

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**

**PRINCIPAL BENCH, NEW DELHI**

**COMPANY APPEAL (AT) (INSOLVENCY) No. 312 of 2021**

(Arising out of Order dated 22<sup>nd</sup> March, 2021 passed by National Company Law Tribunal, Chandigarh Bench, Chandigarh in CP(IB) No. 262/Chd/Hry/2018 with CA Nos. 566/2019 & 1145/2019).

**IN THE MATTER OF:**

**Mr. Rashpal Singh Todd  
Son of Sh. Ajit Singh  
(Shareholder/Director)  
E-26, South City-I  
Gurgaon, Haryana**

**...Appellant**

**Versus**

**1. M/s. Volkswagen Finance Pvt. Ltd.  
Having its Registered Office at:  
3<sup>rd</sup> Floor, Silver Utopia, Cardinal Gracius Road  
Off Andheri Kurla Road, Chakala  
Andheri (East)  
Mumbai - 400009**

**...Respondent No. 1**

**2. M/s. Zenica Performance Cars Pvt. Ltd.  
Through Interim Resolution Professional  
Sh. Rajender Kumar Jain  
At: House No. 3698/1, First Floor,  
Sector-46C,  
Chandigarh – 160047.  
Email: [amicusthe@gmail.com](mailto:amicusthe@gmail.com)**

**...Respondent No. 2**

**3. Sh. Rajender Kumar Jain  
Interim Resolution Professional  
Registration No. IBBI/IPA-001/IP-  
P00543/2017-18/10968  
House No. 3698/1. First Floor, Sector 46C,  
Chandigarh – 160047.  
Email: [amicusthe@gmail.com](mailto:amicusthe@gmail.com)**

**...Respondent No. 3**

**Appellant:**

Mr. Amit Sibal, Sr. Advocate with Mr. Ajay Kohli, Mr. S.S. Sobti, Mr. Kaustubh Prakash, Mr. Saksham Dhingra, Mr. Vinay Tripathi and Ms. Priyanka Sethia, Advocates

**Respondents:**

Dr. Abhishek Manu Singhvi and Mr. Vikas Singh, Sr. Advocates with Ms. Nazia Parveen, Mr. Sanjeev Sagar, Mr. Utkarsh Singh, Mr. Vardhman Kausik, Mr. Abhishek Chand, Mr. Nishant Guatam, Mr. Dhruv Joshi, Azeem Samule, Advocates for R-1.  
Ms. Pallavi Singh, Advocate for RP

**With**

**COMPANY APPEAL (AT) (INSOLVENCY) No. 313 of 2021**

(Arising out of Order dated 22<sup>nd</sup> March, 2021 passed by National Company Law Tribunal, Chandigarh Bench, Chandigarh in CP(IB) No. 263/Chd/Hry/2018 with CA Nos. 565/2019 & 1146/2019).

**IN THE MATTER OF:**

**Mr. Rashpal Singh Todd  
Son of Sh. Ajit Singh  
(Shareholder/Director)  
E-26, South City-I  
Gurgaon, Haryana**

**...Appellant**

**Versus**

**1. M/s. Volkswagen Finance Pvt. Ltd.**

**Having its Registered Office at:**

**3<sup>rd</sup> Floor, Silver Utopia, Cardinal Gracius Road  
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**...Respondent No. 1**

**2. M/s. Zenica Cars India Pvt. Ltd.**

**Through Interim Resolution Professional**

**Sh. Rajender Kumar Jain**

**At: House No. 3698/1, First Floor,  
Sector-46C,  
Chandigarh – 160047.**

**...Respondent No. 2**

**Email: [amicusthe@gmail.com](mailto:amicusthe@gmail.com)**

**3. Sh. Rajender Kumar Jain**

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**House No. 3698/1, First Floor, Sector 46C,  
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**Appellant:**

Mr. Amit Sibal, Sr. Advocate with Mr. Ajay Kohli, Mr. S.S. Sobti, Mr. Kaustubh Prakash and Ms. Priyanka Sethia, Advocates

**Respondents:**

Dr. Abhishek Manu Singhvi and Mr. Vikas Singh, Sr. Advocates with Ms. Nazia Parveen, Mr. Sanjeev Sagar, Mr. Utkarsh Singh, Mr. Birendra Singh, Mr. Vardhman Kausik, Mr. Nishant Guatam, Mr. Praful Singh, Mr. Dhruv Joshi, Azeem Samule, Advocates for R-1.  
Ms. Pallavi Singh, Advocate for RP

## **J U D G E M E N T**

**[Per: Shreesha Merla, Member (T)]**

1. Challenging in these Appeals i.e. *Company Appeal (AT) Ins. No. 312 of 2021* and *Company Appeal (AT) Ins. No. 313 of 2021* is to the Impugned Orders dated 22.03.2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh) in CP(IB) No. 262/Chd/Hry/2018 with CA Nos. 566/2019 & 1145/2019 and CP(IB) No. 263/Chd/Hry/2018 with CA Nos. 565/2019 & 1146/2019 respectively. Since both these Appeals deal with common facts and common parties, they are being disposed of by this common Order. By the Impugned Orders dated 22<sup>nd</sup> March, 2021, the Adjudicating Authority has admitted the Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the '**Code**') by *M/s. Volkswagen Finance Private Limited/Financial Creditor* against *M/s. Zenica Performance Cars Private Limited (hereinafter referred to as 'ZPC/Dealer')* and *M/s. Zenica Cars India Pvt. Ltd. (hereinafter referred as 'ZCI/Dealer')*.

2. Succinctly put, the facts in brief are:

- That the Corporate Debtor was appointed by Porsche India (M/s. Volkswagen Group Sales India Pvt. Ltd.) as one of its Dealers for the cars manufactured/trade by them; A preferred Financer Agreement was executed between the Financial Creditor and Porsche India, on account of which, the Corporate Debtor being a Dealer of Porsche India applied for and was provided credit-Financial Facilities by the Financial Creditor; the payment for the cars provided by Porsche India was to be made by the Financial Creditor to the Manufacturer;

All the cars provided by Porsche India to the Corporate Debtor under this Financier Facility Agreement were hypothecated to the Financial Creditor for the invoices raised by Porsche India; The Corporate Debtor was to pay to the Financial Creditor the amount from the sale proceeds of the cars towards repayment of the loan as well as agreed upon interest. The Corporate Debtor was sanctioned a revolving credit facility for purchase of new cars and also executed Facility Agreements with the Financial Creditor for 'used cars' manufactured by Porsche India. It is stated that the Corporate Debtor defaulted in making payments under the Facility Agreements –Undertakings executed by it and the Financial Creditor issued a Legal Notice on 10.05.201 recalling the loan and terminating the Agreements.

3. **Submissions of the Learned Senior Counsel appearing on behalf of the Appellant:**

- Learned Sr. Counsel strenuously contended that M/s. Volkswagen Finance Pvt. Ltd.- the First Respondent is not a 'Financial Creditor' under Section 5 (7) of the Code as there is no 'Financial Debt' under Section 5(8) of the Code as there is no disbursement or time value of money. It is contended that there is no 'evidence of disbursement' and no proof of 'debt' or 'default' and hence the Petition ought to not have been admitted by the Adjudicating Authority.
- M/s. Porsche India was not made a party to the Petition though it was pleaded that the payment for all the cars was to be made by the Financial Creditor to Porsche India on behalf of the Corporate Debtor.

- In the absence of any evidence of the purported disbursement by the First Respondent to the Manufacturer, the obligation on the part of the Corporate Debtor to make the payment does not arise.
- A comparison of invoices raised by Porsche India show that for the same vehicle, identified by VIN-Chassis, the First Respondent is claiming purported 'debt' and 'default' and the Manufacturer is raising invoices @ 21% penalty interest. It is the case of the First Respondent that the Second Respondent has sold 39 cars and *malafidely* did not pay for the same.
- It is raised in the counter affidavit by the First Respondent that the fact that 'the cars were delivered to the Corporate Debtor is proof enough that the payment was made to the Manufacturer'. The First Respondent has also argued that 'cases are decided on pleadings' and therefore it has to be construed that the First Respondent does not have any other evidence to establish the 'disbursal of the amount'.
- The alleged tax invoices do not bear the acknowledgment of the Dealer and are raised by the Manufacturer referring to payment of interest @ 21% and the same clearly contradicts the terms of the Facility Agreement providing for payment of interest to the First Respondent and that too at a floating rate of interest. Hence, the element of disbursement is non-existent and the Petition is not maintainable.
- The tabular form of pleadings as stated to be an excel-sheet does not constitute any statement of account maintained in the ordinary

course of business much less being of any evidentiary value and/or even being admissible as 'evidence of disbursement' or 'debt' or 'default'. It is vehemently contended by the Learned Sr. Counsel that mere pleadings do not constitute evidence and that the Excel-Sheet is self-serving and created with self-service entries without any material to substantiate the same and therefore, the requirement under Section 7(3)(a) of the Code has not been met.

- The First Respondent has only given some identification numbers without showing that such vehicles have in fact been delivered to the Corporate Debtor.
- Though it is claimed in Part-IV of Form-1 that the date of default is 02.02.2018, the alleged default even as per the said tabulation refers to only three instances and even in respect thereof it is shown that principal and/or interest outstanding is 'NIL' and hence the said date of default does not exist. It is denied that 39 cars have been sold without accounting for the same. It is submitted that even as per tabulation there are 15 instances wherein amounts shown against the principal and/or interest outstanding is 'NIL', therefore it can be said that the said Application has been filed to stifle the legitimate claims raised on account of losses suffered by the Corporate Debtor owing to the breaches committed by the Volkswagen Group.
- Even a certificate from the First Respondent is not filed to acknowledge any such disbursement.
- The Application under Section 7 of the Code was incomplete and does not comply with the mandatory requirements as envisaged

under Section 7(2) of the Code, particularly under Form-1. The Adjudicating Authority has directed on 10.09.2018 and on 19.09.2018 to furnish the accounts statement, but the First Respondent failed to do so on the ground that the accounts statement were voluminous.

- Prior to filing of the Section 7 Application, Arbitration Proceedings between M/s. Volkswagen Group Sales India Pvt. Ltd. and M/s. Zenica Cars India Pvt. Ltd. arising out of losses suffered by the Zenica Group having regard to the 'Volkswagen Emissions Scandal' and breach of warranties were pending adjudication before the sole Arbitrator-Hon'ble Mr. Justice S.J. Vazifdar, wherein Zenica Cars has filed statement of defense along with a claim of Rs. 800 Crores against M/s. Volkswagen Group Sales India Pvt. Ltd., a sister concern of the first Respondent. It is contended that the present Petition was merely an attempt to stall any recovery qua Volkswagen Group. It is stated that the Arbitral Award in Comm Arb Pet 1497 of 2019, while deciding the validity of the appointment of Mr. D.K. Sonawane as an arbitrator has been stayed by the Hon'ble High Court of Bombay vide Order dated 23/12/2021.
- The Adjudicating Authority failed to consider Application I.A. No. 566 of 2019 prior to pronouncement of the Order in the main Application. At best, the First Respondent could have filed the claim as an 'Operational Creditor', but intentionally filed an Application under Section 7 of the Code fully aware that it had earlier invoked

Arbitration and the same would amount to 'pre-existing dispute' as defined under Sections 8 and 9 of the Code.

- It is submitted by Learned Sr. Counsel that M/s. Volkswagen Group Sales Pvt. Ltd. while having initially filed a claim of Rs. 537,70,97,863/- has given up the claim of Rs. 524,91,60,000/-. Therefore, it is apparent that the Application was filed with ulterior motives with a view to avoid the liabilities and the Adjudicating Authority failed to appreciate that merely because 'Notice' invoking Arbitration has not been replied to, the said fact cannot amount to admission of the contents of the said 'Notice' or facts.
- The Application was liable to be dismissed in as much as the First Respondent suppressed that a Letter of Reference was issued by them under Section 21 of the Arbitration and Conciliation Act, 1996 vide Reference dated 10.05.2018 against the Corporate Debtor as well as the guarantors. The statement of claim was filed only qua the guarantors before the Arbitral Tribunal. Therefore, the claims qua the Corporate Debtor stood abandoned. The proceedings under this Code were filed on 18.07.2018 subsequent to the Arbitral Proceedings and hence are not maintainable. The First Respondent falsely represented before the Arbitrator that the Corporate Debtor is undergoing Insolvency Process and Moratorium had been issued and hence the Corporate Debtor Company had not been arrayed as a party before the Ld. Arbitrator. On strength of these submissions, the First Respondent was able to get an Order in their favour. The Learned Sr. Counsel submitted that on all these grounds the Petition filed under

Section 7 of the Code is not maintainable and hence the Impugned Order ought to be set aside.

