

**NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH-V**

(IB) 143 (ND)/2022

**In the matter of:**

**Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016**

**AND**

**In the matter of:**

**Orbis Trusteeship Services Private Limited**

Registered Office at:  
4A, Ocus Technopolis,  
Sector 54, Golf Club, Gurugram,  
Haryana-122002

**... Applicant**

**Versus**

**Nobal Buildtech private Limited**

Registered Office at:  
C-60, Vikas Marg,  
Preet Vihar, Delhi-110092

**...Respondent**

**Order delivered on: 02.06.2022**

**CORAM:**

**SH. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (J)**

**SH. HEMANT KUMAR SARANGI, HON'BLE MEMBER (T)**

**For the Applicant:** Mr. Ashish Dholakia, Sr. Adv., Mr. Uddyam Mukherjee, Adv., Mr. Swapnil Pattanayak, Adv., Mr. Reohan Chawla, Adv.

**ORDER**

**Mr. Abni Ranjan Kumar Sinha, Member (Judicial)**

We have heard the Learned Counsel appearing for the applicant and perused the averments made in the application.

2. The matter was heard and order was reserved on the point of issuance of notice.

3. The Learned Counsel appearing for the applicant submitted that the applicant was appointed as a debenture trustee to act for the benefit of and on behalf of the debenture holders, in terms of debenture trustee deed dated 27<sup>th</sup> June, 2019 (as amended and restated vide debenture trust deed dated 30<sup>th</sup> September, 2020).

4. The Learned Counsel appearing for the applicant further submitted that for the purpose of additional funding, a debenture trust deed dated 25<sup>th</sup> February, 2021 was entered into between the applicant and principal borrower and other guarantor, in pursuant to which an additional amount of Rs. 06 crores was availed by the principal borrower from the debenture holders by way of issuance and allotment of NCD.

5. He further submitted that the applicant is a financial creditor under Section 7 of the IBC, 2016 and there is a default in making the payment of the amount.

6. In terms of submissions, at this juncture, we would like to refer to the decision of Hon'ble Supreme Court in the matter of Anuj Jain and as per the decision of the Hon'ble Supreme Court the disbursal of the amount is the

basic element to become the financial debt u/s 5(8) of the IBC. The relevant portion of the decision of Hon'ble Supreme Court in Anuj Jain case is reproduced below: -

***“43. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become ‘financial debt’ for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursement against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be 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). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of ‘disbursement’ against ‘the consideration for the time value of money’ could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said subclauses (a) to (i) of Section 5(8) would be falling within the ambit of ‘financial debt’ only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursement, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as ‘financial debt’ within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursement against consideration for the time value of money.*”**

44. As noticed, the root requirement for a creditor to become Financial Creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.

45. It is also evident that what is being dealt with and described in Section 5(7) and in Section 5(8) is the transaction vis-à-vis the Corporate Debtor. Therefore, for a person to be designated as a Financial Creditor of the Corporate Debtor, it has to be shown that the Corporate Debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the Corporate Debtor does not owe a financial debt cannot become its Financial Creditor for the purpose of Part II of the Code.

46. Expounding yet further, in our view, the peculiar elements of these expressions "Financial Creditor" and "financial debt", as occurring in Sections 5(7) and 5(8), when visualised and compared with the generic expressions "creditor" and "debt" respectively, as occurring in Sections 3(10) and 3(11) of the Code, the scheme of things envisaged by the Code becomes clearer. The generic term "creditor" is defined to mean any person to whom the debt is owed and then, it has also been made clear that it includes a 'Financial Creditor', a 'secured creditor', an 'unsecured creditor', an 'Operational Creditor', and a 'decree-holder'. Similarly, a "debt" means a liability or obligation in respect of a claim which is due from any person and this expression has also been given an extended meaning to include a 'financial debt' and an 'operational debt'.

46.1. The use of the expression "means and includes" in these clauses, on the very same principles of interpretation as indicated above, makes it clear that for a person to become a creditor, there has to be a debt i.e., a liability or obligation in respect of a claim which may be due from any person. A "secured creditor" in terms of Section 3(30) means a creditor in whose favour a security interest is created; and "security interest", in terms of

**Section 3(31), means a right, title or interest or claim of property created in favour of or provided for a secured creditor by a transaction which secures payment for the purpose of an obligation and it includes, amongst others, a mortgage. Thus, any mortgage created in favour of a creditor leads to a security interest being created and thereby, the creditor becomes a secured creditor. However, when all the defining clauses are read together and harmoniously, it is clear that the legislature has maintained a distinction amongst the expressions 'Financial Creditor', 'Operational Creditor', 'secured creditor' and 'unsecured creditor'. Every secured creditor would be a creditor; and every Financial Creditor would also be a creditor but every secured creditor may not be a Financial Creditor. As noticed, the expressions "financial debt" and "Financial Creditor", having their specific and distinct connotations and roles in insolvency and liquidation process of corporate persons, have only been defined in Part II whereas the expressions "secured creditor" and "security interest" are defined in Part I.**

**47. A conjoint reading of the statutory provisions with the enunciation of this Court in *Swiss Ribbons (supra)*, leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression 'Financial Creditor' is a person who has direct engagement in the functioning of the Corporate Debtor; who is involved right from the beginning while assessing the viability of the Corporate Debtor; who would engage in restructuring of the loan as well as in reorganisation of the Corporate Debtor's business when there is financial stress. In other words, the Financial Creditor, by its own direct involvement in a functional existence of Corporate Debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the Corporate Debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders namely, Financial Creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the Corporate Debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the Corporate Debtor.**

**47.1. Keeping the objectives of the Code in view, the position and role of a person having only security interest over the assets of the Corporate Debtor could easily be contrasted with the role of a Financial Creditor because the former shall have only the interest of realising the value of its security (there being no other stakes involved and least any stake in the Corporate Debtor's growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in rejuvenation, revival and growth of the Corporate Debtor. Thus understood, it is clear that if the former i.e., a person having only security interest over the assets of the Corporate Debtor is also included as a Financial Creditor and thereby allowed to have its say in the processes contemplated by Part II of the Code, the growth and revival of the Corporate Debtor may be the casualty. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution.**

**47.2. Therefore, we have no hesitation in saying that a person having only security interest over the assets of Corporate Debtor (like the instant third party securities), even if falling within the description of 'secured creditor' by virtue of collateral security extended by the Corporate Debtor, would nevertheless stand outside the sect of 'Financial Creditors' as per the definitions contained in subsections (7) and (8) of Section 5 of the Code. Differently put, if a Corporate Debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of 'debt' under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a 'financial debt' within the meaning of Section 5(8) of the Code.**

**The respondent mortgagees are not the Financial Creditors of Corporate Debtor JIL**

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

***are not the 'Financial Creditors' of the Corporate Debtor JIL.***

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7. As per the averment made in part-IV of the application, we observe that the amount was not disbursed by the applicant. Rather it was disbursed by the debenture holders. Therefore, in our considered view, in terms of the decision referred to Supra, the petitioner is not a financial creditor and the amount claimed by the petitioner do not come under the definition of financial debt.

8. Hence, the present application is not maintainable and **the same is dismissed.**

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**(Hemant Kumar Sarangi)**  
**Member (Technical)**

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**(Abni Ranjan Kumar Sinha)**  
**Member (Judicial)**