

**IN THE NATIONAL COMPANY LAW TRIBUNAL AT  
ALLAHABAD BENCH**

**CA NO.81/2018**

**(Application under Section 60(5) of the Insolvency & Bankruptcy Code, 2016)**

**IN**

**COMPANY PETITION NO. (IB)77/ALD/2017**

**(Application under Section 7 of the Insolvency & Bankruptcy  
Code, 2016)**

**IN THE MATTER OF**  
**ICICI BANK LIMITED.**

**..... APPLICANT**

**VERSUS**

**MR. ANUJ JAIN,**  
Resolution Professional for Jaypee Infratech Limited.

**..... RESPONDENT**

**AND**

**IN THE MATTER OF**  
**IDBI BANK LIMITED.**

**..... FINANCIAL CREDITOR**

**VERSUS**

**JAYPEE INFRATECH LIMITED.**

**..... CORPORATE DEBTOR**

**JUDGMENT/ORDER DELIVERED ON 09.05.2018**

**CORAM** : **SH. V.P SINGH, MEMBER (J)**  
**MS. SAROJ RAJWARE, MEMBER (T)**

**For the applicant** : **Sh. Anurag Khanna, Sr. Adv. Along with**  
**Sh. Madhav Kanoria, Adv.**  
**Sh. Shantanu Chaturvedi, Adv.**  
**Ms Gunjan Jadwani, Adv.**

**For the Resolution Professional:** **Sh. Sudhanshu Batra, Sr. Adv. Along with**  
**Sh. Abhishek Anand, Advocate &**  
**Ms Honey Satpal, Advocate.**

**PER SE** : **SH. V.P. SINGH, MEMBER (J)**



## JUDGMENT/ORDER

Applicant has filed this application under Section 60 (5) of the Insolvency and Bankruptcy Code 2016 against the Decision of the Resolution Professional of the Corporate Debtor in Rejecting the Claim of the Applicant as a Financial Creditor of the Corporate Debtor.

2. The ICICI Bank Limited (hereinafter referred to as the "Applicant") in the Company Petition (IB) No. 77/ALD/2017 under section 60 (5) Of the Insolvency and Bankruptcy Code 2016 (hereinafter referred to as "code") has filed the present application against the decision of the Resolution Professional of Jaypee Infratech Ltd (the Corporate Debtor) in rejecting the claim of the applicant as a Financial Creditor of the corporate debtor on account of the security provided for the facilities granted by the applicant to the holding company of the Corporate Debtor namely Jayprakash Associates Ltd ("JAL") by its letter dated 24 November 2017 and 16 December 2017. In the aforesaid letters the Resolution Professional inter-alia, stated that the applicant cannot be termed as the **Financial Creditor** as defined under **Sec 5 (7) of the Code** and that the claim does not amount to **Financial Debt** under **sec 5 (8) of the code** in relation to the security provided by the **Corporate Debtor for the loans of JAL.**

3. Brief facts stated by the applicant are as under.

- 3.1. IDBI Bank limited filed the Company Petition under sec 7 of the Code for initiation of The Corporate Insolvency Resolution Process ("CIRP") concerning the corporate debtor. The company petition was admitted by this Tribunal vide its order dated 9 August 2017 and Mr Anuj Jain



process to carry out the functions as elucidated in the Code. The resolution Professional under the orders of the Tribunal dated 9 August 2017 issued a public advertisement in the newspaper and invited the creditors of the corporate debtor to submit their claim on or before 24 August 2017.

3.2. In response to the said public announcement, Applicant submitted its proof of claim against the Corporate Debtor before the Resolution Professional for a total amount of ₹304,10,12,486.52 as on 9 August 2017 vide its Form-C, dated 22 August 2017, for the financial assistance granted to the Corporate Debtor by the applicant. A copy of Form C is annexed with the petition.



3.3. Further, the applicant also filed a claim against the corporate debtor as a security provider for the facilities provided by it for the loan advance by the applicant, to its holding company, JAL. It is pertinent to mention that in addition to being a lender of the Corporate Debtor, the applicant is also a member of the consortium of lenders to JAL ("JAL lenders"). The applicant has among other things granted the Rupee Term Loan Facilities to JAL, from now on referred to as JAL facilities.

