supp) SCC 440) and **'Sahara India Real Estate Corporation Ltd. & Ors. V. S.E.B.I & Anr.'** make it pertinently clear that instruments that postulate the repayment of the Principal are indeed Debentures. Even CCDs do not contemplate the repayment of the Principal, they cannot be regarded as Debentures in its classic sense. It is submitted that the CCDs in the instant case postulate the repayment of Principal and according to Clause 8.1 of the DSA, the entire subscription amount, including interest and other charges outstanding of the CCDs, would be due and payable on the occurrence of any event of a Default. In furtherance of Clause 8.1, the Appellant issued a Demand Notice dated 28/05/2021 to the Corporate Debtor under Section 30(2) of the SARFAESI Act, 2002, demanding the payment of the entire Principal amount, along with interest. The Corporate Debtor requested for an OTS which is again an Acknowledgement of Debt and the very fact that the OTS was requested by

the Corporate Debtor and accepted by the Appellant proves that there was consensus between the Parties to treat the CCDs as a 'Debt', repayable to the Appellant.

11. The conversion of CCDs to 'Equity' became impossible due to the Insolvency of IVRCL and by virtue of Clause 8.1 of the DSA. The entire Principal Amount along with interest become due and payable. It is argued that the RP has neither treated the Appellant as a Share Holder nor as a Financial Creditor, leaving the Applicant herein remedy less. It is argued by the Senior Counsel for the Appellant that even assuming that the CCDs in the instant case are Equity Instruments, since they stood matured for conversion in December 2017, in accordance with the second Proviso to Section 21 of the Code, the Appellant should have been included to the CoC. The Appellant placed reliance on the following Judgments in support of his contention that the CCDs ought to be treated as a 'Debt' and not as an 'Equity' in the instant case.

1. *The Assistant Commissioner of Income Tax Circle – 2 (I) (I), Bangalore. V. M/s CAE Flight Training (India) Pvt. Ltd. (Batch Cases).*
2. *Narendra Kumar Maheshwari V. UOI & Ors. (1990 (Supp) SCC 440)*
3. *Sahara India Real Estate Corporation Limited & Ors. V. S.E.B.I. & Anr. (2013 1 SCC 1)*

12. Learned Sr. Counsel Mr. P.H. Arvinth Pandian appearing on behalf of the Respondent No. 1 submitted that ICTL is a 'Subsidiary Company' of IVRCL

(‘Sponsored Company’) holding 100% share capital of ICTL, that the present stage of CIRP is that the Resolution Plan of one SPCP Luxembourg strategies S.A.R.L was approved by the CoC with 100% vote on 08.03.2023. It is contended by the Learned Sr. Counsel that all the important contracts executed between the parties have treated the CCDs as ‘Equity’. IFCI has already claimed its dues in the Liquidation of IVRCL on account of guarantee of IVRCL and it was held that the put option available to IFCI was not an exercise by IFCI. Learned Counsel submitted that the ‘Adjudicating Authority’ has rightly relied on the Judgement of the Hon’ble Apex Court in ‘Narendra Kumar Maheshwari’ (Supra). It is submitted by the Learned Sr. Counsel that the principle payment obligation is that of IVRCL and that the amount does not constitute a ‘debt’ on part of ICTL.

13. It is submitted that Clause 2.11 of the DSA provides that IFCI has a put option on IVRCL for buy-back of the CCDs. The CCDs had matured and were to be automatically converted in terms of the DSA. Admittedly, IFCI did not exercise its put option; that all security was provided by IVRCL under the DSA and no security/collateral has been provided by ICTL on its assets, as is also seen from the filings of ICTL with the ROC, Ministry of Corporate Affairs; that Clause 2.9 read with Clause 3.2 provides that, on default of the buy-back obligations by IVRCL, the CCDs were to covert to equity automatically. The time period for conversion of the CCDs to equity lapsed on 9 November 2017. It is also submitted that the ‘debt to equity ratio’ for the Project is approved by the NHAI. It is a matter

of fact that the CCDs were a part of the 'equity' component of the Project, approved by the NHAI and the Lenders. No approval of the NHAI was sought for recategorization of the CCDs to debt.

14. It is further contended that the category 'debt' or equity in which a CCD holder falls would depend on the status of maturity of the CCDs and the position of the investor at the relevant time. It would also very depending on the facts and circumstances of each case. In the present case, the CCDs had already matured on 09.11.2017 and therefore stood automatically converted to equity.