- Learned Sr. Counsel relied on Paragraph 64 of Judgment in **‘Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.’**, (2019) 4 SCC 17 in which the Hon’ble Apex Court has observed as under:

*“64. The trigger for a financial creditor’s application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(e) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. Legislative policy now is to move away from the concept of “inability to pay debts” to “determination of default”. The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation”*

- Learned Sr. Counsel also placed reliance on following Judgments in support of his contentions:

1.	<i>Anuj Jain, IRP for Jaypee Infratech Limited Vs. Axis Bank &amp; Ors. [Para 43, 46-50], (2020) 8 SCC 401.</i>
2.	<i>Surendra Trading Company Vs. Jugilal Kamplapat Jute Mills Company Limited &amp; Ors. [Para 26], (2017) 1 SCC 407.</i>
3.	<i>Innoventive Industries Limited Vs. ICICI Bank &amp; Anr. [Para 27, 28, 30], (2018) 1 SCC 407.</i>
4.	<i>Park Energy Pvt. Ltd. Vs. Syndicate Bank &amp; Anr., 2020 SCC OnLine NCLAT 562</i>
5.	<i>Supreme Commotrade LLP &amp; Anr. Vs. Shree Sai Rolling India Ltd., 2020 SCC OnLine NCLAT 562</i>
6.	<i>Urban Infrastructure Trustees Limited Vs. Neelkanth Realty Pvt. Ltd., 2019 SCC OnLine NCLAT 1232</i>
7.	<i>Radha Exports (India) Pvt. Ltd. Vs. K.P. Jayaram &amp; Anr. [Para 42], (2020) 10 SCC 538.</i>
8.	<i>Nikhil Mehta and Infrastructure Ltd. [Para 17], 2017 SCC NCLAT 377.</i>
9.	<i>Vishwa Nath Singh Vs. Visa Drugs &amp; Pharmaceuticals Pvt. Ltd. [Para 16] 2017 SCC NCLAT 863 OnLine.</i>
10.	<i>K.D. Sharma Vs. SAIL &amp; Ors. [Para 38-39] (2008) 12 SCC 481.</i>
11.	<i>S.P. Chengalvaraya Naidu (Dead) by LRS Vs. Jagannath (Dead) by LRS &amp; Ors. [Para 6] 1994 1 SCC 1.</i>
12.	<i>Charanji Lal &amp; Ors. Vs. Financial Commissioner, Haryana, Etc. [Para 10 &amp; 14] (1978) 2 ILR (PH) 361</i>
13.	<i>Dr. Vishnu Kumar Agarwal Vs. Piramal Enterprises Ltd. [Para 29-33], 2019 SCC OnLine NCLAT 81.</i>

14.	<i>IFCI Ltd. Vs. ACCIL Hospitality Ltd. [Para 6-7], MANU/NL/0130/2020.</i>
15.	<i>ICICI Bank Vs. Era Infrastructure India Limited [Para 19], MANU/NC/0186/2019.</i>
16.	<i>Dena Bank Vs. West Haryana Highways Projects Pvt. Ltd. [Para 11-12], MANU/NC/2888/2019.</i>
17.	<i>Oriental Bank of Commerce Vs. Helios Photo Voltec Limited NCLT [Para 8], CP (IB) No. 154 (PB)/2018.</i>
18.	<i>Re Malcolm Robert Ross (a Bankrupt) Vs. Stonewood Securities Limited [Page 435-437], 2020 WL 491444.</i>

4. **Submissions of the Learned Sr. Counsel appearing on behalf of the first Respondent**

- Learned Sr. Counsel vehemently contended that the Tribunal has to examine the limited issue of 'Debt' and 'Default' as this present proceeding is not a recovery suit.
- The First Respondent entered into a preferred Financer Agreement with M/s. Volkswagen Group Sales India Pvt. Ltd. whereby credit facility was to be provided to the Dealers of Audi India and Porsche India at reasonable interest rates. The Dealers of cars were free to choose their Financers as it was voluntary facility available to various Dealers.
- M/s. ZCI Limited was a Dealer of Porsche Cars and entered into Facility Agreements with the First Respondent/Financial Creditor on 21.12.2011 whereby the Corporate Debtor was granted a revolving facility of 84 Crores; Sanction Letter Dated 15.12.2011, Personal Guarantee dated 21.12.2011 together with the deed of hypothecation and the demand promissory note establish the sanctioning of the loan to the Corporate Debtor.
- 4 Facility Agreements were entered into between the Corporate Debtor and the Financial Creditor on 20.02.2013, 17.07.2013,

28.10.2013 for a credit amount of Rs. 10 Crores, 18 Crores and 9 Crores respectively.

- 3 Facility Agreements were also executed for 'Used Audi Cars' on 27.04.2013, 20.10.2014 and 26.09.2015 for revolving credit facility of Rs. 10 Crores, 2 Crores 50 Lacs and 1 Crore 40 Lacs respectively.
- M/s. ZPC Pvt. Ltd. entered into four Facility Agreements dated 03.09.2012, 03.10.2012, 06.09.2014 and 10.07.2015 for an approximate value of Rs. 32.50 crores with respect to financing of new cars.
- Four Supplementary Agreements dated 28.12.2012, 29.01.2013, 22.02.2013 and 08.02.2016 were executed for an approximate value of Rs. 16.50 crores. It is submitted that the Dealer had used the facility for a long period without any issues or problems, the total amount of facility being Rs. 49 Crores with the first 30 days being interest free. Additionally, the Corporate Debtor also entered into Hypothecation Agreements, Personal Guarantors Deed and also executed Demand Promissory Notes for both 'new' and 'used' cars.
- In view of the default committed by the Corporate Debtor, two Legal Notices dated 10.05.2018 were issued but there was no reply.
- The Learned Sr. Counsel relies on the ratio laid down by the Hon'ble Supreme Court of India in para 28 in '**M/s. Innovative Industries Pvt. Ltd.' Vs. 'ICICI'** (2018 SCC 407), in support of his contention that the Adjudicating Authority has to be convinced only that a 'Default' has occurred and that there is a disbursement of debt. The Corporate Debtor itself admitted that it has defaulted in repayment of

the credit facilities and therefore no roving enquiry need be conducted.

- As per the terms of the Agreement, the Financial Creditor disburses the amount to the Manufacturer on behalf of the Corporate Debtor, and on sale of the cars, the Dealer repays the Financial Creditor. Hence disbursement of money and time value are equally present in the terms of the Agreements and therefore the acceptance of the credit facilities by the Corporate Debtor clearly comes under the definition of 'Financial Debt'.
- The two I.A.s filed by the Corporate Debtor before the Ld. Adjudicating Authority are irrelevant as the Arbitration Dispute in respect of Emission Standards is against the Manufacturer of cars and the Respondent has no role to play in the said dispute; It is the Corporate Debtor who has opposed when an Application was filed by the Financial Creditor giving clarification before the Ld. Arbitrator regarding pending IBC proceedings against the Corporate Debtor.
- All the records which were maintained by the Financial Creditor in the ordinary course of business to show evidence of default has been filed along with the Petition.
- The Manufacturer does not need to be a party to the proceedings as the credit facility arrangement was between the Financial Creditor and the Corporate Debtor.
- The fact that 'cars were delivered to the Corporate Debtor is proof enough that the payment was made' to the Manufacturer as without payment there would be no delivery of vehicles. Further, the Stock

Audit Report shows the presence of the vehicles at the Dealership of the Corporate Debtor.

- More than one certificate is not required as details of default is enumerated in the records. Further in the absence of any proof of payment annexed by the Corporate Debtor, it is sufficient that the Corporate Debtor did not make any payments to the Respondent.
- The date of default mentioned is only the first date of default committed by the Corporate Debtor, though subsequently the Corporate Debtor committed a series of defaults.
- Any dispute between the Manufacturer and the Corporate Debtor has no relation to the repayment of credit facilities availed by the Corporate Debtor. The Corporate Debtor was guilty of siphoning of funds and there have been several FIRs registered against the management. Arbitration Proceedings against the M/s. Volkswagen Group Sales India Pvt. Ltd. has nothing to do with the Insolvency Proceeding initiated against the Corporate Debtor.
- Learned Sr. Counsel during the conclusion of final arguments stated that 'financing by some other Lenders' is a new plea taken by the Appellant and further added that the Resolution Professional is not permitting them to vote in the CoC.

5. Learned Sr. Counsel-Mr. Vikas Singh in his course of arguments has strenuously contended that the Corporate Debtor has admitted before the Adjudicating Authority that a loan was sanctioned and further argued that 'Value of Loan' is in the form of cars and by no stretch of imagination would cars have been delivered without any disbursement of amount by the

Financial Creditor. It is also submitted that the amount was disbursed by the First Respondent to the Manufacturer on behalf of the Corporate Debtor and therefore the question of making Manufacturer a Party does not arise.

6. In compliance of the Order of this Tribunal dated 24.09.2021, the Agreement executed between M/s. Volkswagen Finance Pvt. Ltd. and M/s. Volkswagen Group Sales India Pvt. Ltd. dated 14.12.2011, was filed before this Tribunal.

7. **Submissions of Learned Sr. Counsel appearing on behalf of Respondent No. 2-Resolution Professional for Respondent No. 3**

- It is submitted that in pursuance to his duties the Resolution Professional (RP) received various claims from the Creditors of the Corporate Debtor. As per the Information Memorandum shared with the Committee of Creditors (CoC in short) on 15.05.2021, the CoC Members, during the course of discussion found that the Corporate Debtor is not viable for Resolution and therefore Agenda for Liquidation of the Corporate Debtor was to be placed before the CoC on 28.07.2021, however in pursuance of the Order dated 27.07.2021 passed by this Tribunal, the same was not presented.
- It is further submitted that the Suspended Directors are refusing to co-operate with the Resolution Professional to file an Application under Section 19(2) of the Code before the Adjudicating Authority. Section 19(2) of the Code are as under:

*“19(2) Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the interim resolution professional does not assist or cooperate, the interim resolution*

*professional may make an application to the Adjudicating Authority for necessary directions.”*

*(Emphasis Supplied)*

8. **Assessment:**

The brief point that falls for consideration in this Appeal is:

- Whether the First Respondent/Lender/VWFPL falls within the ambit of definition of ‘Financial Creditor’ as defined under Section 5(7) of the Code and if the amount claimed to be ‘due and payable’ falls within the ambit of definition of ‘Financial Debt’ as defined under Section 5(8) of the Code, in view of the contention of the Appellant that there was no direct/actual disbursement of the amounts.
- Whether the prior invocation of the Arbitration Proceedings against the Appellant/Personal Guarantor bars the initiation of CIRP against the Company.

9. Keeping in view the submissions of both sides and the facts on record, we are of the considered view that the first issue in question is to be decided on the touchstone of what the Hon’ble Supreme Court has laid down in paragraphs 27, 28 and 30 of **‘M/s. Innoventive Industries Ltd. Vs. ICICI & Anr.’**, (2018) 1 SCC 407 and in Paragraph 64 of **‘Swiss Ribbons Pvt. Ltd. & Anr.’ Vs. ‘Union of India & Ors.’** (2019) 4 SCC 17 which read as under:

*“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very*

*wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.*

*28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the*

adjudicating authority by registered post or speed post to the registered office of the corporate debtor.

.....

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

.....

“64. The trigger for a financial creditor’s application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(e) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. Legislative

Policy now is to move away from the concept of “inability to pay debts” to “determination of default”. The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation. Four policy reasons have been stated by the learned Solicitor General for this shift in legislative policy.”