3.4. The corporate debtor has Mortgaged certain of its immovable properties to secure the JAL Facilities, granted to JAL by the applicant, had been, among other things secured. The details of land mortgaged under the JAL facilities is given in para 7 & 9 of the application and from now on referred to as the "Consortium mortgages" and the Exclusive mortgages".

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3.5. The applicant contends that the corporate debtor had taken all requisite corporate approvals at all relevant times for creation of the mortgages above. The corporate debtor had also recorded the information about the Consortium mortgages as well as the Exclusive mortgages in its Annual Report that were filed with the relevant Stock Exchanges where the shares of the corporate debtor are listed. The copies of the annual reports of the corporate debtor for the financial year 2013 -14, 2014-15, 2015-16 and 2016-17 are annexed as Annexure A5 with the petition.

3.6. Petitioner submitted that all the mortgages were validly executed in compliance with the governing laws, including the Companies Act 2013 and The Transfer of Property Act 1882. All necessary filings/registrations were undertaken by the Corporate Debtor with the Registrar of Companies, The Central Registry of the Securitisation Asset Reconstruction and Security Interests ("CERSAI") under The Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act 2002 ("SARFAESI Act") and Sub- Registrar Assurances.

3.7. The applicant contends that the disclosure of the Consortium mortgages and the Exclusive mortgages at in the Annual Report of the corporate debtor ensured that everyone concerned with the business and affairs of the Corporate Debtor, including the lenders had sufficient knowledge about the Consortium Mortgages and the Exclusive Mortgages. It is further submitted that despite the knowledge of the Consortium mortgages and Exclusive mortgages being in public records and annual reports of JAL, none of the lenders of the Corporate Debtor, whether at any of the Joint Lenders Meeting or otherwise, have raised any



objection to the creation of the Consortium Mortgages and the Exclusive mortgages by the corporate debtor. It is further submitted that neither any shareholder nor the Director of the Corporate Debtor has raised any objection to the creation of the "Consortium Mortgages and Exclusive Mortgages" by the corporate debtor.

3.8. The applicant further contends that on account of continuous default in payment under the various credit facilities extended to JAL by the applicant including the JAL facilities, the applicant was constrained to issue a demand notice dated 28 June 2017 to JAL, whereby the applicant called upon JAL to clear the outstanding amounts that were due and payable under the facilities as on 28 June 2017. A copy of the said demand notice issued to JAL by the applicant is annexed with the application as annexure A6.

3.9. The applicant by way of a letter bearing Ref No. MSG/2017/08/692 dated 7 August 2017 issued to the Corporate Debtor put the corporate debtor to notice about the defaults of JAL and inter alia informed the Corporate Debtor that in the event of JAL fails to pay overdue amounts, the applicant shall be constrained to take such steps as be necessary to enforce the mortgages and realising the security obligations including the overdue amounts.

3.10. The applicant further contends that after the public announcement by the Resolution Professional as above and given the third-party mortgages provided by the corporate debtor as security for JAL facilities as mentioned above, the applicant filed his claim against the corporate debtor as a security provider for JAL facilities vide separate Form C dated 22 August 2017. A copy of IAI Form C is annexed and



marked as annexure A-8. It is submitted that the Mortgages IOM-1, IOM-2, IOM Tappal property 1, IOM Tappal property 2 and IOM Jaganpur property form part of the JAL Form -C.

3.11. The Resolution Professional vide letter dated 24<sup>th</sup> number 2017 prima facie rejected the claim of the applicant under the JAL Form-C, inter alia erroneously holding that the mortgages created in favour of the applicant do not qualify as a **Financial Debt within the meaning of subsection 8 of Sec 5 of the Code**, and therefore, the applicant cannot claim itself to be a **Financial Creditor**. Further, the Resolution Professional stated that since no credit facilities have been sanctioned by the applicant to the Corporate Debtor, therefore no Financial Debt arises in favour of the applicant against the Corporate Debtor. By way of the said letter dated 24<sup>th</sup> November 2017, the Resolution Professional offered an opportunity to the applicant to make any submissions or submit any application document or material to substantiate his claim within 15 days. A copy of the letter is annexed as Annexure A- 9 with the application.

