NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

Company Petition No. (IB)-856(ND)/2022

IN THE MATTER OF:

Globe Capital Market Limited
609, Ansal Bhawan,
16, K. G. Marg,
Connaught Place,
New Delhi-110001
Through its Authorized Representative
Mr. Pawan Kumar Hira ... **Applicant**

VERSUS

Narayan Securities Limited
Having its Registered Office at:
E-1/7, 3rd Floor, East Patel Nagar,
Delhi-110008 ... **Respondent**

Section: 7 of IBC, 2016

Order Delivered on: 03.07.2023

CORAM

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Nishant Bhatia

For the Respondent : Presence not marked

ORDER

PER: SH. L. N. GUPTA, MEMBER (T)

Globe Capital Market Limited (for brevity, the **'Applicant'**) has filed the present petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity, the '**IBC, 2016'**) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate the Corporate Insolvency Resolution Process against M/s Narayan Securities Limited (for brevity, the '**Respondent**').

2. The Respondent namely, M/s Narayan Securities Limited is a Company incorporated on 24.04.1989 with CIN U74899DL1989PLC 035956 under the provisions of the Companies Act, 1956 having its registered office at E-1/7, 3rd Floor, East Patel Nagar, Delhi-110008, which is situated within the jurisdiction of this Tribunal. The Authorized Share Capital of the Respondent Company is Rs.3,00,00,000/- and the Paid-up Share Capital of the Company is Rs.2,40,25,000 /- as per Master Data.

3. It is stated by the Applicant that it was admitted as a "Clearing Member" (CM) of National Securities Clearing Corporation Limited [hereinafter "NSCCL"] and is authorized to carry on the activities of "Clearing and Settlement of deals/trades, on behalf of the Trading Members (TM) of National Stock Exchange of India Limited [hereinafter "NSEIL"], who have executed/ execute deals/trades, on the "Currency Derivatives Segment" of NSEIL. The Respondent was admitted as the "Trading Member" of the Currency

Derivatives Segment of "NSEIL" and was required to 'clear and settle' the deals executed by it, either by itself, by becoming a clearing member of "NSCCL" or by entering into an arrangement with other Clearing Member, through whom the deals could be cleared and settled in accordance with the Rules, bye Laws and Regulations of "NSCCL" [Currency Derivatives Segment]. Consequently, an Agreement between Trading Member and Clearing Member (TM-CM Agreement) dated 28.08.2008 was executed in writing between the Respondent and the Applicant. The subsequent events in terms of the "List of Dates" annexed by the Applicant are as follows:

LIST OF DATES

Sr.No.	Dates	Particulars
1	28.08.2008	Agreement between Trading Member and Clearing Member (TM-CM Agreement) dated 28.08.2008 was executed in writing between the Corporate Debtor and the Financial Creditor.
2.	09.03.2017	Clearing Member-Trading Member Agreement dated 09.03.2017 was executed in writing between Corporate Debtor and Financial Creditor.
3.	11.09.2019	Corporate Debtor became liable to pay a composite sum of Rs.20,13,06,546.11 as on 11.09.2019 to the Financial Creditor towards the services of clearing and settlement of deals, and allied services, availed by the Corporate Debtor from Financial Creditor.
4.	16.09.2019	Corporate Debtor made an "on account part payment" of Rs. 2.00 Crores to the Financial Creditor.
5.	24.09.2021	The Learned Arbitral Tribunal, vide its Award dated 24.09.2021 held that the Corporate Debtor liable to pay a Principal sum of Rs.12,05,64,652.12 to the Financial Creditor alongwith interest computable @ 10% p.a. from the date of the said Award, till the date of full realization.
6.	13.07.2022	Notice of Demand dated 13.07.2022, issued by the Financial Creditor to the Corporate Debtor through its Counsel.
7.	25.07.2022	Upon receipt of the said Notice the Corporate Debtor sent a reply/response communication dated 25.07.2022, admitting its liability. However, the Awarded Amounts have not been paid by the Corporate Debtor, till date.
8	22.08.2022	Hence the present Application.

4. The particulars of the total unpaid financial amount debt and the date of default are mentioned by the Applicant in Part IV of its application, which is reproduced below, for the immediate reference:

Part-IV

PARTICULARS OF FINANCIAL DEBT

1.	**TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT**	As per Arbitration Award dated 24.09.2021.		
2.	**AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF THE AMOUNT AND DATES OF DEFAULT IN TABULAR FORM)**	**A.**	**Principal Awarded Amount outstanding:**	Rs.12,05,64,652.12 /-
		B.	**Interest Amount outstanding: (computed @ 10% p.a. with effect from 24.09.2021 till 31.07.2022)**	Rs. 1,02,39,737.57/-
		C.	**Total Amount in due (As on 31.07.2022) A+B**	Rs. 13,08,04,389.69/-
		D.	**Date on which Default occurred:**	**23.12.2021**
		* The Statement of dues as per Arbitration Award is annexed with the present Application as **<u>Annexure-A10.</u>** That Financial Creditor aforenamed is a Company incorporated under the Companies Act 1956 having SEBI Registration No. INE230663732. Financial Creditor was/is admitted as a "Clearing Member" of National Securities Clearing Corporation Limited [hereinafter "NSCCL"] and is authorized to carry on the activities of "Clearing and Settlement of deals/trades, on behalf of the Trading Members of National Stock Exchange of India Limited [hereinafter "NSEIL"], who have executed/execute deals/trades, on the "Currency Derivatives Segment" of NSEIL. The Corporate Debtor aforenamed had been admitted as the "Trading Member" of the Currency Derivatives Segment of "NSEIL" and were required to 'clear and settle' the deals executed by it, either by itself, by becoming a clearing member of "NSCCL" or by entering into an arrangement with other Clearing Member, through whom the deals could be cleared and settled in accordance with the Rules, bye Laws and Regulations of "NSCCL" [Currency Derivatives Segment]. The Corporate Debtor aforenamed, being desirous of clearing and		