(Emphasis Supplied)

10. It is the case of the Appellants that since there is no direct/actual disbursement of the amount by the Appellant herein to the First Respondent, the ratio laid down by the Hon’ble Supreme Court in **‘Anuj Jain, IRP for Jaypee Infratech Limited Vs. Axis Bank & Ors.’**, (2020) 8 SCC 401 is squarely applicable to the facts of this case. The Appellant relied on Paragraphs 46 to 50 of the Judgment of Hon’ble Supreme Court of India in **‘Anuj Jain’** (Supra) are detailed as hereunder:

*“The essentials for financial debt and financial creditor*

*46. 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 disbursal 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 sub-clauses (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 disbursal, 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 disbursal against consideration for the time value of money.

47. 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.

48. 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.

49. 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'.

49.1. 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.

50. A conjoint reading of the statutory provisions with the enunciation of this Court in Swiss Ribbons (supra), leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression 'financial creditor' is a person who has direct engagement in the functioning of the

corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor."

(Emphasis Supplied)

11. In the afore-noted 'Anuj Jain (Supra)', Jaypee Infratech Limited ('JIL') had mortgaged these properties as collateral securities for the loans and advances made by the Bankers to Jaiprakash Associates Limited ('JAL'), the Holding Company of 'JIL'. The Resolution Professional (RP) rejected the claim of the lenders of 'JAL' as 'Financial Creditors' of 'JIL', which decision was challenged. The Adjudicating Authority agreed with the Resolution Professional. This Tribunal allowed the Appeal. The Hon'ble Supreme Court has set aside the Order of this Tribunal observing that the debts in question are in the form of third party security, given by 'JIL' so as to secure the loans obtained by 'JAL' from the said lenders and hence cannot be covered under the expression 'Financial Debt' as defined under the

Code. The Hon'ble Apex Court construed the meaning of the words 'mean' and 'include' as provided under Section 5(8) of the IBC has held as follows:

1. *The definition, by its very frame, cannot be read so expansive, rather infinitely wide; and*
2. *The root requirements of 'disbursement' against 'the consideration for the time value of money' could not be forsaken in the manner that any transaction could stand alone to become a financial debt."*

For a fuller and a better appreciation of 'Anuj Jain (supra)', the facts of this case has to be seen in the light of the relationship between the first Respondent/Financial Creditor/VWFPL and the Dealer/Corporate Debtor and the Manufacturer/VWGS IPL.

12. Several Facility Agreements were entered into between M/s. Zenica Cars Pvt. Ltd and M/s. Zenica Performance Cars Pvt. Ltd. and M/s. Volkswagen Finance Pvt. Ltd./the First Respondent. Some of the relevant terms and conditions relied upon by the Learned Sr. Counsel for the Appellant are being reproduced as hereunder:

4.1 Purpose A Loans

- (a) The Borrower hereby confirms and agrees that the request for the disbursement of a Purpose A Loan(s) under the Facility shall be made by the Manufacturer to the Lender directly on behalf of the Borrower either by forwarding Invoices for the Car(s) dispatched or by utilising the System; which disbursement request shall be upto the Available Facility Limit and shall contain the VIN details of the Cars proposed to be financed using the proceeds of the Purpose A Loan (s) sought together with amount due in respect of each of such Cars ("Purpose A Disbursement Request").

- (b) The Borrower hereby agrees, undertakes and confirms that the Lender shall be entitled to rely on such Purpose A Disbursement Request received from the Manufacturer and hereby authorises the Lender to make disbursements to the Manufacturer of the amounts requested by the Manufacturer as if such Purpose A Disbursement Requests had come from the Borrower itself. The Borrower hereby confirms that the Lender has consented to such a drawdown procedure for Purpose A Loans at the request of the Borrower and the Borrower shall be bound by any disbursements so made by the Lender based on the Purpose A Disbursement Requests received from the Manufacturer. The Borrower agrees to indemnify and shall indemnify and hold the Lender harmless of, from and against any and all loss, damage, expenses, charges, actions, suits, claims, demands, penalties and all other costs and proceedings or other consequences which may arise or result from acting on such Purpose A Disbursement Requests received from the Manufacturer or allowing the Manufacturer to perform all or any of the acts contemplated / enumerated hereinabove.
- (c) On receipt of every Purpose A Disbursement Request by the Lender from the Manufacturer for and on behalf of the Borrower as aforesaid, the Borrower shall be deemed to have undertaken/ confirmed to the Lender the following:
- (i) the supply contract between the Borrower and the Manufacturer is in full force and effect and would continue to be in full force and effect during the period for which the Facility has been/shall be granted and the Borrower shall not initiate any action for alteration, modification or termination of such contract without the prior consent of the Lender. Further any notice to do any of the above shall be sent by the Borrower to the Manufacturer only after the prior consent of the Lender has been received. In the event the contract is terminated by the Manufacturer for any reason whatsoever, the Borrower shall forthwith intimate the Lender of the same;
  - (ii) that the amounts as mentioned in the Purpose A Disbursement Request in respect of each Car therein mentioned are the final amounts due and payable by the Borrower to the Manufacturer in respect of such Car;
  - (iii) that the amount of moneys to be disbursed pursuant to such Purpose A Disbursement Request together with the moneys already disbursed and outstanding under the Facility shall not exceed the Facility Limit; and
  - (iv) that the Borrower agrees to unconditionally repay the Borrower Obligations (or the portion thereof that are due and payable) to the Lender on each of the Relevant Payment Dates.

4.3 Purpose C Loans

- (a) The request for the disbursement of a Purpose C Loan(s) under the Facility may be made by the Borrower to the Lender by hand delivery/email or by utilising the System; which disbursement request shall be upto the Available Facility Limit and shall contain the name of the Borrower or any third party to whom disbursement is to be made alongwith VIN details of the Cars and any other Collateral Assets owned and possessed by the Borrower which are to constitute the security for each such Purpose C Loan ("Purpose C Disbursement Request").
- (b) On receipt of every Purpose C Disbursement Request by the Lender from the Borrower as aforesaid, the Borrower shall be deemed to have undertaken/ confirmed to the Lender the following:
- (i) the supply contract between the Borrower and the Manufacturer is in full force and effect and would continue to be in full force and effect during the period for which the Facility has been/shall be granted and

5. DISBURSEMENT

- 5.1 Upon receipt of a Disbursement Request as aforesaid the Lender may in its sole discretion permit the Borrower to utilise the Facility pursuant to the terms and conditions of this Agreement. The Borrower hereby agrees, acknowledges and confirms that notwithstanding anything to the contrary contained in this Agreement or in any other document, writing or other arrangement entered into between the Parties in relation to the Facility, the Lender shall not be bound to make disbursement on every Disbursement Request made by the Manufacturer or Borrower (as the case may be) and the Lender shall consider the same on a case to case basis prior to making any disbursement under the Facility. The Borrower hereby agrees and acknowledges that the Lender shall have the right to refuse disbursement without assigning any reason whatsoever for the same. The Borrower further agrees, acknowledges and confirms that the decision of the Lender shall be final and binding on the Borrower.

9. PAYMENT TERMS

9.1 The Borrower hereby unconditionally and irrevocably agrees and undertakes to repay all amounts due and payable by the Borrower to the Lender under the Facility including the principal amounts disbursed by the Lender pursuant to this Agreement together with any Interest, Default Interest (if applicable) and all other costs, charges, payments, reimbursements and expenses relating thereto and payable hereunder and incidental to each Loan on the Relevant Payment Dates.

9.2 All payments made by the Borrower to the Lender pursuant to this Agreement shall be made without any delay or demur and without any deduction whatsoever by way of set off or counterclaim or otherwise in respect of any amount due or alleged to be due or outstanding from the Lender, the Manufacturer or any other person and notwithstanding any legal limitation, disability or incapacity of the Borrower. The Borrower hereby expressly waives any and all rights that it would have to set-off, counterclaim against the Manufacturer or reduce the amounts payable under Invoices raised by the Manufacturer for any reason whatsoever. The Borrower hereby agrees and undertakes to indemnify and to keep indemnified the Lender at all times from and against any loss or claim arising out of any dispute raised by the Borrower on the ground that the value of the Invoice(s) is not acceptable to it/ him.

13. At this juncture, we find it relevant to refer to the definition of 'Claim' as defined under Section 3(6) of the Code, definition of 'Debt' as defined under Section 3(11) of the Code, definition of 'Default' as defined under Section 3(12) of the Code and definition of 'Financial Creditor' and 'Financial Debt' as defined under Sections 5(7) and 5(8) of the Code respectively as follows:

**“Section 3(6):** *"claim" means— (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*

*(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;”*

**“Section 3(11)** *"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;*”

**“Section 3 (12)** *"default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;*”

**“Section 5 (7)** *"financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;*”

**“Section 5(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 dematerialised 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;*

*(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;”*

14. In compliance of an Order of this Tribunal, an Affidavit has been filed by the First Respondent bringing on record the Preferred Financier Agreement dated 01.01.2012 executed between M/s. Volkswagen Finance Pvt. Ltd. (VWFPL) and M/s. Volkswagen Group Sales India Pvt. Ltd. (VWGS IPL). It is stated in the Agreement that VWFPL is a Non-Banking Finance Company engaged in the business of providing wholesale and retail finance facilities and is willing to associate with VWGS IPL by providing Finance Facilities to Dealers of VWGS IPL, which has accepted the terms and conditions. ‘Duties and Obligations of VWGS IPL’ BS and ‘Undertakings, Representations and Warranties’ are as under:

#### 4. DUTIES AND OBLIGATIONS OF VWGSIPL

- 4.1 VWGSIPL shall submit a list of Dealers along with transaction history to VWFPL. Based on the said information and preliminary eligibility criteria & creditworthiness of Dealer, VWFPL will set Facility limits of the Dealer. VWGSIPL would endeavor to ascertain on a best effort basis that the recommended Dealers are financially sound and have good reputation in the market and are satisfied with them based on their business dealings as VWGSIPL Dealers. The Parties agree and acknowledge that VWGSIPL shall not be held responsible for any financial or other information about the Dealer furnished to VWFPL by the Dealers.
- 4.2 VWGSIPL undertakes to dispatch Products to Dealers where VWFPL has agreed to extend the Financing Facility, only upon express authorization made by VWFPL to VWGSIPL, about the Facility Limit.
- 4.3 VWGSIPL shall endeavour to solicit on a best effort basis the Dealers' co-operation in the monthly audit (or such frequency as required) of the business of the Dealer conducted by VWFPL or by its nominated agencies.
- 4.4 In case of dealer default, liquidation, foreclosure, or bankruptcy; VWGSIPL agrees to provide its support to VWFPL to repossess vehicles, distribute and sell such repossessed vehicles through its dealer network.
- 4.5 In case the Dealers avail Finance Facility from VWFPL; VWGSIPL agrees to release Bank Guarantee (submitted by Dealer to acquire the Products from VWGSIPL) back to the Dealers within 2 working days from date of receipt of payment by VWFPL for the Products dispatched to the Dealers. VWGSIPL further agrees to extend its co-operation to VWFPL for surrender of such Bank Guarantee with concerned bank by executing documents required for such surrender of Bank Guarantee.
- 4.6 In case of takeover of VWFPL limits by any other financier, VWGSIPL has to wait for NOC from VWFPL and not to accept any direct payments from any other financier.
- 4.7 All Parties shall act prudently in accordance with the terms of this Agreement until its termination and exercise all due diligence and vigilance in carrying out their respective duties and obligations under this Agreement.
- 4.8 VWGSIPL will not entertain any direct payment from any Dealer for VWFPL financed vehicles without consent from VWFPL.