3.12. In response to the Resolution Professional letter dated 24 November 2017, the applicant vide its letter bearing Reference Number MSG/2017/12/743 dated 7 December 2017 verified inter alia that the Corporate Debtor has mortgaged property to secure the repayment of the loan which is granted by the applicant to JAL and was sure that it shall be discharged by JAL under its obligations to the applicant under the JAL facilities (The Mortgage Debt) and as such the Corporate Debtor assured the Applicant with respect to such Mortgage Debt. It was also brought to the attention of the Resolution Professional that



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regarding mortgages, the Corporate Debtor has also undertaken to indemnify and keep the applicant indemnified against all losses, costs, claim and expenses which the applicant as the security trustee may incur.

3.13. The applicant further contends that the Resolution Professional thereafter issued the letter dated 16 December 2017 in response to the applicant's letter and denied the contention of the applicant that the corporate debtor owed any financial debt to the applicant and reiterated that in terms of the provisions of the code, the applicant is not a Financial Creditor of the Corporate Debtor with respect to the mortgages and the mortgage debt. The resolution professional further stated that the guarantee and the indemnity are distinct documents under the relevant laws and the mortgages executed by the corporate debtor is not like the guarantee and indemnity.



4. In response to the Resolution Professional letter dated 16 December 2017 the applicant vide letter bearing number MFD/2018/01/765 dated 30 January 2018, made, among other things, the following submissions for consideration of the Resolution professional:

- a. Under sec 3 (11) of the code, **debt** means liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. Therefore, the scope of the debt is not limited to the liability or obligation owed directly by the Principal debtor, but also includes liabilities or obligations of other parties in respect of the debt of the principal debtor.
- b. The definition of financial debt under sec 5 (8) of the code is an inclusive definition and not exhaustive.
- c. It is settled principle under the Indian law that the contract of indemnity or guarantee constitutes an independent and separate contract from the main contract. However, this does not imply that the indemnity or guarantee in question must be provided under the distinct agreement. Therefore, the classes are creating,

and indemnity or a guarantee under the contract shall be treated as an independent contract from the main contract. Provision of Sec 126 of the Indian Contract 1872 makes it clear that the contract of guarantee is created when it confers on a person the obligation of performing the promise, or discharging the liability, or offering a third person in case of default, even if not expressly stated in the contract.

- d. Under the consortium mortgages and exclusive mortgages, the corporate debtor has undertaken that upon default of the payments owed by the JAL to the applicant under the JAL facilities; the corporate debtor shall discharge the liability of JAL under the JAL facilities.
- e. Each of the Consortium Mortgages and Exclusive Mortgages has been created as an English mortgage in registered form. Therefore, by the provision of the Transfer of Property Act, the Mortgagor (i.e. the corporate debtor) is bound under the mortgages among other things to repay the mortgage money (i.e. the outstanding dues of JAL under the JAL facilities) to the mortgagee (i.e. the applicant herein). Consequently, the corporate debtor stands as a guarantor for the financial debt owned by the JAL under the JAL facilities.



- 4.1. However, despite clarification given by the applicant, the resolution Professional failed to appreciate the transactions and the applicable laws and admit the claim of the applicant under the JAL Form -C and consider the applicant as a Financial Creditor Of The Corporate Debtor about the claim as mentioned in JAL Form-C.
- 4.2. The applicant states that he was hopeful that the issue would be resolved between the applicant and the Resolution professional in the light of the correspondence exchanged between them as mentioned hereinabove as well as the discussion in the meeting of Committee of Creditors.
- 4.3. Applicant contends that resolution Professional has already invited resolution plans from the Resolution Applicants, which are at advanced stages of considerations. The Applicant has been constrained to file this application praying for the relief from the Tribunal as contained herein.

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4.4. The applicant further contends that since the resolution professional has rejected the claim of the applicant as a Financial Creditor under JAL Form C, the prospective resolution applicant shall not provide for any amount to be paid to the applicant as a creditor and shall also seek extinguishment of the mortgages in their Resolution Plans. The applicant apprehends that if such resolution plans are certified by the Resolution Professional as complying with laws and are approved by the COC and this Tribunal, then the applicant shall be unjustly deprived of valuable security against the provisions of the mortgages and applicable laws. It is submitted that each of the mortgages specifically provide that the security created therein shall be continuing security and shall among other things, remain in full force and effect until all amounts due and payable under the JAL facilities have been paid to the satisfaction of the applicant. It is submitted that each of the mortgages are also binding on the successor of the corporate debtor by the terms of the mortgages.