	settling the deals, executed by it on the trading system of "NSEIL" through Financial Creditor, approached Financial Creditor to undertake clearing and settlement of deals and to discharge its duties and obligations towards "NSCCL" on its behalf. Consequently, an Agreement between Trading Member and Clearing Member (TM-CM Agreement) dated 28.08.2008 was executed in writing between the Corporate Debtor and the Financial Creditor. Post execution of the aforesaid referred Agreement Financial Creditor started undertaking the Clearing and Settlement of Deals as well as started discharging its duties and obligations towards "NSCCL", on behalf of the Corporate Debtor. Thus in terms of the afore referred Agreement, the Corporate Debtor became liable/obligated to pay fees, charges brokerage/commission to Financial Creditor. The Corporate Debtor further were/are liable to pay to Financial Creditor the amounts paid/deposited by Financial Creditor, on behalf of the Corporate Debtor, towards its obligations/liabilities on account of payments of margins, daily mark to market settlement, final settlement and other settlements amounts as per the requirements of "NSCCL". The Corporate Debtor was/is further liable/obligated, to pay/reimburse to Financial Creditor, the loss amounts caused due to closing out/liquidation of the open positions by Financial Creditor on account of non-payment of dues by Corporate Debtor. Financial Creditor was/is also admitted as a "Clearing Member" of National Securities Clearing Corporation Limited [hereinafter "NSCCL"] and is authorized to carry on the activities of "Clearing and Settlement of deals/trades, on behalf of the Trading Members of National Stock Exchange of India Limited [hereinafter "NSEIL"], who have executed/execute deals/trades, on the "Futures & Options Segment" of NSEIL. The Corporate Debtor was admitted as the "Trading Member" of the Futures & Options Segment of "NSEIL" and was required to 'clear and settle' the deals executed by it, either by itself, by becoming a clearing member of "NSCCL" or by entering into an arrangement with other Clearing Member, through whom the deals could be cleared and settled in accordance with the Rules, bye Laws and

	Regulations of "NSCCL" [Futures & Options Segment]. The Corporate Debtor being desirous of clearing and settling the deals, executed by it on the trading system of "NSEIL" through Financial Creditor, approached Financial Creditor to undertake clearing and settlement of deals and to discharge its duties and obligations towards "NSCCL" on behalf of Corporate Debtor, with respect to the said Future & Options Segment. Consequently, a Clearing Member-Trading Member Agreement dated 09.03.2017 was executed in writing between Corporate Debtor and Financial Creditor , Post execution of the aforesaid referred Agreement Financial Creditor started undertaking the Clearing and Settlement of Deals as well as started discharging the duties and obligations of the Corporate Debtor towards "NSCCL", even as far as the "Future & Options Segment" of the "NSEIL" was/is concerned. Thus in terms of the afore referred Agreement, the Corporate Debtor aforenamed became liable/obligated to pay fees, charges brokerage/commission to Financial Creditor. The Corporate Debtor was further liable to pay to Financial Creditor the amounts paid/deposited by Financial Creditor, on its behalf, towards its obligations/liabilities on account of payments of margins, daily mark to market settlement, final settlement and other settlements amounts as per the requirements of "NSCCL". The Corporate Debtor was/is further liable/obligated, to pay/reimburse to Financial Creditor, the loss amounts caused due to closing out/liquidation of the open positions by Financial Creditor on account of non-payment of dues by the Corporate Debtor. Accordingly, the Corporate Debtor became liable to pay a composite sum of Rs. 20,13,06,546.11 as on 11.09.2019 to the Financial Creditor towards the services of clearing and settlement of deals, and allied services, availed by the Corporate Debtor from Financial Creditor, pursuant to the execution of the two Agreements, referred hereinabove. On 16.09.2019, the Corporate Debtor made an "on account part payment" of Rs. 2.00 Crores to the Financial Creditor. It would be pertinent to mention here that in terms of the afore referred Two

Agreements executed between the Corporate Debtor and the Financial Creditor, the Corporate Debtor had made certain deposits/furnished Bank Guarantees, drawn in favour of the Financial Creditor towards security. On 16.09.2019, Financial Creditor invoked the said Bank Guarantees, and realized a composite sum of Rs. 6.00 Crores. The said amount(s) were duly credited to the Account of the Corporate Debtor .

That since the Corporate Debtor failed/avoided to comply with its payment obligations qua Financial Creditor, Financial Creditor was constrained to invoke the Arbitration Proceedings in terms of the afore referred Agreements as per the norms, guidelines and byelaws framed by the National Stock Exchange of India Limited (NSE). The said Arbitration Proceedings bearing Arbitration Matter No. NSEDRO/0006533/21-22/ARB was conducted under the aegis of NSE. The said Arbitration Matter was decided by the Learned Panel of Arbitrators consisting of Justice Mahmood Ali Khan (Retd.) [Presiding Arbitrator], Mr. Dipankar Basu and Mr. Tejinder Singh Laschar, Arbitrators vide their Award dated 24.09.2021. The Learned Arbitral Tribunal, vide its Award dated 24.09.2021 held that the Corporate Debtor liable to pay a Principal sum of Rs. 12,05,64,652.12 to the Financial Creditor alongwith interest computable @ 10% p.a. from the date of the said Award, till the date of full realization.