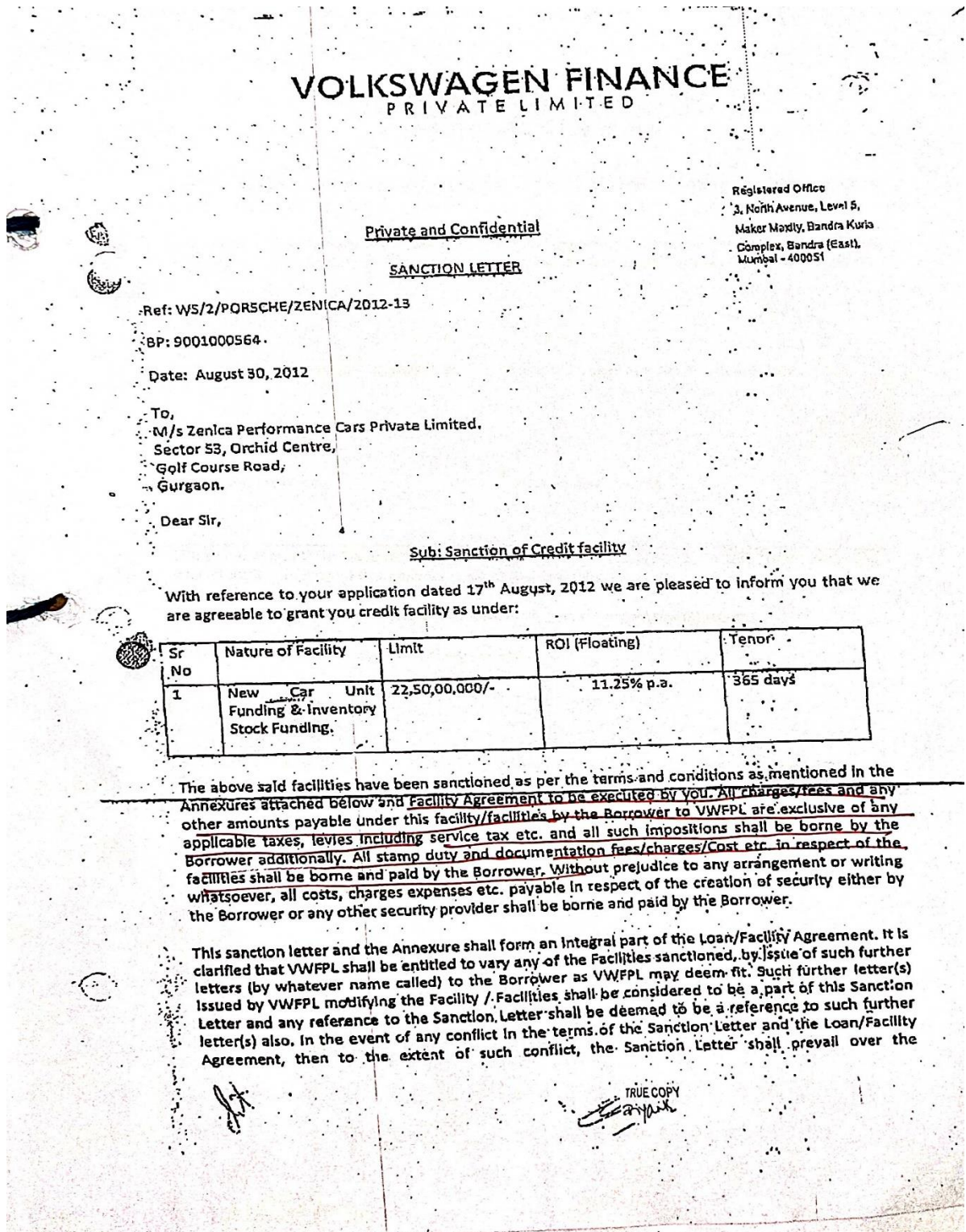
#### 6. UNDERTAKINGS, REPRESENTATIONS AND WARRANTIES

VWGSIPL hereby undertakes, represents and warrants as under:

- 6.1 VWGSIPL agrees, confirms and undertakes to stop forthwith all dispatches to the Dealer upon receipt of written intimation of such Dealer's default, repeated instances of breach of any terms and conditions of the Transaction documents received from VWFPL and despite interventions from VWGSIPL, not remedying such breach within 15 days from such reporting of VWFPL.
- 6.2 VWGSIPL shall forthwith intimate VWFPL of the termination of Dealership Agreement of a particular Dealer. VWGSIPL further agrees, confirms and undertakes to render all required assistance to VWFPL on a best efforts basis in such situation, to recover its dues from the Dealer.
- 6.3 That VWGSIPL agrees confirms and undertakes to mark a hypothecation/lien in favor of VWFPL on every Product invoiced and released to a Dealer, who has availed the Finance Facility from VWFPL.

This Document has been signed by the authorized signatories of both VWFPL and VWGSIPL.

15. The Sanction Letters between M/s. Volkswagen Finance Pvt. Ltd. and M/s. Zenica Performance Cars Pvt. Ltd./M/s. Zenica Cars India Pvt. Ltd. show the financial relationship between the two parties. For Ready Reference one such Sanction Letter dated 30.08.2012 is detailed as hereunder:



**VOLKSWAGEN FINANCE**  
PRIVATE LIMITED

Registered Office  
3, North Avenue, Level 5,  
Maker Maxity, Bandra Kuria  
Complex, Bandra (East),  
Mumbai - 400051

Private and Confidential

SANCTION LETTER

Ref: WS/2/PORSCHE/ZENICA/2012-13

BP: 9001000564.

Date: August 30, 2012

To,  
M/s Zenica Performance Cars Private Limited,  
Sector 53, Orchid Centre,  
Golf Course Road,  
Gurgaon.

Dear Sir,

Sub: Sanction of Credit facility

With reference to your application dated 17<sup>th</sup> August, 2012 we are pleased to inform you that we are agreeable to grant you credit facility as under:

Sr No	Nature of Facility	Limit	ROI (Floating)	Tenor
1	New Car Unit Funding & Inventory Stock Funding.	22,50,00,000/-	11.25% p.a.	365 days

~~The above said facilities have been sanctioned as per the terms and conditions as mentioned in the Annexures attached below and Facility Agreement to be executed by you. All charges/fees and any other amounts payable under this facility/facilities by the Borrower to VWFPPL are exclusive of any applicable taxes, levies including service tax etc. and all such impositions shall be borne by the Borrower additionally. All stamp duty and documentation fees/charges/Cost etc. in respect of the facilities shall be borne and paid by the Borrower. Without prejudice to any arrangement or writing whatsoever, all costs, charges expenses etc. payable in respect of the creation of security either by the Borrower or any other security provider shall be borne and paid by the Borrower.~~

This sanction letter and the Annexure shall form an integral part of the Loan/Facility Agreement. It is clarified that VWFPPL shall be entitled to vary any of the Facilities sanctioned, by issue of such further letters (by whatever name called) to the Borrower as VWFPPL may deem fit. Such further letter(s) issued by VWFPPL modifying the Facility / Facilities shall be considered to be a part of this Sanction Letter and any reference to the Sanction Letter shall be deemed to be a reference to such further letter(s) also. In the event of any conflict in the terms of the Sanction Letter and the Loan/Facility Agreement, then to the extent of such conflict, the Sanction Letter shall prevail over the

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Loan/Facility Agreement, which will be executed in favour of VWFPPL following your acceptance to the offer.

If the terms and conditions are acceptable, kindly arrange to return a copy of this letter duly signed by the authorised signatory in token of having accepted the terms and conditions mentioned herein.

Sincerely,

For Volkswagen Finance Private Limited.

For Volkswagen Finance Private Limited.

Authorised Signatory.

Authorised Signatory.

I/We hereby acknowledge receipt of your sanction letter no WS/2/PORSCHE/ZENICA/2012-13 dated August 30, 2012 along with annexures of which this is a copy.

We accept and agree to be bound by the terms and conditions contained therein.

For M/s Zenica Performance Cars Private Limited.

Authorised Signatory  
(Signature with rubber stamp of the Company)

Place: Gurgaon

Date: 31<sup>st</sup> Aug 2012

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**VOLKSWAGEN FINANCE  
PRIVATE LIMITED**

ANNEXURE A

TERMS AND CONDITIONS

Nature of Facility	New Car Unit Funding & Inventory stock funding
Facility Limit	22,50,00,000/- (Rupees Twenty Two Crore Fifty Lacs Only)
Purpose	Purchase of New Cars
Security	<ol style="list-style-type: none"> <li>1. First charge by way of Hypothecation over the Financed Cars, Sales Receivables, Assets (as defined in the Facility Agreement &amp; Hypothecation Deed)</li> <li>2. Personal guarantee of Rashpal Singh Todd, Mandir Singh Todd, Ajit Singh Todd.</li> <li>3. Corporate guarantee of M/s Zenica Cars India Private Limited and M/s Zenica Auto Services Private Limited.</li> <li>4. 4 (four) Post-dated cheques of applicant and 1 cheque from each Guarantor).</li> </ol>
Security Documents	<ol style="list-style-type: none"> <li>1. Facility Agreement</li> <li>2. Deed of Hypothecation</li> <li>3. Deed of Guarantee</li> <li>4. Power of Attorney</li> </ol> <p>(Aforesaid should be executed by Borrower Pre-disbursement)</p>
Additional Condition	<ol style="list-style-type: none"> <li>1. <b>Pre-disbursement:-</b> <ol style="list-style-type: none"> <li>a. Share application of Rs.19,00,000.00/- mentioned in the asset and liability statement dated June 27, 2012. Of M/s Zenica Performance Cars Private Limited to be converted into share capital before activation of limit; CA certified shareholding pattern to be provided before activation of limit.</li> </ol> </li> <li>2. <b>Post disbursement:-</b> <ol style="list-style-type: none"> <li>a. Dealer is going to infuse further capital worth Rs.12,11,00,000.00/- into the business within 4 months. CA certified shareholding pattern to be provided on or before 4 months from the date of activation of limit.</li> <li>b. Quarterly financial statement of the company to be provided.</li> <li>c. Audited Financial for FY 2012 of all the group companies to be provided by October 10, 2012.</li> </ol> </li> </ol>
Interest Rate (Linked to VRR)	Floating 11.25% p.a.

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(Emphasis Supplied)

**VOLKSWAGEN FINANCE**  
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VRR Rate	19.07% p.a (w.e.f. 01/05/2012 which will be reviewed on monthly basis)	
Interest Free Period for Purpose A Loans	NIL	
Interest Payment Dates	Interest on every Loan shall be payable by the 3 <sup>rd</sup> of every month or as specified in Invoices raised by Lender.	
Review date	31 <sup>st</sup> July, 2013	
Processing Fees	0.7% of NCUF amount plus service tax as applicable	
Default Interest	3% per month on outstanding amount	
Standard Penalties & charges	As per Annexure B	
Repayment - Sold cars	<ol style="list-style-type: none"> <li>The Borrower shall make payment of the principal amount due on any Loan as soon as possible after the sale of the Financed Car and in any event no later than 5 (Five) calendar days from the date of any such sale.</li> <li>Non adherence of aforesaid provision shall be treated as Sale out of Trust (SOT) and /or Audit noncompliance for which the Borrower shall be liable to pay default interest @3% p.m.</li> </ol>	
Repayment of unsold financed cars	Repayment of unsold financed cars	
	Sr. No	Date of repayment
		Percentage of Loan to be repaid
	1	On or before the 180 <sup>th</sup> day from the date of Dispatch of Vehicles
	2	On or before the 240 <sup>th</sup> day from the date of Dispatch of Vehicles
3	On or before the 300 <sup>th</sup> day from the date of Dispatch of Vehicles	
4	On or before the 365 <sup>th</sup> day from the date of Dispatch of Vehicles	
(The Lender may vary the date and percent of repayment from time to time and inform the Borrower through revised sanction letter)		
Other conditions	<ol style="list-style-type: none"> <li>Finance avail for New Cars /Demo cars/ any additional cars should be routed through this finance facility and within sanctioned limit.</li> <li>Borrower to undertake that the facilities granted by VWFPL are not used for any other purpose than specified. Borrower to</li> </ol>	

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	<p>provide an End use Certificate annually to that effect by 30.09.2012.</p> <p>3. Audited annual financial statement shall be submitted by the Borrower to the Lender within 180 days following the closure of the preceding financial year. (Submission Date)</p> <p>4. Provisional financial statement shall be submitted by the Borrower to the Lender within 15 days from the end of every quarter. (Submission Date)</p> <p>5. If Borrower is a Company (Public or Private) certified copy of resolution passed by the Board Meeting of the Company authorising borrower of credit limits from VWFPL and execution of facility documents.</p> <p>6. If Borrower is company, VWFPL's charge over building, machinery, stock, vehicles, other assets and modification of charge, where if any, should be registered with the Registrar of Companies within 30 days of its creation as per the company's Act.</p> <p>7. All assets charged to or to be charged to VWFPL to be kept fully insured at all times against all risks and ensure that VWFPL's name is included as co-assignee on the policy.</p> <p>8. In case the borrower commits default in the payment of any of the facilities or in the repayment of interest charge on any of the facilities within the stipulated date, the Lender shall have an unqualified right to discontinue to pay in the future to the Borrower and its directors, partners, members, employees and through such means as the Lender may in its absolute discretion may deem fit.</p> <p>9. The Borrower shall not, without prior written consent of the Lender, do any of the following:</p> <ul style="list-style-type: none"> <li>• Effect change in the Company's capital structure</li> <li>• Institute any scheme of amalgamation/merger/consolidation</li> <li>• Undertake guarantee obligation on behalf of any other company, firm or person.</li> <li>• Sell, assign, mortgage or otherwise dispose off any of the assets charged to VWFPL.</li> </ul> <p>10. Rate of Interest and other terms applicable to the Facilities are subject to review from time to time and are liable to be modified at the sole discretion of VWFPL.</p> <p>11. VWFPL reserves the right at any point of time to revoke or cancel the Facility(ies) sanctioned and/or vary, alter, modify or rescind, amend or change any one or more terms and conditions of the Facility at VWFPL's sole discretion with such notice as VWFPL may deem reasonable and without assigning any reasons.</p> <p>12. VWFPL shall be entitled to vary/change the rate of Interest (including any change as may be directed by Reserve Bank of India and /or any other regulatory/statutory body) from time to</p>
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*[Signature]*  
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[Signature]

# VOLKSWAGEN FINANCE PRIVATE LIMITED

time or vary/change the method of computation of such rate of interest or to charge an additional or penal rate by sending to the Borrower an intimation of such change/variation in the interest rates, Borrower shall be deemed to have consented to such change.