5. Aggrieved by the actions of the Resolution Professional failing to accept the claim of the applicant herein and the possible consequences thereof whereby the applicant shall stand to lose valuable security created under the mortgages, the applicant has filed the present application seeking relief from this Tribunal.

The applicant has further submitted that the resolution Professional has erred in appreciating the scheme of the Code and the established law relating to mortgages, indemnities and guarantees in India. The conclusion of the Resolution Professional is impugned on the following grounds:

i. The Resolution professional failed to appreciate that the applicant is a

secured creditor of the corporate debtor



ii. The resolution professionals failed to understand and appreciate that the applicant is a financial creditor of the corporate debtor on account of the third-party mortgage created by the corporate debtor as well as the indemnity provided by the Corporate debtor to the applicant. It is further alleged that the mortgages, by nature, implies the pecuniary liability upon the Corporate Debtor in respect of the secured debt.

iii. The Corporate Debtor had provided in the indemnities to the applicant under the terms of the mortgages.

iv. The applicant is a Financial Creditor of the Corporate Debtor.

v. The Resolution Professional must verify all possible liabilities of the Corporate Debtor for effective resolution of the corporate debtor under the provisions of the Code.

vi. The resolution professional is bound to interpret "claim" in an expansive manner.

6. Applicant has sought the relief of declaration to set-aside the decision of the resolution professional vide its letter dated 24 November 2017 and 16 December 2017 whereby the claim of the applicant as a financial creditor of the corporate debtor has been rejected by the resolution professional.

Further directions has been sought for against the resolution professional to accept the claim of the applicant as the financial creditor of the corporate debtor to the extent of the amount of debt of Jaiprakash Associates Ltd ("JAL") secured under the mortgages and include the applicant in the committee of the creditors of the corporate debtor in respect of its claim in relation to the JAL facilities submitted vide its Form C dated 23 August 2017. Pending the hearing in final disposal of the present application, the applicant has sought an injunction for restraining the



Resolution Professional from putting any resolution plan in respect of the corporate debtor for voting before the Committee of Creditors.

7. We have heard the argument of the learned counsels for the parties and perused the record. The main contention of the applicant is that, applicant is a Secured Creditor of the Corporate Debtor.

7.1. The word debt is defined in sec 3 (11) of the Code which is as follows.

*"Debt" means any liability or obligations in respect of the claim which is due from any person and includes a financial debt and operational debt.*

The word claim is defined in sec 3 (6) of the Code which is as follows;

*"claim" means-*

*(a) "right to payment, whether or not such right is reduced to judgement, fixed, disputed, undisputed, legal, equitable, secured or unsecured."*

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The petitioner contends that the conjoint reading of sec 3 (6) and 3 (11) of the Code shows that the debt is a liability obligation which is due and payable from any person and not necessarily from the Corporate debtor alone. The word creditor is defined in sec 3 (10) of the code provides as follows;

*"Creditor" means any person to whom its debt is owed and includes a financial creditor, and operational creditor, a secured creditor, unsecured creditor and the decree holder.*

The word secured creditor is defined in sec 3 (30) of the Code which is as follows;

*"Secured Creditor" means creditor in favour of whom security interest is created.*

Section 3 (31) of the code provides as follows;

*"Security Interest" means right, title or interest claimed to property, created in favour of, or provided for the secured creditor by a transaction which secures payment or performance of an obligation and includes*

*charge, mortgage, assignment*



*and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee.*

The applicant contends that the conjoint reading of sec 3 (10), 3 (30) and 3 (31) shows that the creditor can be any person to whom debt is owed and includes a secured creditor as well, if it has security interest in favour of securing payment for performance of obligation of any person and not only a Corporate debtor.

7.2. The applicant further contends that the applicant, having mortgages from the Corporate Debtor, which secures payment or performance of any obligation of any person, is a secured creditor under the provisions of the Code.

Based on the above, the applicant claims that he is a secured Creditor of the corporate debtor under the provisions of the code.

7.3. The applicant further contends that the mortgages by nature imply a personal liability upon the Corporate Debtor to the extent of the amounts secured by the mortgage properties, till the repayment. It is submitted that the mortgages enable the mortgagee to secure the payment of a pecuniary claim through the medium of the property itself, that is mortgaged to him.