It is pertinent to mention here that as per the information available with the Financial Creditor, the Corporate Debtor has not challenged the said Award and the Arbitral Award has since attained finality.

It would be pertinent to bring to the notice of this Hon'ble Tribunal, that the Financial Creditor was constrained to issue a Notice of Demand dated 13.07.2022, through its Counsel, to the Corporate Debtor whereby the Corporate Debtor was called upon to pay the aforesaid Awarded amount alongwith interest computed till 04.07.2022. The said Notice was duly received by the Corporate Debtor, through speed post on 16.07.2022. The said Notice was also served upon the Corporate Debtor through e-mail on 18.07.2022.

Upon receipt of the said Notice the Corporate Debtor sent a reply/response communication dated 25.07.2022, whereby the

	Agreements executed between the Corporate Debtor and the Financial Creditor, the Corporate Debtor had made certain deposits/furnished Bank Guarantees, drawn in favour of the Financial Creditor towards security. On 16.09.2019, Financial Creditor invoked the said Bank Guarantees, and realized a composite sum of Rs. 6.00 Crores. The said amount(s) were duly credited to the Account of the Corporate Debtor . That since the Corporate Debtor failed/avoided to comply with its payment obligations qua Financial Creditor, Financial Creditor was constrained to invoke the Arbitration Proceedings in terms of the afore referred Agreements as per the norms, guidelines and byelaws framed by the National Stock Exchange of India Limited (NSE). The said Arbitration Proceedings bearing Arbitration Matter No. NSEDRO/0006533/21-22/ARB was conducted under the aegis of NSE. The said Arbitration Matter was decided by the Learned Panel of Arbitrators consisting of Justice Mahmood Ali Khan (Retd.) [Presiding Arbitrator], Mr. Dipankar Basu and Mr. Tejinder Singh Laschar, Arbitrators vide their Award dated 24.09.2021. The Learned Arbitral Tribunal, vide its Award dated 24.09.2021 held that the Corporate Debtor liable to pay a Principal sum of Rs. 12,05,64,652.12 to the Financial Creditor alongwith interest computable @ 10% p.a. from the date of the said Award, till the date of full realization. It is pertinent to mention here that as per the information available with the Financial Creditor, the Corporate Debtor has not challenged the said Award and the Arbitral Award has since attained finality. It would be pertinent to bring to the notice of this Hon'ble Tribunal, that the Financial Creditor was constrained to issue a Notice of Demand dated 13.07.2022, through its Counsel, to the Corporate Debtor whereby the Corporate Debtor was called upon to pay the aforesaid Awarded amount alongwith interest computed till 04.07.2022. The said Notice was duly received by the Corporate Debtor, through speed post on 16.07.2022. The said Notice was also served upon the Corporate Debtor through e-mail on 18.07.2022. Upon receipt of the said Notice the Corporate Debtor sent a reply/response communication dated 25.07.2022, whereby the
	Corporate Debtor acknowledged its liability towards the Financial Creditor in terms of the aforesaid Arbitral Award dated 24.02.2021, however the Corporate Debtor expressed its inability to make the payment of the awarded sum, to the Financial Creditor, immediately.

5. Thus, as per Part IV of the Application, the Applicant has claimed a debt of Rs.13,08,04,389.69/- including interest. Further, the Applicant has relied on 23.12.2021 as 'the date of default'.

6. The Applicant has annexed and relied upon the following documents in support of the existence of the debt so claimed -

i) Copy of the Board Resolution dated 08.06.2022.

ii) Copy of the Agreement dated 28.08.2008.

iii) Copy of the Agreement dated 09.03.2017.

iv) Copy of the Arbitration Award dated 29.04.2021.

v) Copy of the Notice 13.07.2022 along with a copy of the postal receipts as well as the delivery status reports retrieved from the official website of India Post.

vi) Copy of the e-mail dated 18.07.2022.

vii) Certificate under Section 65B of the Indian Evidence Act.

viii) Statement of dues as per the Arbitration Award.

7. Based on the aforesaid facts and documents, the Applicant has prayed for the initiation of CIRP against the Respondent.

8. On issuance of the notice, Mr. Ramesh Chandra, Director of the Respondent appeared on 19.01.2023, admitted the debt, and submitted that the Respondent does not wish to file any reply. In the wake, on the issuance of direction by this Bench, both parties have filed their respective Affidavits stating that they are not related to each other and that the present application is not collusive.

9. Though the Respondent admitted the default during the course of hearings, we would still like to examine, **Whether the debt claimed by the Applicant is a Financial Debt.** Accordingly, we visit the definition of "Financial Debt" as given in Section 5(8) of IBC 2016, which reads thus:

(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 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;

[1][*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;

On perusal of the abovesaid definition, it is observed that "Financial Debt" has the following 03 necessary ingredients:

a) debt along with interest if any;
b) disbursement
c) time value of money

Further, the Financial Debt also includes transactions as stipulated under Section 5(8)(a) to 5(8)(i) of IBC 2016.

10. On perusal of the application, we find that the Applicant, in Column 1 of Part-IV of the application where particulars of the total amount of debt along with the date(s) disbursement are to be given, has mentioned: "*As per Arbitration Award dated 24.09.2021*".