13. VWFP shall have the right to inspect/cause the inspection of premises/assets and statements of the Borrower. The cost of such audit (including any service tax) shall be borne by the Borrower.

14. VWFP shall have the right to inspect/cause the inspection of stocks without giving any prior notice. The cost of such audit (including any service tax) shall be borne by the Borrower.

15. In addition to any general lien or similar right to which VWFP is in law generally entitled, VWFP may at its discretion use and enforce its right of set off and cross default in respect of any other obligations of the Borrower to the Lender.

16. The unsecured loans (both principal and interest) and share application money from promoters/friends/relatives/associate companies would be subordinate to the credit facilities being provided by VWFP and cannot be withdrawn during the currency of this Facility.

17. It is also agreed, acknowledged and understood by you that if a default is committed by the Borrower and is not remedied within the cure period if any provided under the Facility(ies) then such default shall be deemed to be a default of under all the other facilities availed of by you from the Lender and notwithstanding anything contrary elsewhere contained in any writing or otherwise, VWFP shall regard all borrowings made by you from VWFP as immediately due and payable and VWFP shall be entitled to recall all the facilities granted to you and also utilize and enforce any mortgage, charge, pledge, hypothecation, lien or any other security interest created and subsisting as on date towards recovery of its dues under the facilities.

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**VOLKSWAGEN FINANCE**  
PRIVATE LIMITED

ANNEXURE B

SCHEDULE OF CHARGES AND PENALTIES


Non submission of End use certificate	Rs. 5000/- per month until the certificate is submitted						
Non submission of Audited/Provisional financial statements	Rs.5000/- per month from the Submission date						
Overdue charges/default charges/Penal rate	3% p.m. on outstanding /unpaid amount						
Borrower Termination charges/ Foreclosure charges	<p>(a) <u>If termination by the Borrower is effected during the first 12 months from the date of the Agreement:</u></p> <p>5% of the principal amount on the Facility then outstanding</p> <p>(b) <u>If termination by the Borrower is effected after the expiry of 12 months from the date of the Agreement but before the expiry of 24 months from the date of the Agreement:</u></p> <p>3% of the principal amount on the Facility then outstanding.</p> <p>(c) <u>If termination by the Borrower is effected after the expiry of 24 months from the date of the Agreement:</u></p> <p>1% of the principal amount on the Facility then outstanding</p>						
Prepayment charges in case of repayment by raising finance from other Banks/ Financial Institutions.	If Repayment of Loan within 75 days						
	<table border="1"> <tr> <td>1<sup>st</sup> time during the term</td> <td>3% per month</td> </tr> <tr> <td>2<sup>nd</sup> time during the same term</td> <td>3% per month + 20% reduction of facility limit</td> </tr> <tr> <td>3<sup>rd</sup> time during the same terms</td> <td>3% per month + Facility limit will be frozen</td> </tr> </table>	1 <sup>st</sup> time during the term	3% per month	2 <sup>nd</sup> time during the same term	3% per month + 20% reduction of facility limit	3 <sup>rd</sup> time during the same terms	3% per month + Facility limit will be frozen
	1 <sup>st</sup> time during the term	3% per month					
	2 <sup>nd</sup> time during the same term	3% per month + 20% reduction of facility limit					
3 <sup>rd</sup> time during the same terms	3% per month + Facility limit will be frozen						
[The Lender may vary the Prepayment Charges as its sole discretion]							
Execution and delivery of copies of documents (on Borrower's request)	Rs.200						

TRUE COPY

### VOLKSWAGEN FINANCE PRIVATE LIMITED

Cheque/ECS bounced charges	Rs.1000/-
External agency/firm charges/fees for outsourced activities like Registration, Title search, ROC search, valuation, Insurance, Audits	All charges/fees of external agencies/ firms shall be debited to the account of Borrower.

We accept and agree to be bound by the terms and conditions contained in Annexures.  
 For M/s Zenica Performance Cars Private Limited.

  
 Authorised Signatory Place: Gurgaon Date: 31<sup>st</sup> Aug 2012  
(Signature with rubber stamp of the Company)

TRUE COPY  
*[Handwritten mark]*

16. It is also relevant to reproduce the details of the Facility Agreement dated 21<sup>st</sup> December, 2011 between M/s. Zenica Cars India Pvt. Ltd. and M/s. Volkswagen Finance Pvt. Ltd./the First Respondent which is appended in Schedule 1, for Ready Reference:

**SCHEDULE I  
DETAILS OF THE FACILITY**

Sr. No	Heading	Details
1.	Date of execution of the Agreement	21 <sup>st</sup> December, 2011
2.	Place of execution of the Agreement	Gurgaon (HR)
3.	Description of Borrower/s Name : Constitution: Registered Address :	Zenica Cars India Pvt. Ltd. Company Orchid Centre, Sec-53, Gurgaon
4.	Description of the Manufacturer: Name : Registered Address :	Volkswagen Group Sales (India) Pvt. Ltd. 3, North Avenue, Level 5, Maker Maxity BKC, Bandra East Mumbai
5.	Cars	Audi
6.	Purpose of Facility	Purpose A <input checked="" type="checkbox"/> NCUR Purpose B <input type="checkbox"/> Purpose C <input type="checkbox"/> FOR ZENICA CARS INDIA PVT. LTD.
7.	Facility Limit	Rs. 84,00,00,000/-
8.	Facility Review Date	15 <sup>th</sup> November, 2012
9.	Disbursement Date	
10.	Interest Rate	Floating <u>10.40%</u> p.a. in case value of unsold stock is 25% of the utilised limit after 30 days from date of dispatch of vehicles. or Floating <u>10.70%</u> p.a. in case value of unsold stock is 50% of the utilised limit after 30 days from date of dispatch of vehicles.
11.	VRB Rate	18.72 % p.a.

Signature of Borrower/s

12.	Facilitation Period for Purpose A Loans	<u>30</u> calendar days		
13.	Interest Free Period	<u>30</u> calendar days		
14.	Interest Payment Dates	Purpose A Loans Interest on every Purpose A Loan shall be payable on the 3 <sup>rd</sup> of every month or as specified in invoices raised by Lender  Purpose B Loans and Purpose C Loans. Interest on every Purpose B Loan and Purpose C Loan shall be payable on the 3 <sup>rd</sup> day of every month following dates of disbursement of such Purpose B Loans and Purpose C Loans or as specified in invoices raised by Lender		
15.	Default Interest	[3]% per month on outstanding amount		
16.	Security	<ul style="list-style-type: none"> <li>➤ First ranking hypothecation in the nature of a floating charge over the Financed Cars and over the receivables (present and future) emanating from/ to emanate from the sale of the Financed Cars.</li> <li>➤ First and exclusive registered mortgage over the immovable property of the Borrower being [•] [Description of the Property to be inserted].</li> <li>➤ [First and exclusive mortgage by deposit of title deeds in respect of the immovable property of the Borrower being [•] [Description of the Property to be inserted].</li> <li>➤ Guarantee provided by [•] guaranteeing the performance by the Borrower of the terms of this Agreement and the due discharge by the Borrower of the Borrower Obligations.</li> </ul>		
17.	Security Documents	<ul style="list-style-type: none"> <li>➤ Deed of Hypothecation</li> <li>➤ Deed of Mortgage/ Memorandum of Entry and Security Provider Declaration/ Declaration</li> <li>➤ Personal Guarantee/ Corporate Guarantee</li> </ul>		
18.	Repayment of unsold Cars under Clause 8.2(b) with	Sr.	Date of repayment	Percentage of

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FOR ZONIC CARS INDIA PVT  
LIMITED  
MUMBAI

Signature of Borrower/s:

reference to each Loan	No.	Loan to be repaid
	1	On or before the <u>180</u> day from the Disbursement date of the Loan . 20 %
	2	On or before the <u>240</u> day from the Disbursement date of the Loan . 10 %
		On or before the <u>300</u> day from the Disbursement date of the Loan 10 %
		On or before the <u>365</u> day from the Disbursement date of the Loan 60 %
		On or before the ___ day from the Disbursement date of the Loan
(The Lender may vary the date and percent of repayment from time to time and inform the Borrower through revised sanction letter)		
19.	Prepayment charges	If Repayment of Loan within <u>75</u> days 1 <sup>st</sup> time during the term 3% per month 2 <sup>nd</sup> time during the same term 3% per month + 20% reduction of facility limit 3 <sup>rd</sup> time during the same terms 3% per month + Facility limit will be frozen (The Lender may vary the Prepayment Charges as its sole discretion . )
20.	Borrower Termination Charges	(a) <u>If termination by the Borrower is effected during the first 12 months from the date of the Agreement:</u>  5% of the principal amount on the Facility then outstanding  (b) <u>If termination by the Borrower is effected</u>

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Signature of Borrower/s:

		<p>after the expiry of 12 months from the date of the Agreement but before the expiry of 24 months from the date of the Agreement:</p> <p>3% of the principal amount on the Facility then outstanding</p> <p>(c) <u>If termination by the Borrower is effected after the expiry of 24 months from the date of the Agreement:</u></p> <p>1% of the principal amount on the Facility then outstanding</p>
21.	Permitted Location of Financed Cars	Gurgaon
22.	Notice Details	<p>For the Lender: Volkswagen Finance Pvt. Ltd. 3, North Avenue, Level 5, Maker Maxity, BKC, Bandra East, Mumbai 400 051. Attention: [Head- Business Strategy •] Phone: [•] Fax: [•] Email: [•]</p> <p>For the Borrower: [•] Zenica Cars India Pvt. Ltd. [•] Orchid Centre, Sec-53, Gurgaon Attention: [•] Director Phone: [•] 0124-4510900 Fax: [•] Email: [•]</p>