15. The Learned Counsel Mr. Srinath Sridevan appearing for the 2nd Respondent / ACRE, the sole CoC member argued that the guidelines by RBI on FDI Investments may not have been made under the Code, but nevertheless, they are the guiding principles for understanding the treatment of such instruments. As per RBI Master Direction on FDIs, Debentures which are fully, compulsorily and mandatorily convertible shall be treated as 'Equity Instruments'. Moreover, the occurrence of default or any other happening of an event, unless it is part of the conditions of the Contract / Agreement, which by its nature treats the CCDs as 'Equity' and not 'Debt'. It is contended by the Counsel that CCDs do not constitute Financial Debt as defined under Section 5(8) of the Code as the date for the Project was partly financed by 'Equity' and partly financed by 'Debt'. The 'Debt' for the Project was financed by a Consortium of Lenders, who thereafter assigned their Debt to ACRE, while 'Equity' Component

was provided by the Parent Company of the Corporate Debtor, IVRCL, which is the Sponsor and the Appellant. This is evident from the terms of the Common Loan Agreement entered into between Lenders Consortium and the Corporate Debtor and the Concession Agreement dated 25/03/2010 between NHAI and the Corporate Debtor.

16. The definition of ‘Equity’ under the ‘Concession Agreement’ is reproduced as herein for ease of reference:

“ “Equity” means the sum expressed in Indian Rupees representing the paid up equity share capital of the Concessionaire for meeting the equity component of the Total Project Case, and shall for the purpose of this Agreement include convertible instruments or other similar forms of capital, which shall compulsorily convert into equity share capital of the Company, and any interest free funds advanced by any shareholder of the Company for meeting such equity component, cut does not include Equity Support”

[Equity supplied]

17. The Hon’ble Supreme Court of India in ‘**Narendra Kumar Maheshwari V. Union of India and Ors.**’ categorically held that CCDs do not postulate any repayment of Principal and accordingly do not constitute a ‘Debenture’ in its classic sense. It is submitted that there is no Jural relationship between the Debtor and Creditor in the instant case; the Corporate Debtor cannot raise further debt without the approval of the Lenders Consortium as there was a clause titled ‘Negative Covenants’, which restricted the Corporate Debtor from raising any debt without the written approval of the Lenders Consortium. The Obligation of

the Sponsor was recorded in the Notes to the Balance Sheets of the Corporate Debtor, which has to be interpreted in its truest sense as obligation for discharging liability was of the Sponsor and not the Corporate Debtor.

18. It was contended by the Learned Counsel that the RP had rejected the claim on 09/08/2022, there was no challenge raised by the Appellant herein, until 30/11/2022, which is more than 3 ½ months after the rejection of the claim. Therefore, the Application filed on 30/11/2022 is nothing but a backdoor attempt in hindering the process of Resolution of the Corporate Debtor.

Assessment:

19. The brief point which falls for consideration in this Appeal is whether the fully Convertible Debentures should be treated as an '*Equity Instrument*' or as a '*Debt*' and if the amount stated to be due and payable, falls within the definition of '*Financial Debt*' as defined under the '*Code*'

20. On 31/12/2021, the Appellant / IFCL Limited filed a Section 7 Application seeking initiation of CIRP against the Corporate Debtor. ACRE also filed a Section 7 Application on 22/11/2022 seeking initiation of CIRP against the Corporate Debtor and the Adjudicating Authority vide Order dated 20/04/2022 admitted the Section 7 Application filed by ACRE and CIRP against the Corporate Debtor was initiated. While so, on 25/04/2022, the RP issued a Public Announcement notifying claims of the Creditors. On 09/05/2022, the Appellant filed a claim with the RP as '*Financial Creditor*' claiming a total sum of

Rs. 525,04,21,889/- which also includes the interest amount. On 09/08/2022, the RP rejected the claim of the Appellant.

21. It is seen from the record that it was only after four months i.e. on 30/11/2022 that the Appellant herein filed IA No. 1465/2022 challenging the rejection of its 'Claim'. On 07/12/2022, the RFRP was issued for inviting the Resolution Plans. On 09/03/2023, the e-voting on the Resolution Plan was conducted and the Resolution Plan of the 'Successful Resolution Applicant' ("SRA") was approved by 100% voting share. It is seen that on 14/03/2023 the Adjudicating Authority has upheld the rejection of 'Claims' by the RP and has dismissed the Application.