11. Accordingly, we would like to examine whether the Arbitration Award dated 24.09.2021 will bring the claim of the Applicant within the ambit of Financial Debt. We are aware that the Hon'ble Supreme Court in its judgment dated 04.08.2021 in the matter of "**Dena Bank (now Bank of Baroda) vs. C. Shivakumar Reddy and Anr. in Civil Appeal No.1650 of 2020"**, has held that a "Decree" will give a fresh cause of action to a Financial Creditor to initiate Section 7 proceedings. The relevant extract of the judgment is reproduced below:

> *"143. Moreover, a* ***judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery****, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid."*
>
> *(Emphasis supplied)*

12. On perusal of the Judgement (Supra), it is observed that *a* judgment and/or a decree for money in favour of the Financial Creditor would give rise to a fresh cause of action for the Creditor to initiate Section 7 proceedings.

13. However, when we come to the case in hand, the mere fact the Decree/Award is in favour of the Applicant, will not decide the nature of the debt of the Applicant. We are conscious of the fact that a Decree Holder is a 'Creditor' within the meaning of Section 3(10) of IBC, 2016. However, a Creditor can be an "Operational Creditor" or a "Financial Creditor". Here we refer to the Judgement of Hon'ble NCLAT dated 14.08.2020 passed in the matter of "**Sh. Sushil Ansal v. Ashok Tripathi & Ors. in Company Appeal (AT) (Insolvency) No. 452 of 2020"**, wherein the following was held:

> *"20**. A 'decree-holder' is undoubtedly covered by the definition of 'Creditor' under Section 3(10) of the 'I&B Code' but would not fall within the class of creditors classified as 'Financial Creditor' unless the debt was disbursed against the consideration for time value of money or falls within any of the clauses thereof as the definition of 'financial debt' is inclusive in character**. A 'decree' is defined under Section 2(2) of the Code of Civil Procedure, 1908 ("CPC" for short) as the formal expression of an adjudication which conclusively determines the rights of the parties with regard to the matters in controversy in a lis. A 'decreeholder', defined under Section 2(3) of the same Code means any person in whose favour a decree has been passed or an order capable of execution has been made. Order XXI Rule 30 of the CPC lays down the mode of execution of a money decree. According to this provision, a money decree may be executed by the detention of judgment-debtor in civil prison, or by the attachment or sale of his property, or by both. Section 40 of the 'Real Estate (Regulation and Development) Act, 2016' lays down the mode of execution by providing that the RERA may order to recover the amount due under the Recovery Certificate by the concerned Authority as an arrear of land revenue. In the instant case, RERA has conducted the recovery proceedings at the instance of Respondent Nos.1 & 2 against the Corporate Debtor which culminated in issuance of Recovery Certificate and passing of order*

*under Section 40 of the 'Real Estate (Regulation and Development) Act, 2016' directing the concerned Authority to recover amount of Rs.73,35,686.43/- from the Corporate Debtor as an arrear of land revenue. As already stated elsewhere in this Judgment, Respondent Nos.1 & 2 instead of pursuing the matter before the Competent Authority sought triggering of Corporate Insolvency Resolution Process against the Corporate Debtor resulting in passing of the impugned order of admission which has been assailed in the instant appeal. **The answer to the question whether a decree-holder would fall within the definition of 'Financial Creditor' has to be an emphatic 'No' as the amount claimed under the decree is an adjudicated amount and not a debt disbursed against the consideration for the time value of money and does not fall within the ambit of any of the clauses enumerated under Section 5(8) of the 'I&B Code"**.*

(Emphasis supplied)

From the aforesaid Judgement of the Hon'ble NCLAT, it can be inferred that mere holding of a Decree/Award per se by an individual will not make its debt fall within the ambit of "Financial Debt".

14. At this stage, we consider it appropriate to refer to the Judgement of the Hon'ble High Court of Madras dated 01.12.2022 in the matter of "**Cholamandalam Investment and Finance Company Ltd. Vs. Navrang Roadlines Private Limited O.S.A.(CAD) No.115 of 2022"**, wherein the Hon'ble Court observed the following as regards to what determines the categorization of an amount payable under the final decree:

*"12 ......Consequently, the nature of the underlying claim of the creditor, would determine the categorisation of the amount payable under the final decree passed adjudication of the same claim. **The liability arising out of an arbitral award or a court decree would be***

categorised as either financial or operational debt <u>depending on the nature of the underlying claim</u> which stands crystallised through the arbitral or court proceedings.

(Emphasis supplied)

Further, the Principal Bench of NCLT in the matter of "**M/s Jones Lasalle Building Operations Pvt. Ltd. Vs Celebration City Projects Pvt. Ltd." (IB) -652(PB)/2019** dated 26.09.2022 observed the following while referring to the Judgment of Hon'ble NCLAT passed in the matter of "**Mukul Agarwal Vs Royale Resinex Pricate Limited**" in Company Appeal (AT) (Insolvency) No. 777 of 2020:

> *"……… In this case, the Hon'ble NCLAT had held that **a decree of the civil court will not alter the basic nature of the transaction**. The transaction prima facie has to be considered for the purpose of adjudicating the claim and the decree of the court is a measure of debt and that would be the manner in which it should be heard."*

15. From the conjoint reading of the aforesaid Judgements, it can be observed that -

a) a Decree/Award of the Court/Tribunal is a measure of debt,

b) mere holding of a Decree per se by an individual will not make its debt fall within the ambit of "Financial Debt",

c) it is the underlying claim under a decree that will decide the nature of the debt, whether it is Financial or Operational debt.