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17. The Corporate Debtor was to be provided cars by the Manufacturer; under the credit Financial Agreement entered into between the parties, the payment for the vehicles provided by the Manufacturer to the Corporate Debtor was to be made by the First Respondent to the Manufacturer on behalf of the Dealer/Corporate Debtor. All such cars, payments for which were made by the First Respondent were hypothecated to the First Respondent. The Corporate Debtor sold the cars and paid from the sale proceeds, the principal and the agreed interest, to the First Respondent. In the instant case, the lender cannot be said to be the creditor of the Manufacturer as it can be seen that the Facility Agreements and other deeds are executed between the Dealer and the Lender/First Respondent. It is significant to mention that the Manufacturer is not a Party to these Facility Agreements/Sanction Letters. Merely because there is no Bank Statement filed to show direct physical disbursement of money from the bank account of the Lender to the bank account of the Dealer/Corporate Debtor, it cannot be said that the amount claimed does not have the essential ingredients of a 'Financial Debt' as defined under Section 5(8) of the Code, having regard to the fact the root requirement of 'disbursement' against 'consideration for time value of money' is met as the amount has been disbursed, by operation of Agreements for and on behalf of the Dealer/Corporate Debtor. In the factual matrix of the attendant case, the Creditor/Lender/First Respondent is a 'financial creditor' as defined under Section 5(7) of the Code as it cannot be narrowly construed that the debts in question are in the form of only a third party security. In '*Anuj Jain* (supra)', it was observed that lenders of 'JAL' the Holding Company cannot

be recognised as 'Financial Creditors' of 'JIL' on the strength of the mortgage created by 'JIL'. The moot question addressed to in '*Anuj Jain (supra)*' case is whether 'a person having only a security interest over the assets of the corporate debtor, 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'. In the case on hand, the lender has extended credit facilities to the Dealer/Corporate Debtor and has disbursed amounts for and on behalf of the Dealer/Corporate Debtor for purchase of cars. *Simply put, the loan has not been obtained by the Manufacturer/M/s. Volkswagen Group Sales Company but by the Dealer/Corporate Debtor.* At this juncture, we note that the contention of the Appellant that the Petition is bad for non-joinder of necessary party i.e. the Manufacturer, is unsustainable. The Preferred Financial Agreement (the relevant extract of which is reproduced here in para 12) does not anywhere state that the Manufacturer has borrowed the money for and on behalf of the Dealer/Corporate Debtor. The Manufacturer has confirmed to make a hypothecation/lien in favour of the lender VWFPL on every product invoiced and released to a Dealer who has availed the Finance Facility from VWFPL. Succinctly put, even if the First Respondent/Lender VWFPL is a sister concern of VWGSIPL, it cannot be treated on the same footing as the lenders/bankers in '*Anuj Jain*' case, specially in the light of the fact that the Dealer/Corporate Debtor is not a part of the Holding Company, in comparison to 'JIL' (Corporate Debtor) which is a part of 'JAL', 'the Holding Company'. For all the afore-noted reasons, it is evident that the facts and circumstances in '*Anuj Jain*' (supra) are veritably different from the facts and circumstances of this case,

regarding the lender having only a 'security interest'. We hold that the First Respondent/Lender in the instant case is a 'secured creditor' who is involved right from the beginning as the Sanction Letters issued by the lender establish the assessment of the viability of the Corporate Debtor and therefore falls within the ambit of definition of 'Financial Creditor' as defined under Section 7 of the Code. In the same lines, the Learned Sr. Counsel also relied on other Judgements, which for the sake of brevity are not being detailed.

18. It is the main contention of the Learned Sr. Counsel appearing for the Appellant that 'mere claim of delivery of Cars is not proof of disbursement' and there is no evidence of disbursement in the absence of a 'Disbursement Request Form'. The preferred Financial Agreement dated 01.01.2012 executed between the M/s. Volkswagen Finance Pvt. Ltd. and M/s. Volkswagen Group Sales India Pvt. Ltd. read together with the Facility Agreements executed between 'ZPC' and 'ZCI' with the First Respondent/M/s. Volkswagen Finance Pvt. Ltd. clearly establishes that the cars which were purchased by the Dealers i.e. 'ZPC' and 'ZCI' were to be financed by the First Respondent and after disbursement of the funds by the First Respondent the cars were delivered to the Dealers. A brief perusal of the Facility Agreements entered into between the First Respondent and 'ZPC' and 'ZCI' right from 21.12.2011 onwards till 08.02.2016 evidence this arrangement of funds. At this juncture, we find it relevant to refer to one such sample Invoice raised by the Manufacturer on 'ZPC' which is detailed as hereunder:



# PORSCHE

## Tax Invoice

**Name of Seller / Consignor / Supplier:**  
Porsche India  
Division of Volkswagen Group Sales India Private Limited  
4th floor, Silver Utopia, Cardinal Gracious Rd  
Chakala, Andheri (East)  
Mumbai - 400099 Maharashtra

**Name of Purchaser / Recipient**  
Dealer No : 91102  
Zenica Performance Cars Private Limited  
Orchid Centre, Sec-53,  
Golf Course Road  
Gurgaon 122001  
Phone: +91 124 4409 000  
Email: info@porsche-gurgaon.in

State Code : 06  
State Name : Haryana

**Delivery Address:**  
Zenica Performance Cars Private Limited  
Khasra No 1169, Behrampur  
Road, VPO Khandas Gurgaon  
Gurgaon 122004  
Phone: +91 124 4409 000

Invoice No. : TI/2017-18/0142  
Invoice Date : 06-Sep-2017  
PI No. : PI/2017-18/0209  
Commission No. : 803634  
Page No. : 1/2

Original for : Recipient  
Duplicate for : Transporter  
Triplicate for : Supplier  
Quadruplicate for : For Logistics

**Purchaser's GSTIN No**  
GSTIN No. : 06AAACZ5846J1ZY

LR No :  
Date :  
Transporter :  
Vehicle No :

Chassis No. : WP1ZCH959HLB10078 MY : 2017 Engine No. : CYP4051363  
Quantity : 1 HSN Code : 87032391

The Vehicle is held under agreement of Hire Purchase / Lease / Hypothecation with Volkswagen Finance Private Ltd

Model/Options	Code	Description	Amount (Rs.)
Model	1	95BAA1 Macan 2.0	5,314,854.00
Exterior Colour	2	0Q White	0.00
Interior Colour	3	VE Standard interior Luxor Beige	0.00
Option Equipment	4	3FU Panoramic roof system	169,473.91
	5	9VL BOSE Surround Sound System	124,301.99
Vehicle Price			5,608,629.50
Basic Discount @ 5.00 %			-280,431.48
Model Discount @ 2.4 %			-134,607.11
Dealer Price			5,193,590.91
Transportation Charges			34,000.00
Total Net			5,227,590.91
IGST 28 %			1,463,725.46
CESS 15 %			784,138.64
Total Invoice Amount			7,475,455.01

Reg.Off.Add.: Volkswagen Group Sales India Private Limited, 3rd & 4th floor, Silver Utopia, Cardinal Gracious Rd, Chakala, Andheri (East), Mumbai 400099, Maharashtra.  
GSTIN No. : 27AACC4413F1ZK

19. The afore-mentioned Invoice dated 06.09.2017 shows that the 'Vehicle' is held 'Under Agreement of Higher Purchased/Lease/Hypothecation with M/s. Volkswagen Finance Pvt. Ltd'. The excel sheet is reproduced hereunder to see if it has sufficient details with respect to the

cars delivered, the invoice numbers and the amount financed.

**ANNEXURE - A 8**

TYPE OF FACILITY	VEHICLE IDENTIFICATION NUMBER	REMARKS	AMOUNT DISBURSED	DATE OF BURSAL	PRINCIPAL PAID	INTEREST PAID	PAYMENT RECEIVED ON DUE DATE	PRINCIPAL OUTSTANDING	INTL OUTSTANDING	PENAL OUTSTANDING	TOTAL AMOUNT PAYABLE	DATE OF DEFAULT	NO. OF DAYS DEFAULT	CURRENT DATE
PORSCHÉ - Used Car	WP1ZB924FLA39009	Unsold - Certificate dt.03.05.2018 - Pg.1039	53,65,384	06-06-2017	18,23,133	5,68,976	23,97,109	35,42,252	48,257	54,537	36,45,046	05.06.2018	35	10.07.2018
PORSCHÉ - Used Car	WP1ZB921FLA32853	Unsold - Certificate dt.03.05.2018 - Pg.1039	60,75,384	31-05-2017	20,85,204	6,12,659	26,97,863	39,90,180	98,300	71,379	41,60,859	30.05.2018	41	10.07.2018
PORSCHÉ - NCUF	WP1ZB924JKA1545	Invoice dt.31.10.2017 - Pg.962	1,12,00,076	31-10-2017	11,20,008	6,19,628	17,49,636	1,00,80,068	3,86,053	1,02,878	1,05,69,000	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WP0ZB978HLL15985	Invoice dt.11.07.2017 - Pg.954	2,09,07,206	11-07-2017	62,79,028	19,13,946	82,02,974	1,46,28,178	5,41,043	1,48,501	1,53,17,722	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WP1ZB929HKA36679	Invoice dt.11.07.2017 - Pg.952	1,07,07,764	11-07-2017	32,17,780	9,90,251	42,08,031	74,89,983	2,77,026	78,532	78,45,542	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WPOZFH981J5200355	1) Unsold - Certificate dt.03.05.2018 Pg.1021 2) Invoice dt.27.09.2017 - Pg.948	87,53,509	28-09-2017	8,75,351	5,94,992	14,70,343	78,78,158	2,91,384	33,014	82,02,556	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WPOZJG93H45114184	1) Unsold - Certificate dt.03.05.2018 Pg.1021 2) Invoice dt.12.07.2017 - Pg.950	1,68,16,853	12-07-2017	50,50,212	15,52,787	66,02,999	1,17,66,641	4,35,206	1,24,994	1,23,26,842	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WP1ZB925HLL10078	Invoice dt.06.09.2017 - Pg.946	74,75,455	06-09-2017	7,49,042	5,03,156	13,12,198	67,26,414	2,48,786	44,646	70,19,845	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WPOZFH990J5151173	Unsold - Certificate dt.03.05.2018 - Pg.1021	2,81,51,027	29-09-2017	28,15,103	19,14,520	47,29,623	2,53,35,924	9,59,024	4,28,729	2,67,23,678	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WP1ZB920KKA42729	Invoice dt.06.03.2018 - Pg.979	1,04,92,253	06-03-2018	1,04,92,253	52,165	1,05,44,418		56	269	325	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WP1ZB928KKA42809	Invoice dt.06.03.2018 - Pg.985	1,08,38,596	06-03-2018	1,08,38,596	2,36,000	1,10,74,596			6,070	6,070	28.04.2018	73	10.07.2018
PORSCHÉ - NCUF	WPOZJH986J5201560	Invoice dt.09.02.2018 - Pg.971	88,23,217	09-02-2018	88,23,217	1,53,379	89,76,596			1,249	1,249	09.02.2019	0	10.07.2018
PORSCHÉ - NCUF	WP1ZB925KKA42749	Invoice dt.29.01.2018 - Pg.973	1,08,38,596	29-01-2018	1,08,38,596	3,54,272	1,12,22,868			3,369	3,369	27.04.2018	74	10.07.2018
PORSCHÉ - NCUF	WP1ZB925KKA42685	Invoice dt.24.03.2018 - Pg.993	1,08,53,733	26-03-2018	1,08,53,733	1,70,000	1,10,23,733			5,102	5,102	25.04.2018	76	10.07.2018
PORSCHÉ - NCUF	WP1ZB929KKA42740	Invoice dt.24.03.2018 - Pg.989	1,09,39,080	26-03-2018	1,09,39,080	1,54,276	1,11,03,356			2,234	2,234	25.04.2018	76	10.07.2018
PORSCHÉ - NCUF	WPOZJH983J5201421	Invoice dt.27.07.2018 - Pg.981	88,23,217	27-07-2018	88,23,217	94,638	89,17,855			959	959	27.02.2019	0	10.07.2018
PORSCHÉ - NCUF	WP1ZB925KKA42939	Invoice dt.20.02.2018 - Pg.969	1,03,82,086	20-02-2018	1,03,82,086	1,19,039	1,05,01,125			1,059	1,059	20.02.2019	0	10.07.2018
PORSCHÉ - NCUF	WP1ZB955JLB09395	Invoice dt.24.04.2018 - Pg.1009	79,41,287	24-04-2018				79,41,287	2,26,164	1,641	81,69,092	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WP1ZB921JKA42909	1) Unsold - Certificate dt.03.05.2018 - Pg.1021 2) Invoice dt.23.03.2018 - Pg.991	1,04,92,253	23-03-2018				1,04,92,253	3,88,070	4,589	1,08,84,913	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WP1ZB927JLB05967	Invoice dt.15.02.2018 - Pg.965	79,16,556	15-02-2018	79,16,556	1,13,098	80,34,694			1,014	1,014	15.02.2019	0	10.07.2018
PORSCHÉ - NCUF	WP1ZB956JLB05958	Invoice dt.15.02.2018 - Pg.967	79,90,418	15-02-2018	79,90,418	1,19,653	80,10,071			1,030	1,030	15.02.2019	0	10.07.2018
PORSCHÉ - NCUF	WPOZJH984J5201539	Invoice dt.15.01.2018 - Pg.958	88,23,217	25-01-2018	88,23,217	2,02,330	90,25,547			1,468	1,468	25.01.2019	0	10.07.2018
PORSCHÉ - NCUF	WPOZJH986J5200947	Invoice dt.25.01.2018 - Pg.956	86,91,417	25-01-2018	86,91,417	1,99,307	88,50,724			1,446	1,446	25.01.2019	0	10.07.2018
PORSCHÉ - NCUF	WPOZJH984J520214	Invoice dt.23.04.2018 - Pg.995	85,38,437	23-04-2018				85,38,437	2,46,328	1,837	87,86,603	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WPOZCP985J5202490	Invoice dt.26.04.2018 - Pg.1007	88,62,050	26-04-2018				88,62,050	2,45,831	1,680	91,09,561	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WP1ZB929JKA42737	Invoice dt.23.02.2018 - Pg.983	1,05,77,600	23-02-2018	1,05,77,600	2,73,474	1,08,51,074			6,123	6,123	28.04.2018	73	10.07.2018
PORSCHÉ - NCUF	WPOZJH988J5201592	Invoice dt.23.02.2018 - Pg.987	88,75,795	23-02-2018				88,75,795	3,28,283	4,740	92,08,818	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WP1ZB925JKA43044	Invoice dt.16.03.2018 - Pg.977	1,04,92,253	16-03-2018	1,04,92,253					3,659	3,659	25.04.2018	76	10.07.2018
PORSCHÉ - NCUF	WP1ZB956JLB06852	Invoice dt.25.04.2018 - Pg.1011	79,25,148	25-04-2018				79,25,148	2,22,773	1,570	81,49,451	30.04.2018	71	10.07.2018
PORSCHÉ - NCUF	WPOZMH99X5166351	1) Unsold - Certificate dt. 03.05.2018 - Pg. 1021 2) Invoice dt.20.03.2018 - Pg.975	2,69,14,394	20-03-2018				2,69,14,394	9,95,464	12,086	2,79,21,543	30.04.2018	71	10.07.2018