22. It is the main case of the Learned Senior Counsel Mr. P.S. Raman appearing for the Appellant that the CCDs were wrongly treated as 'Equity' and not as 'Debt', as CCDs could not have been converted to Equity, although they matured for conversion in 2017 as there was a change in the ownership of the Corporate Debtor. The Appellant also filed a Form – D claiming as the Financial Creditor in the Liquidation Proceedings of IVRCL limited under the Corporate Guarantee executed by IVRCL in respect of the very same CCDs issued by the Corporate Debtor and the claim of the Appellant had been admitted in full by the Liquidator of IVRCL who is also the RP in the case of the Corporate Debtor.

23. We rely on the Judgement of the Hon'ble Supreme Court 'Narendra Kumar Maheshwari' (Supra) in the matter of 'Sahara India Real Estate Corporation

Limited & Ors.’ Vs. ‘Securities and Exchange Board of India & Anr.’ reported in (2013) 1 SCC 1, wherein it was observed as follows:

“14.6.8. In Narendra Kumar Maheshwari v. Union of India [1990 Supp SCC 440] , the Hon'ble Supreme Court, observed that in the various guidelines applicable to such instruments, compulsorily convertible debentures are regarded as ‘equity’ and not as a loan or debt. One of the critical considerations adopted by the Hon'ble Supreme Court of India in concluding so, is that ‘a compulsorily convertible debenture does not postulate any repayment of the principal’. The thinking of the Hon'ble Supreme Court revealed in this judgment, not only clarifies the issue, but also provides me with a touchstone to determine whether OFCDs issued by the two Companies are more in the nature of shares or debentures. SIRECL has issued three bonds viz. Abode Bond, Real Estate Bond and Nirman Bond. SHICL has also issued three bonds viz. Multiple Bond, Income Bond and Housing Bond. From a plain reading of the summary of their descriptions at Paras 9.2 and 9.3 above, it is evident that all these six bonds postulate a repayment of the principal. The repayment of the principal will be at the option of the investor. The investor holds the option, which gives her a right to determine whether she would like to get her principal back in cash or as equity shares. Hence, optionally fully convertible debentures unlike their counterpart category of compulsorily convertible debentures do not share the characteristic pointed out by the Hon'ble Supreme Court in arriving at the conclusion that compulsorily convertible debentures are more of equity than of debentures. Thus, all the six financial instruments issued by the two Companies share the defining feature of debentures in that a payment of interest to the investor and a repayment of the principal, albeit at the option of the investor, is postulated.”

24. It is the case of the Appellant that the Adjudicating Authority had wrongly relied on the ‘RBI Master Direction’ as it is related to FDI and has nothing to do

with the Domestic Investments in India. The Contention of the Learned Senior Counsel that the ratio in the Judgment passed by the National ITAT, Bangalore is applicable to the facts of this case, is untenable as the definition of convertible Debentures has to be construed keeping the facts of the attendant case on hand more so when in the Context of RBI Master Direction of FDI clearly distinguishes Non Convertible Debentures (NCTs) and Optionally Convertible Debentures (OCDs) from CCDs and treats the NCDs and OCDs as ‘Debt’. This Tribunal is of the considered view that though there is no express definition or interpretation regarding whether CCDs are to be treated as ‘Debt’ or ‘Equity’, the Adjudicating Authority has rightly relied on Para 4, sub para 4.6 of ‘RBI Master Direction’ of FDI in coming to a conclusion that Debentures which are fully, compulsorily and mandatorily convertible are to be treated as ‘Equity Instrument’.

25. The perusal of the record also shows that the Concession Agreement dated 25/03/2010, the DSA Agreement dated 14/10/2011, the Share Pledge Agreement dated 21/10/2011 and the Share Buy Back Agreement dated 14/10/2011 executed between the Parties clearly treated the CCDs as ‘Equity’. There is no condition in any of the Agreements which changes the nature of the CCDs in the ‘happening of any event’. Merely because of the fact that interest is payable on the CCDs, by the Sponsor, in the case of a default, it cannot be construed that the CCDs fall with the definition of Section 5(8) of the Code. For better understanding of the case, Section 5(8) of the Code is reproduced as hereunder.

(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;

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

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

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

(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;

26. The OTS Proposal which the Learned Senior Counsel Mr. P.S. Raman has relied on, in support of his contention that it is an ‘Acknowledgment of Liability’,

cannot be sustained as it is the proposal issued by the Corporate Debtor in 2017 and the Payment obligation is on the 'Sponsor' and not on the 'Corporate Debtor'.