16. Further, from the perusal of Part IV of the application and the Arbitration Award dated 24.09.2021, it is observed that the Applicant and the Respondent were involved in the derivative transactions.

17. Accordingly, we would like to examine **Whether the claim underlying the Arbitral Award dated 24.09.2021, is arising out of the transaction as specified under Section 5(8)(g) of IBC, 2016**. The contents of Section 5(8)(g) of IBC 2016 read thus:

> *"(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;"*
>
> *(Emphasis supplied)*

On perusal of the above, it is observed that under Section 5(8)(g) of IBC 2016, the Financial Debt would include *any derivative transaction entered into for protection or seeking benefit from fluctuation in any rate or price*. Further, for calculating the value of derivative transactions, only the market value of such transactions has to be taken into account.

18. On search, we find that the term "Derivative" is not defined under IBC 2016. In order to understand more about derivative transactions, we refer to Section 2(ac) of the Securities Contracts (Regulation) Act, 1956 in terms of Section 3(37) of IBC 2016, which reads thus:

> *"(ac)] "derivative" includes—*
>
> *(A) a **security** derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;*
> *(B) a **contract** which derives its value from the prices, or index of prices, of underlying securities;"*
>
> *(Emphasis provided)*

Since the term "Derivative" includes contract and security, therefore, we would like to refer to their definitions given under Section 2(a) and 2(h) of the Securities Contracts (Regulation) Act, 1956.

"Definitions.

2. In this Act, unless the context otherwise requires, —

*(a) "**contract**" means a contract for or relating to the purchase or sale of securities;*
….
….

*(h) "**securities**" include— (i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;*

(ia) derivative;

(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;]

(ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(id) units or any other such instrument issued to the investors under any mutual fund scheme;]

(ii) Government securities;

(iia) such other instruments as may be declared by the Central Government to be securities; and

(iii) rights or interest in securities"

19. Now, having gone through the definitions of "Derivative" and related terms, we would like to examine whether the Arbitral Award is arising on account of any "Derivative Transaction" specifically in terms of Section 5(8)(g)

of IBC, 2016. Accordingly, we refer to the Arbitral Award dated 24.09.2021 as annexed by the Applicant, which reads thus:

47

INDIA NON JUDICIAL

Government of National Capital Territory of Delhi

e-Stamp

सत्यमेव जयते

Certificate No.	: IN-DL27667105488118T
Certificate Issued Date	: 23-Sep-2021 12:56 PM
Account Reference	: NONACC (BK)/ dl-corpbk/ CORP GUJRAN/ DL-DLH
Unique Doc. Reference	: SUBIN-DLDL-CORPBK51212821356191T
Purchased by	: MAHMOOD ALI KHAN
Description of Document	: Article Others
Property Description	: NA
Consideration Price (Rs.)	: 0 (Zero)
First Party	: MAHMOOD ALI KHAN
Second Party	: NA
Stamp Duty Paid By	: MAHMOOD ALI KHAN
Stamp Duty Amount(Rs.)	: 1,20,570 (One Lakh Twenty Thousand Five Hundred And Seventy only)

Please write or type below this line

Before Justice Mahmood Ali Khan (Retd.) (Presiding Arbitrator), Mr. Dipankar Basu and Mr. Tejinder Singh Laschar, Arbitrators
In the matter of Arbitration under the Bye Laws, Rules and Regulations of the National Stock Exchange of India Ltd
A.M. No. – NSEDRO/0006533/21-22/ARB
Between

Globe Capital Market Ltd.
609, Ansal Bhawan,
16 K G Marg,
New Delhi – 110001 ......Applicant

And

Narayan Securities Ltd.
E-1/7, III Floor,
East Patel Nagar,
New Delhi – 110008 ......Respondent

Award

0008783493

VOID VOID VOID

Statutory Alert:

1. The authenticity of this Stamp certificate should be verified at 'www.shcilestamp.com' or using e-Stamp Mobile App of Stock Holding. Any discrepancy in the details on this Certificate and as available on the website / Mobile App renders it invalid.
2. The onus of checking the legitimacy is on the users of the certificate.
3. In case of any discrepancy please inform the Competent Authority.

Globe Capital Market Limited New Delhi

TRUE COPY

NATIONAL STOCK EXCHANGE OF INDIA LIMITED

Before the Panel of Arbitrators: Justice Mahmood Ali Khan (Retd), Presiding Arbitrator

Mr. Dipankar Basu, Arbitrator

Mr. Tejinder Singh Laschar, Arbitrator

In Arbitration matter no.: NSEDRO/0006533/21-22/ARB

Globe Capital Market Limited,

609, Ansal Bhawan, 16, K. G. Marg,

New Delhi – 110001. ...Applicant/Clearing Member

Versus

Narayan Securities Limited,

E – 1/7, 3rd Floor, East Patel Nagar,

New Delhi – 110008. ...Respondent/Trading Member

AWARD

1. The Clearing Member is seeking an award against the respondent Trading Member for an amount of Rs. 14,31,70,502.30 along with interest @ 15% p.a. calculated w.e.f. 01.04.2021 till the date of full payment of the award amount and future interest at such rate as the Arbitral Tribunal deemed fit and proper.