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TYPE OF FACILITY	VEHICLE IDENTIFICATION NUMBER	REMARKS	AMOUNT DISBURSED	DATE OF DISBURSAL	PRINCIPAL PAID	INTEREST PAID	PAYMENT RECEIVED ON DUE DATE	PRINCIPAL OUTSTANDING	INTEREST OUTSTANDING	PENAL OUTSTANDING	TOTAL AMOUNT PAYABLE	DATE OF DEFAULT	NO. OF DAYS DEFAULT	CURRENT DATE
PORSCHE - NCUF	WP12KH9281KA05052	1) Unsold - Certificate dt. 03.05.2018 - Pg. 1021 2) Invoice dt. 19.01.2018 - Pg. 960	1,03,82,006	19-01-2018	197	2,75,475	2,76,672	1,03,81,889	3,83,987	6,156	1,07,72,032	30.04.2018	71	10.07.2018
PORSCHE - NCUF	WP02A984US202025	1) Unsold - Certificate dt. 03.05.2018 - Pg. 1021 2) Invoice dt. 28.03.2018 - Pg. 1005	88,62,050	28-03-2018		13,111	13,111	88,62,050	3,27,774	16,580	92,06,403	30.04.2018	71	10.07.2018
PORSCHE - NCUF	WP02KH985JS201326	Invoice dt. 28.03.2018 - Pg. 1003	88,62,050	28-03-2018	88,62,050	1,20,000	89,82,050			5,420	5,420	27.04.2018	74	10.07.2018
PORSCHE - NCUF	WP12LH924KA4281U	1) Unsold - Certificate dt. 03.05.2018 - Pg. 1021 2) Invoice dt. 28.03.2018 - Pg. 1001	1,09,23,943	28-03-2018		16,161	16,161	1,09,23,943	4,04,036	1,31,447	1,14,59,426	30.04.2018	71	10.07.2018
PORSCHE - NCUF	WP02LH989JS201333	Invoice dt. 28.03.2018 - Pg. 999	86,95,028	28-03-2018	99,695	1,09,343	2,09,038	85,95,333	2,24,307	1,77,022	89,96,662	08.05.2018	63	10.07.2018
PORSCHE - NCUF	WP02KH984US202205	Invoice dt. 28.03.2018 - Pg. 997	88,62,050	28-03-2018		13,111	13,111	88,62,050	3,27,774	59,790	92,49,613	30.04.2018	71	10.07.2018
PORSCHE - NCUF	WP12LH957L805970	Invoice dt. 28.03.2018 - Pg. 1013	79,53,599	28-03-2018		11,767	11,767	79,53,599	2,94,174	3,324	82,51,096	30.04.2018	71	10.07.2018
PORSCHE - NCUF	WP12MH9591L807345	Invoice dt. 28.03.2018 - Pg. 1015	79,25,148	28-03-2018		11,725	11,725	79,25,148	2,93,123	1,62,641	83,80,912	30.04.2018	71	10.07.2018
PORSCHE - Used Car	WP02FC986ES130155	Unsold - Certificate dt. 03.05.2018 - Pg. 1039	54,00,000	27-02-2018	1,15,064	62,248	1,77,312	52,84,936	1,87,746	26,037	54,93,719	27.04.2018	74	10.07.2018
					1,69,47,414	1,27,17,334	18,21,91,461	25,97,76,111	83,80,969	17,59,320	24,98,96,900			

The excel sheet refers to the Type of Facility, the vehicle identification number, the amount disbursed and the date of disbursement together with the Amounts payable. It is not the case of the Dealer/Corporate Debtor that all the cars were never delivered. It is their case that the 'amount claimed' was never disbursed. Though we are conscious of the fact that the excel sheet is unsigned, it is to be read together with the Stock Audit Reports and Invoices raised; as this Tribunal is to only to see whether there is a 'debt'

and a 'default' as envisaged under the Code and if the threshold has been met, but 'not quantify the amount of debt'.

20. It is the case of the First Respondent that the Statement of Account read together with the Stock Audit Report show that six cars were repossessed by First Respondent in the year 2019 and that the remaining cars are still not traceable. This Tribunal does not wish to go into the issue of the 'mystery of the missing cars'; the issue of faulty emission; the traceable/untraceable cars; the other new Models giving stiff competition to the Dealers as these aspects are of no relevance to the main issue raised in this Appeal.

21. Learned Sr. Counsel for the Appellant asserted that the amount claimed could be classified as an 'operational debt' and not a 'financial debt' and only to skirt the 'Pre-Existing Dispute' i.e. the pending Arbitration Proceedings, the First Respondent has with a *malafide* intention filed this Application under Section 7. To address this issue, at this point, we find it apropos to rely on the recent Judgment dated 04<sup>th</sup> February, 2022 of the Hon'ble Supreme Court in '***M/s. Consolidated Construction Consortium Limited Vs. M/s. Hitro Energy Solutions Private Limited.***' (Civil Appeal No. 2839 of 2020) in which the Hon'ble Apex Court has discussed in detail the provisions in IBC relating to two different class of creditors: 'operational and financial' and observed as follows:

***“Legislative History***

*28. Unlike other foreign jurisdictions, which usually differentiate between secured and unsecured creditors only, the IBC is unique because it provides for two different classes of creditors: operational creditors and financial creditors. To understand the position of the*

former within the framework of the IBC, it is important to understand the distinction between these two classes.

29. The primary source is Volume I of the Report of the Bankruptcy Law Reforms Committee. It notes that “[e]nterprises have financial creditors by way of loan and debt contracts as well as operational creditors such as employees, rental obligations, utilities payments and trade credit”. It provides that a corporate debtor will have financial and operational liabilities, and explains the difference as follows:

“Liabilities fall into two broad sets: liabilities based on financial contracts, and liabilities based on operational contracts. Financial contracts involve an exchange of funds between the entity and a counterparty which is a financial firm or intermediary. This can cover a broad array of types of liabilities: loan contracts secured by physical assets that can be centrally registered; loan contracts secured by floating charge on operational cash flows; loan contracts that are unsecured; debt securities that are secured by physical assets, cash flow or are unsecured. Operational contracts typically involve an exchange of goods and services for cash. For an enterprise, the latter includes payables for purchase of raw-materials, other inputs or services, taxation and statutory liabilities, and wages and benefits to employees.”

(emphasis supplied)

Further, the Report also notes:

“Here, the Code differentiates between financial creditors and operational creditors. Financial creditors are those whose relationship with the entity is a pure financial contract, such as a loan or a debt security. Operational creditors are those whose liability from the entity comes from a transaction on operations. Thus, the wholesale vendor of spare parts whose spark plugs are kept in inventory by the car mechanic and who gets paid only after the spark plugs are sold is an operational creditor. Similarly, the lessor that

*the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease. The Code also provides for cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt.”*

*(emphasis supplied)*

30. *It is thus clear that operational creditors are those whose debt arises from operational transactions, i.e., transactions which are undertaken in relation to the operation of an enterprise. As the examples in the BLRC Report suggest, these generally include transactions involving goods or services which are considered necessary for the operational functioning of an entity.*

31. *The Joint Parliamentary Committee Report on the IBC differentiates between financial and operational creditors in the following terms:*

*“Clause 21 appended with the Bill which states as under:- “The committee has to be composed of members who have the capability to assess the commercial viability of the corporate debtor and who are willing to modify the terms of the debt contracts in negotiations between the creditors and the corporate debtor. Operational creditors are typically not able to decide on matters relating to commercial viability of the corporate debtor, nor are they typically willing to take the risk of restructuring their debts in order to make the corporate debtor a going concern. Similarly, financial creditors who are also operational creditors will be given representation on the committee of creditors only to the extent of their financial debts. Nevertheless, in order to ensure that the financial creditors do not treat the operational creditors unfairly, any resolution plan must ensure that the operational creditors receive an amount not less than the liquidation value of their debt (assuming the corporate debtor were to be liquidated).”*

*(emphasis supplied)*

32. This makes it clear that another point of difference between financial and operational creditors would be in the nature of their role in the Committee of Creditors, because it is assumed the operational creditors will be unwilling to take the risk of restructuring their debts in order to make the corporate debtor a going concern. Thus, their debt is not seen as a long-term investment in the going concern status of the corporate debtor, which would incentivize them to restructure it, but merely as a one-off transaction with the corporate debtor for certain goods or services.

### **D.3 Judicial Precedent**

33. In Swiss Ribbons (P) Ltd. v. Union of India (“Swiss Ribbons”), the constitutionality of certain provisions of the IBC was challenged, with the focus being on the difference of rights provided to the financial and operational creditors. After observing the difference in the methods through which financial creditors and operational creditors trigger a proceeding under the IBC, the two-judge Bench of the Court noted that there was an intelligible differentia between financial and operational creditors. The Court held:

“50. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation

*of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set-up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable.*

*51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.*

*[...]*

75. Since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.”

(Emphasis Supplied)

22. In the instant case, the documentary evidence shows that the First Respondent/Lender is involved in a ‘New Car Unit Funding’ and ‘Inventory Stock Funding’ and also supports the ‘Used Cars Funding’. The Sanction Letter (reproduced in paragraph 15) establishes that the Credit Limit/Loan/Sanction includes specific interest components and time periods. It is seen that the liability is based on a financial contract; the loan contract is secured; the credit facility, involving large sums of money, extended by the lender enables the Dealer/Corporate Debtor to operate its business; the Agreements entered into between the parties have specified repayment schedule and defaults entitle the Lender to recall the Agreement; the First Respondent/Lender being an NBFC is involved right from the beginning in funding the Dealer/Corporate Debtor in setting up its

business and hence we hold that the financial relationship between the parties satisfies the ingredients to be termed as a 'Financial Creditor' as observed in the aforementioned '*Swiss Ribbons*' quoted in '*M/s. Consolidated Construction*' (supra).