27. At this juncture, we find it relevant to read Section 71(8) of the Companies Act, 2013 which states that 'debt' means a 'liability' or 'obligation' in respect of a 'Claim' which is due from any person and includes a 'Financial Debt' and 'Operational Debt'. Hence, this Tribunal is of the considered view that ICTL is bound by the terms of the CCDs provided for under the Agreements. It is significant to mention that the exit option for IFCI is only buy-back of CCDs by the IVRCL or conversion of CCDs into equity.

28. This Tribunal is also conscious of the fact that CCDs in the present case have matured before the 'Admission into CIRP'. The Learned Adjudicating Authority has also rightly placed reliance on the decision of the Hon'ble Supreme Court in '**Narendra Kumar Maheshwari Vs. UOI and Ors.**' wherein it is held by the Hon'ble Apex Court that any Instrument, which is fully, compulsorily convertible into shares, is regarded as 'Equity', and not a 'Loan' or 'Debt'. The Argument of the Learned Senior Counsel that this Judgment is with the relevance to a PIL that challenged the grant of consent by the CCI and those observations cannot be used to interpret the nature of CCDs, cannot be sustained as it is the principal and the ratio laid down by the Hon'ble Apex Court '*regarding the nature of CCDs*', is what is to be taken into consideration and it is clear from this

Judgment that CCDs do not postulate any repayment of Principal and accordingly do not constitute a '*Debenture in its classic sense*'.

29. It is pertinent to mention that 'Schedule III' of the DSA includes CCD amounts as part of the equity component of the Project. 'Schedule – II' 'Part – B' of the 'Common Loan Agreement' recognizes the CCDs as equity. The definition of 'equity' includes any 'Compulsory Convertible Debentures' by the ICTL. The contention of the Learned Sr. Counsel for the Appellant that the CCD should be treated as 'debt' would tantamount to a breach of the 'Concession Agreement' and the 'Common Loan Agreement'.

30. It is clear from the record that the investment was in the form of Debentures and these Debentures are convertible into Equity. The terms and conditions of the CCD and the intention of the Parties does not anywhere specify that the instrument would take the character of a Financial Debt, in the happening of any event. The Debt component was assigned by the Consortium of Lenders to ACRE and the Equity component was provided by the Sponsor Company IVRCL and the Appellant herein. This is clear from the terms of the Loan Agreement and the Concession Agreement entered into between NHAI and the Corporate Debtor on 25/03/2010, that defines 'Equity' is defined to include the CCDs as part of the Equity component of the Project.

31. Clause 2.1 of the DSA specifies that interest at 11% p.a., shall be payable on quarterly basis by the '*Sponsor Company*' on the last day of the quarter, till the

buy back of all CCDs / Conversion of CCDs into equity in the SPV Company. The DSA Agreement also clarifies that it is the ‘Sponsor’ and not the ‘Corporate Debtor’ who is liable to pay Coupon interest on the CCD. The Corporate Debtor is not under any obligation to pay the interest on the so called borrowing and therefore the argument of the Learned Senior Counsel that the interest component in the factual matrix of this case, signifies ‘Time value of Money’, cannot be accepted. The CLA dated 22/02/2017 categorically states that the amount infused by the Appellant is to be treated as ‘Equity’, thereby manifesting a relationship of ‘Investor of the Corporate Debtor’.

32. It is evidenced from the material on record that as per terms of the CLA between the Lenders Consortium, assigned to ACRE and the Corporate Debtor, the Corporate Debtor was prohibited from taking any further debt without the consent of the assignee. The Record does not show anywhere that any such approval was sought by the Corporate Debtor from the Lenders Consortium. At the time of disbursal of the amount, it was to be treated as Equity alone and not as ‘Debt’. Even if these amounts were reflected in the financial statements of the Corporate Debtor as ‘Other Financial Liability’, it would depend on the facts of each case as to whether such an entry in the balance sheet construes a ‘Financial Debt’ as defined under the Code. In the instant case, the terms of the DSA, CLA and the ‘Share Agreement’ have to be read together with the fact that it was the Sponsor Company which was liable to pay the interest component and not the

Corporate Debtor. The Hon'ble Supreme Court in a catena of Judgments has categorically held that 'IBC Code, 2016' is a time bound process and any delay in challenging the rejection of the claims cannot be condoned as a matter of routine. In the instant case, the claim of the Appellant was rejected on 09/08/2022 where as the challenge to the Rejection was filed only on 30/11/2022 after a period of four months after the rejection of the claim. Today, the Resolution Plan has already been approved by the CoC by 100% majority voting share.

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

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

05/06/2023
SPR/HA/TM