2. Briefly stated the case of the applicant is that the respondent Trading Member became its constituent after executing Clearing Member – Trading Member Agreement on 09.03.2017 with respect to Future & Option Segment and Clearing Member – Trading Agreement dated 28.08.2008 with respect to Currency Derivative Segments for the purpose of, inter alia, clearing and settlement of its obligations on NSEIL for Future & Option Segment and Currency Derivative Segment. In terms of those agreements, the respondent was obliged to pay certain fees, charges, brokerage, commission etc., besides other amounts towards daily mark to market settlement, final settlement etc. As a Trading Member the respondent was further obliged to reimburse any loss amount caused by closing/liquidation of open positions, by the applicant being clearing Member in the event of non-payment of dues by the respondent towards margins, daily mark to market settlement, final settlement, fees, charges, brokerage, commission, penalties, and expenses. A composite sum of Rs. 20,13,06,546.11 became due against the respondent towards services of clearing and settlement of deals, and allied services, availed of by it from the applicant against which it

made part payment of Rs. 2 crores on 16.09.2019. In terms of the aforementioned agreements, the respondent also made certain deposits/furnished Bank Guarantees drawn in favour of the applicant by way of security. The applicant on 16.09.2019 invoked the said Bank Guarantees and realised a composite sum of Rs. 6 crores. After crediting the aforementioned amounts realised in the respondent's ledger account a net principal sum of Rs. 12,05,64,652.12 as on 30.04.2020 was payable by the respondent to the applicant. The respondent has acknowledged in a written communication dated 01.01.2020 its liability to pay this amount. According to the applicant, together with the interest amounting to Rs. 2,26,05,850 calculated @ 15% p.a. on the principal sum a total sum of Rs. 14,31,70,502.30 is due against the respondent as on 31.03.2021 which is recoverable from the respondent. The respondent has failed to pay the amount due. The applicant has prayed for passing an award in the amount of Rs. 14,31,70,502.30 with future interest @ 15% p.a. from 01.04.2021 to the date of full realization and future interest at such rate as this tribunal deemed fit and proper.

3. The respondent in its reply to the arbitration application has submitted that it was having in August 2018 substantial number of shares of DHFL but due to a drastic fall in the prices of those shares on 21.09.2018, it suffered huge losses which wiped of its entire capital. The respondent incurred a total liability of Rs. 70 crores and the applicant partly recovered it by selling respondent's securities with it as margin/collateral or by invoking Bank Guarantee provided by it. An amount of Rs. 2 crores was paid by the respondent on 16.09.2019 leaving a sum of Rs. 12,05,64,652.12 due against it. The respondent is also claiming interest accrued on this amount. Net worth of the respondent is in negative and it does not have any resources left to pay the amount claimed in this case. It is requested that this Tribunal taking a sympathetic view may pass such order in the interest of justice and fair play.

4. We have heard Mr. Kapil Marwah, authorised representative of the applicant clearing member and Mr. Ramesh Chandra Saraf and Mr. Ashish Saraf, authorised representatives of the respondent trading member. We have also carefully considered the documents filed by the parties in this case.

5. The respondent in its reply filed to the arbitration application has admitted that a principal amount of Rs. 12,05,64,652.12 was due and payable by it to the applicant as on 30.04.2020. It has also not denied that adding a sum of Rs. 2,26,05,850/- towards interest calculated @ 15% p.a. on the said principal sum a total amount of Rs. 14,31,70,502.30 was outstanding against it as per the ledger account. The documents filed by the applicant also vouchsafe the veracity of its claim.

6. Mr. Ramesh Chandra Saraf, authorised representative, of the respondent, during the course of arguments, has submitted that as a result of drastic fall in the price of the DHFL shares held by it on 21.09.2018 the respondent suffered huge loss resulting in to an outstanding debit balance of Rs. 70 crores. The respondent made a part payment of Rs. 2 crores on 19.09.2019 and some amount was realised by the applicant by selling the respondent's collateral securities or the Bank Guarantee leaving the balance amount of Rs. 12,05,64,652.12 due against the respondent as claimed by the applicant. Mr Saraf has

submitted that this arbitral tribunal may pass an award in the sum of Rs. 12,05,64,652 in favour of the applicant and against the respondent. As regards the remaining claim Mr. Saraf has submitted that it is toward the interest @ 15% p.a. on the principal amount which the respondent is not in a position to pay since its net worth is in negative and it has left with no resources to raise fund. He has, therefore, requested that the amount claimed in the application as interest may be waived considering the financial distress of the respondent.

7. Mr Marwah, representative of the applicant, conversely, contended that the respondent in its reply has clearly admitted the claim as pleaded by the applicant so an award in the amount of Rs. 14,31,70,502.30 is liable to be passed against the respondent. However, during the discussion, though, he initially pressed for passing award in the total amount claimed in the arbitration application, but on persistent request of the representative of the respondent he relented and waived off the claim towards interest and agreed to the passing of the award in the amount of Rs. 12,05,64,652. As such both of the parties have requested that an award in the amount of Rs. 12,05,64,652.12 may be passed against the respondent instead of the total sum claimed in the prayer clause.

8. The representative of the applicant has submitted that the respondent-trading member has not paid to the Exchange, its share of applicable arbitration fee of Rs. 2,50,431/- and the same has been realised by the Exchange from the applicant and that the respondent should be directed to pay the same to the applicant. The representative of the respondent, however, reiterated that the respondent has no money to pay it. The representative of the applicant did not press his request any further.

9. Accordingly with the consent of the parties an award in the amount of Rs. 12,05,64,652.12 is passed in favour of the applicant clearing member and against the respondent trading member. The respondent shall pay the amount awarded within three months from the date of this award. In the event respondent has failed to pay the amount by the date stipulated above, the applicant clearing member shall be entitled to receive interest on the amount in default @ 10% p.a. from the date of the award to the date of full realisation.