23. It is not in dispute that the Finance Facility provided by the First Respondent was also for 'used cars'. We find force in the contention of the Learned Sr. Counsel for the First Respondent that the Registration of Used Vehicle is of a date prior to the date of disbursement of loan for its second sale vis-a-vis the Dealer. The details of the Invoices broadly match the Stock Audit Report and the statement of account together with the details of the cars, which we are of the view is sufficient documentary evidence to establish that the cars were indeed delivered to the Dealer. Hence the contention of the Appellant that in the absence of any 'Disbursement Request Form', on record, the 'Disbursement' could not be construed and that the excel sheet is self-serving, is untenable, in the light of the aforementioned reasons.

24. Further, the Facility Agreements were entered into from time to time both for the 'new' cars as well as 'used' cars right from 2011 onwards. The Dealer never raised any dispute in respect of these Facility Agreements. It is pertinent to mention that the First Respondent got issued a Legal Notice dated 10.05.2018 demanding payment of the amounts of Rs. 42 Crores, which was never replied to, by the Corporate Debtor. The Facility Agreements, the Hypothecation Agreements, the Personal Guarantees and finally the Demand Promissory Notes admittedly entered into between the both parties establish the jural and financial relationship between the parties. Section 5(8) of the Code defines 'Financial Debt' and includes 'any

amount raised by acceptance under any acceptance credit facility' hence we are of the considered view that the amount disbursed to the Manufacturer on behalf of the Dealers/Corporate Debtor falls within the definition of Financial Debt as defined under Section 5(8) of the Code.

25. Now we address ourselves to the next issue raised in this Appeal as to whether prior invocation of Arbitration Proceedings against the guarantor bars initiation of CIRP against the Corporate Debtor Company. It is submitted that the Arbitral Award dated 18.10.2019 is in favour of the First Respondent against the 'Personal Guarantors' of the Corporate Debtor and relies on the judgement of the Hon'ble Supreme Court in '**Lalit Kumar Jain Vs. Union of India and Ors**'. 2021 SCC Online SC 3969 wherein it is observed as follows:

*"135. In Kaupthing Singer and Friedlander Ltd. (supra) the UK Supreme Court reviewed a large number of previous authorities on the concept of double proof, i.e. recovery from guarantors in the context of insolvency proceedings. The court held that:*

*"The function of the rule is not to prevent a double proof of the same debt against two separate estates (that is what insolvency practitioners call "double dip"). The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. It is for that reason sometimes called the rule against double dividend. In the simplest case of suretyship (where the surety has neither given nor been provided with security, and has an unlimited liability) there is a triangle of rights and liabilities between the principal debtor (PD), the surety (S) and the creditor(C). PD has the primary obligation to C and a secondary obligation to indemnify S if and so far as S discharges PD's liability, but if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability, and the secondary right of obtaining an indemnity from PD. C can (after due notice) proceed against either or both of PD and*

*S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all.”*

*136. In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.”*

26. It is the case of the Appellant that the ‘Statement of Claim’ was filed only qua the Guarantors before the Arbitral Tribunal and therefore the claims qua the Company ‘Zenica Performance Cars Pvt. Ltd.’ stood abandoned. This argument does not hold good having regard to the ratio laid down by the Hon’ble Supreme Court in the aforementioned ‘*Lalit Jain*’ (*Supra*).

*The term “coextensive” has been defined in the celebrated book of **Pollock and Mulla on Indian Contract and Specific Relief Act, 10<sup>th</sup> Ed.**, at p. 728 as under:*

*“Coextensive.- Surety’s liability is coextensive with that of the principal debtor.*

*A surety’s liability to pay the debt is not removed by reason of the creditor’s omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued.*

In *Halsbury's Laws of England, 4<sup>th</sup> Edn., Vol. 20, para 159 at p.*

87 it has been observed that:

*“159. ....It is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for.”*

27. The Hon'ble Apex Court in '**State Bank of India Vs. V. Ramakrishnan**', (2018 17 SCC 394) observed as follows:

*“24. The scheme of Sections 60(2) and (3) is thus clear – the moment there is a proceeding against the corporate debtor pending under the 2016 Code, any bankruptcy proceeding against the individual personal guarantor will, if already initiated before the proceeding against the corporate debtor, be transferred to the National Company Law Tribunal or, if initiated after such proceedings had been commenced against the corporate debtor, be filed only in the National Company Law Tribunal. However, the Tribunal is to decide such proceedings only in accordance with the Presidency-Towns Insolvency Act, 1909 or the Provincial Insolvency Act, 1920, as the case may be. It is clear that sub-section (4), which states that the Tribunal shall be vested with all the powers of the Debt Recovery Tribunal, as contemplated under Part III of this Code, for the purposes of sub-section (2), would not take effect, as the Debt Recovery Tribunal has not yet been empowered to hear bankruptcy proceedings against individuals under Section 179 of the Code, as the said Section has not yet been brought into force. Also, we have seen that Section 249, dealing with the consequential amendment of the Recovery of Debts Act to empower Debt Recovery Tribunals to try such proceedings, has also not been brought into force. It is thus clear that Section 2(e), which was brought into force on 23.11.2017 would, when it refers to the application of the Code to a personal guarantor of a corporate debtor, apply only for the limited purpose contained in Section 60(2) and (3), as stated hereinabove. This is what is meant by strengthening the Corporate Insolvency Resolution Process in the Statement of Objects of the Amendment Act, 2018.*

25. Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him."

28. This Tribunal in '**State Bank of India Vs. Athena Energy**' (2020 SCC Online NCLAT 774) held as hereunder:

*The ILC thus rightly observed that provisions are there in the form of Section 60(2) and (3) and no amendment or legal changes were required at the moment. We are also of the view that simultaneously remedy is central to a contract of guarantee and where Principal Borrower and surety are undergoing CIRP, the Creditor should be able to file claims in CIRP of both of them. The IBC does not prevent this. We are unable to agree with the arguments of Learned Counsel for Respondent that when for same debt 19 Company Appeal (AT) (Ins) No.633 of 2020 claim is made in CIRP against Borrower, in the CIRP against Guarantor the amount must be said to be not due or not payable in law. Under the Contract of Guarantee, it is only when the Creditor would receive amount, the question of no more due or adjustment would arise. It would be a matter of adjustment when the Creditor receives debt due from the Borrower/Guarantor in the respective CIRP that the same should be taken note of and adjusted in the other CIRP. This can be conveniently done, more so when*

*IRP/RP in both the CIRP is same. Insolvency and Bankruptcy Board of India may have to lay down regulations to guide IRP/RPs in this regard.*

*The issue involved in the matter of “Ramakrishnan” was whether Section 14 of IBC will provide for a moratorium for the limited period mentioned in the Code, on admission of an insolvency petition would the same apply to Personal Guarantor of a Corporate Debtor. The issue was answered in negative by the Hon’ble Supreme Court. The Hon’ble Supreme Court in such context made observations as above in Paragraphs – 24 and 25 of the Judgement. It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor. The law as laid down by the Hon’ble High Courts for the respective jurisdictions, and law as laid down by the Hon’ble Supreme Court for the whole country is binding.”*

29. The record evidences that Arbitration was invoked by VWGSIPL against the Company ‘M/s. Zenica Cars India Pvt. Ltd’ too, wherein Sole Arbitrator appointed is Hon’ble Justice S.J. Vazifdar. The Learned Sr. Counsel appearing for the Appellant submitted that the Hon’ble High Court of Bombay has granted a stay on the operation of the Arbitral Award vide Order dated 23.12.2021 in Comm Arb Petition 1497/2019 holding the appointment of Mr. D.K. Sonawane as illegal. It is further submitted that though the VWGSIPL initially filed a claim of Rs. 537,70,97,863/- in the said Arbitration Proceedings, give up the entire claim of Rs. 524,91,60,000/-. We are not inclined to pass any observations regarding the submissions/admissions made before the Learned Arbitrator as the issue raised in this Appeal is whether the Adjudicating Authority was justified in admitting the Application filed by VWFPL under Section 7 of the Code when Arbitration Proceedings were pending against the Personal Guarantor. Keeping in view the ratio laid down in the aforementioned Judgments, this Tribunal is of the view that prior initiation of Arbitration Proceedings

against the 'Personal Guarantor' by the Manufacturer does not bar the 'Financial Creditor' from subsequently filing an Application under Section 7 of the Code.

30. Additionally, it is the further case of the Appellants that the 'date of default' is stated to be 28.04.2018 but again in Para 2 of Part-IV of Form-I, the date of default is given as 02.02.2018 and hence this date of default is imaginary and there are claims of disbursement even after the date of default. Apart from the fact that 'limitation' is not the issue here, this date of default does not subtract the fact that there was a loan taken, it had time value of money, had a commercial effect of borrowing and fulfils all the essential ingredients of a 'financial debt' as defined under the Code.

31. In conclusion, we aptly point out the observations of the Hon'ble Supreme Court in '**Orator Marketing Pvt. Ltd. Vs. Samtex Desinz Pvt. Ltd.**' (2021 SCC Online SC 513), in which the Hon'ble Apex Court has observed in Paras 19 to 22 and in para 31 as follows:

*"19. Corporate Resolution Process gets triggered when a Corporate Debtor commits a default. A Financial Creditor may file an application for initiating a Corporate Insolvency Resolution Process against the Corporate Debtor, when a default has occurred.*

*20. A 'corporate debtor' means a corporate person who owes a debt to any person, as per the definition of this expression in Section 3(8) of the IBC. Section 3(11) defines 'debt' to mean "a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt." The word 'claim' has been defined in Section 3(6) to mean inter alia "a right to payment, whether or not such right is reduced to judgment, fixed, disputed,*

undisputed, legal, equitable, secured or unsecured.” ‘Default’ is defined in section 3(12) to mean “non-payment of a debt when the whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the Corporate Debtor, as the case may be.” Under Section 5(7) of the IBC ‘financial creditor’ means any person to whom a financial debt is owed and includes a person to whom such debt has legally been assigned.

21. The definition of ‘financial debt’ in Section 5(8) of the IBC has been quoted above. Section 5(8) defines ‘financial debt’ to mean “a debt along with interest if any which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest, as per Section 5(8) (a) of the IBC. The definition of ‘financial debt’ in Section 5(8) includes the components of sub-clauses (a) to (i) of the said Section.

22. The NCLT and NCLAT have overlooked the words “if any” which could not have been intended to be otiose. ‘Financial debt’ means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLAT and NCLT have failed to notice clause(f) of Section 5(8), in terms whereof ‘financial debt’ includes any amount raised under any other transaction, having the commercial effect of borrowing.

31. At the cost of repetition, it is reiterated that the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by

the Corporate Debtor. 'Default' means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly exclude an interest free loan. 'Financial Debt' would have to be construed to include interest free loans advanced to finance the business operations of a corporate body."

*(Emphasis Supplied)*

32. In the case of the Corporate Debtor who commits a default of a Financial Debt, the Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the Financial Creditor to satisfy itself that the default has occurred. In the instant case, we are of the considered view that the amount mentioned in Part -IV and V of the Section 7 Application falls within the definition of 'Financial Debt' as defined in Section 5(8) of the Code. At the cost of repetition, it is clear that under the Credit/Financing Facility Agreements the payment of the cars provided for by the Manufacturer to the Dealer/Corporate Debtor was to be made by the Financial Creditor to the Manufacturer for and on behalf of the Corporate Debtor.

33. Having regard to the financial relationship between the parties and in the light of the aforementioned reasons, the defense regarding proof of 'direct/actual disbursement' is not a plausible one worthy of acceptance. This Tribunal concludes that in such a factual matrix, proof of

actual disbursal vide 'Disbursement Request Form/Note' is not a *sine qua non* enabling the Applicant to prefer the Section 7 Application. This Tribunal is subjectively satisfied with the material/evidence available on record that the amount 'due and payable' is a 'Financial Debt' and the First Respondent is a 'Financial Creditor' as defined under Sections 5(8) and 5(7) of the Code, respectively. Hence we do not find any illegality or infirmity in the Orders Impugned.

For all the aforementioned reasons, these Appeals are dismissed, accordingly. No order as to costs.

**[Justice Anant Bijay Singh]**  
**Member (Judicial)**

**[Ms. Shreesha Merla]**  
**Member (Technical)**

**NEW DELHI**  
**10.02.2022**  
*Basant B.*