This award is announced at Delhi on this 24th day of September 2021.

(Justice Mahmood Ali Khan, Retd.)	(Dipankar Basu)	(Tejinder Singh Laschar)
Presiding Arbitrator	Arbitrator	Arbitrator

Globe Capital Market Limited
New Delhi

On perusal of the abovesaid Award, it is observed that the Arbitral Award was passed for the claim arising out of the Trading Agreement dated 28.08.2008, which was executed with respect to Currency Derivative Segments. In terms of the Agreement, the Respondent was obliged to pay certain *fee, charges, brokerages, commission etc.*, Besides, other amounts toward the daily mark-to-market settlement, final settlement etc. Further, *the claim was also raised on account of loss of amount caused by closing/ liquidation of open position, by the Applicant being clearing Member in the event of non-payment of dues by the respondent towards margins, daily mark to market settlement, final settlement, fees, charges, brokerage, commission, penalties, and expenses.*

20. As we have already noted above in para 17, in order to classify a "Derivative Transaction" as a "Financial Debt" under Section 5(8)(g) of IBC 2016, it is necessary that such a transaction is *entered into in connection with protection against or benefit from fluctuation in any rate or price.* On perusal of the Arbitral Award, we observe that it has not been passed for any such Derivative Transaction entered between the parties to seek any protection or benefit from fluctuation in any rate or price. Rather, the Arbitral Award has been passed for claim towards certain fees, charges, brokerages, commission etc., and for the loss caused to the Applicant on account of non-payment of dues by the respondent towards margins, daily mark-to-market settlement, final settlement, fees, charges, brokerage, commission, penalties, and expenses. **Hence, in view of the above, we find that the underlying transactions between the parties are outside the ambit of Section 5(8)(g) of IBC, 2016 and therefore, the claim based on the Arbitral Award dated**

24.09.2021 raised by the Applicant is not covered within the ambit of Financial Debt.

21. However, during the course of the hearing on 10.05.2023, the Ld. Counsel appearing for the Applicant also relied upon the Judgement of the Hon'ble Supreme Court in "**Pioneer Urban Land and Infrastructure & Anr. Vs Union of India & Ors.**" Writ Petition (Civil) No. 43 of 2019 to substantiate that the claim of the Applicant falls within the ambit of Financial Debt. Hence, we would like to visit the relevant paragraph of the Judgement (supra), which reads thus:

> *"65. And now to the precise language of Section 5(8)(f). First and foremost, the sub-clause does appear to be a residuary provision which is "catch all" in nature. This is clear from the words* ***"any amount" and "any other transaction" which means that amounts that are "raised" under "transactions" not covered by any of the other clauses, would amount to a financial debt <u>if they had the commercial effect of a borrowing</u>****. The expression "transaction" is defined by Section 3(33) of the Code as follows:*
>
> > *(33) "transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;*
>
> *As correctly argued by the learned Additional Solicitor General, the expression "any other transaction" would include an arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they*

pay instalments at various stages of construction, so that they themselves then fund the project either partially or completely."

(Emphasis placed)

In the instant case, the Applicant has failed to clearly demonstrate that the transaction entered between the parties was having any commercial effect of borrowing. Rather, as we have already noted above in Para 19, the claim of the Applicant is that owing to the agreement Trading Agreement dated 28.08.2008, the Respondent was obliged to pay certain *fee, charges, brokerages, commission,* amounts toward the daily mark-to-market settlement, final settlement and *on account of loss of amount caused by closing/ liquidation of open position, by the Applicant being clearing Member in the event of non-payment of dues by the respondent towards margins, daily mark to market settlement, final settlement, fees, charges, brokerage, commission, penalties, and expenses.* **Hence, in our considered view, the amount claimed by the Applicant out of the Arbitral Award dated 24.09.2021 is neither based on any transaction having the time value of money nor the commercial effect of borrowing. At the most, the claims of the Applicant (other than brokerage, fee, etc.) could be in the nature of "damages" which do not fall within the ambit of Financial Debt.**

22. Even otherwise, an application under Sections 7, 9, or 10 of IBC 2016 can only be filed against a "Corporate Debtor" as defined under Section 3(8) of IBC 2016. As per the aforesaid definition, a "corporate person", who owes a debt to any person is called a Corporate Debtor. The term "Corporate Person" is defined under Section 3(7) of IBC 2016, which recognizes a Company and

an LLP as a Corporate person. However, it is noticed that as per this definition, the "Corporate Person" does not include a "Financial Service Provider".

23. The term "Financial Service" is defined under Section 3(16) of IBC 2016 and the term "Financial Service Provider" and "Financial Sector Regulator" are defined under Section 3(17) and 3(18) respectively. The contents of Sections 3(16), 3(17) and 3(18) read thus –

> (16) "financial service" includes any of the following services, namely: –
>
> (a) accepting of deposits;
>
> (b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;
>
> (c) effecting contracts of insurance;
>
> (d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person;
>
> (e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of—
>
> (i) buying, selling, or subscribing to, a financial product;
>
> (ii) availing a financial service; or
>
> (iii) exercising any right associated with a financial product or financial service;
>
> (f) establishing or operating an investment scheme;
>
> (g) maintaining or transferring records of ownership of a financial product;
>
> (h) underwriting the issuance or subscription of a financial product; or
>
> (i) selling, providing, or issuing stored value or payment instruments or providing payment services;
>
> (17) "financial service provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator;
>
> (18) "financial sector regulator" means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government;

24. Since Section 3(16)(b) and (d) of IBC 2016 contains the word "Financial Products", therefore, we also refer to Section 3(15) of IBC 2016, which reads thus:

> (15) "financial product" means securities, contracts of insurance, deposits, credit arrangements including loans and advances by banks and financial institutions, retirement benefit plans, small savings instruments, foreign currency contracts other than contracts to exchange one currency (whether Indian or not) for another which are to be settled immediately, or any other instrument as may be prescribed;

25. It is a matter of record that the Applicant in Part IV of the application has specifically stated that -

> *"The Corporate Debtor aforenamed had been admitted as the "Trading Member" of the Currency Derivatives Segment of "NSEIL" and were required to 'clear and settle' the deals executed by it, either by itself, by becoming a clearing member of "NSCCL" or by entering into an arrangement with other Clearing Member, through whom the deals could be cleared and settled in accordance with the Rules, bye Laws and Regulations of "NSCCL" [Currency Derivatives Segment]."*

26. In view of the abovementioned averment, it won't be wrong to say that the Respondent was dealing with "Financial Product" as defined under Section 3(15) of IBC 2016. **Hence, we conclude that the Respondent was providing "Financial Services" in terms of Section 13(d) of IBC 2016.**

27. Further, from the record it is seen that the Respondent was registered with SEBI, which is evident from the "Clearing Member – Trading Member Agreement dated 09.03.2017". The relevant contents of the Agreement are reproduced overleaf:

Clearing Member – Trading Member Agreement

This agreement is made on this day 09th of March ' 2017 between M/s GLOBE CAPITAL MARKET LTD., a company having its registered office at 609, Ansal Bhawan, 16 K.G. Marg, New Delhi – 110 001 and having SEBI Registration No. INF230663732 (hereinafter called the Clearing Member) which expression shall unless repugnant to the context or meaning thereof include its successors, legal representatives and permitted assigns) and M/s NARAYAN SECURITIES LTD., a company/partnership firm/individual having its registered office/office/residence at E-1/7, East Patel Nagar, 3rd Floor, opp. Metro Pillar No. 178, New Delhi and having SEBI Registration No. INF 230935437 (hereinafter called the Trading Member) which expression shall unless repugnant to the context or meaning thereof include its successors, legal representatives and permitted assigns).

For Narayan Securities Limited

Whereas

1. M/s. NARAYAN SECURITIES LTD. has been admitted as Trading Member of Futures & Options Segment of National Stock Exchange of India Limited [hereinafter referred to as "NSEIL"] and is required to clear and settle the deals executed by it /him, either by itself / himself, by becoming Clearing Member of the National Securities Clearing Corporation Limited [hereinafter referred as "NSCCL"] or have an arrangement with other Clearing Member through whom the deals could be cleared and settled, in accordance with the Rules, Bye Laws and Regulations of NSCCL (Futures & Options Segment).

For Globe Capital Market Ltd.

2. M/s. Globe Capital Market Ltd. has been admitted as Clearing Member of the NSCCL and is authorised to carry on the activities of clearing and settlement of deals/trades (hereinafter referred to as deals) on behalf of trading members of NSEIL who have executed deals/trades on the Futures & Options Segment of NSEIL.

3. The Trading Member desires to clear and settle the deals executed by it /him on the Trading System of NSEIL through the Clearing Member and accordingly approached the Clearing Member to undertake clearing & settlement of deals and to discharge its duties & obligations towards NSCCL on it / his behalf and the Clearing Member has also agreed to do the same on the terms and conditions contained herein.

NOTARY GOVT. OF INDIA GURDEEP KHERA DELHI

Now, therefore, this agreement witnesseth as follows:

1. In consideration of Trading Member agreeing to pay certain fees and charges mentioned herein and abide by the terms and conditions contained in this agreement, Rules, Bye Laws and Regulations of NSCCL and NSEIL, the Clearing Member undertakes upon itself /himself, to the total exclusion of the Trading Member, the obligation of clearing and settlement of the deals of the Trading Member executed/done on the Futures & Options Segment of the NSEIL and to do all the acts, deeds and activities incidental to the clearing and settlement of the deals.

For Globe Capital Market Ltd. Authorised Signatory/Director

2. **Rights of the Clearing Member**

(1) The Clearing Member shall be entitled to demand/receive from the Trading Member such deposits in such form as it/ he may specify from time to time.

(2) Without prejudice to the generality of the above, the Trading Member shall place with the Clearing Member such amount as may be prescribed by NSCCL/NSE from time to time as deposit which shall be maintained at any point of time. Subject to the provisions of Bye Laws,

For Globe Capital Market Ltd.	For Narayan Securities Limited	For Narayan Securities Limited
Authorised Signatory/Director	Director	Director

28. Since, the Respondent was registered with SEBI, the Services of the Respondent could be regulated by SEBI, which is covered under the definition of "Financial Sector Regulator" under Section 3(18) of IBC 2016.

29. In view of the aforesaid discussion, **we conclude that Respondent is a "Financial Service Provider" in terms of Section 3(17) of IBC 2016 and as a consequence of that, it cannot be considered a "Corporate Person" as defined under Section 3(7) of IBC 2016**. **Accordingly, no application under Sections 7 (and for that matter under Section 9 or 10) of IBC 2016 can be filed against a "financial service provider" to initiate its CIRP.**

30. **In view of the aforesaid findings, we have no other option but to dismiss the Application**.

Sd/-	Sd/-
(L. N. GUPTA)	**(ASHOK KUMAR BHARDWAJ)**
MEMBER (T)	**MEMBER (J)**