The applicant further contends that Sec 58 (a) of the transfer of property act 1882 defines "mortgage" as *"the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which gives rise to pecuniary liability"*.

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The applicant has further relied on the case law of *Hon'ble High Court Manic Chand vs Baldeo AIR 1951 Patna 527* wherein Hon'ble High Court has held that;

*"mortgage is a transfer of an interest in a specific immovable property as security for the repayment of the debt. That debt subsists in a mortgage whereas the transaction by which a debt is extinguished is not a mortgage but a sale."*

*the applicant further contends that the creation of mortgage over the mortgaged properties itself imply the pecuniary liability of the corporate debtor towards the amounts outstanding under the credit facilities, at least to the extent of mortgaged properties."*

The applicant has also relied on the interpretation of the word "debt" given by *Hon'ble High Court of Delhi in case of State Bank Of India versus Samneel Engineering company, 1995 (35) DRJ 485*, wherein Hon'ble High Court has held that;

*"(18) though I have held that the term "debt" as defined by clause (g) of sec 2 of the Act includes mortgages of every type within its meaning ; I have also held that even if the term debt had not been defined in The Act, it would have included mortgage within it . ---*

*It is, therefore, clear that the debt is an essential ingredient of a mortgage. There may be debt without a mortgage, but there can be no mortgage without a debt. Properties are offered as security only for securing recovery of the debt. If the debt is repaid the mortgage ceases to be a mortgage. Even if the term debt would not have been defined in the act number 51 of 1993 the mortgage would have been included within the meaning of the debt. This is a general law and settled trend of judicial opinion. However, Act No 51 of 1993 incorporates the definition of debt in its interpretation clause by way of abundant caution and gives it out a very wide meaning. The quint essence of the definition is the existence of any liability founded on an allegation as due from any person; the creditor is a bank or a financial institute or a consortium of two. The liability may be in cash or otherwise. It may be secured or unsecured. A decree or the order of any civil court or otherwise may intervene or not; the only rider being that the liability must be legally recoverable. The definition would cover all the cases where the liability is secured*



by a mortgage, charge; hypothecation or in any other manner known to law. An effort at carving out a mortgage away and out of the definition of the debt is futile.--

*The act has to be so interpreted" to give the laws its claws".-- Having already noticed that most of the loans advance by the banks are secured by mortgages, the Act would be reduced to futility if mortgages were to be secluded from the definition of debt."*

8. It is pertinent to point out that the word "debt" in the above mentioned case has been interpreted by the Hon'ble High Court of Delhi in context with the Recovery of Debts due to Banks and Financial Institutions Act 1993. In this case, we are concerned with the definition of "debt" provided in The Insolvency and Bankruptcy Code 2016 where the word financial creditor and financial debt have been defined in sec 5 (7) and (8) of the code which is given below for ready reference.



Sec 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;

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

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The claim of the applicant ICICI bank has been rejected by Resolution Professional on the solitary ground that the claim submitted by the corporate debtor does not qualify as a "financial debt" within the meaning of "financial debt" as defined in sec 5 (8) under The Insolvency and Bankruptcy Code 2016 and therefore, the applicant cannot be treated as a financial creditor of the corporate debtor .

Admittedly, in terms of the provisions of the Code and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (hereinafter, the "CIRP Regulations" only a **financial creditor** of the corporate debtor can file a proof of claim in Form C. Further, it is not the

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case of applicant, nor the applicant has pleaded such that the Corporate Debtor owes any financial debt to the applicant.

The word **financial creditor** is defined under sub-section (7) of sec 5 of the Code.

A person to whom the financial debt is owed and includes a person to whom such debt has been legally assigned.

The word **financial debt** is defined under subsection (8) of sec 5 Of the Code which means debt along with interest if any which is disbursed **against the consideration for the time value of money and includes-**

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- (a) money borrowed against the payment of interest;
  - (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
  - (c) any amount raised under 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 a 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;

9. In the present case undisputedly corporate debtor has mortgaged its property for creating collateral security for the debt of its holding company JAL. The

corporate debtor is not a borrower; it has created a mortgage in favour of

financial institutions for creating collateral security for the money borrowed by its holding company JAL. **In the said transaction time value of money is not involved.** The corporate debtor's liability is not regarding the debt owed by its holding company JAL. In case of default in making payment by the principal borrower, for which security interest has been created by the corporate debtor by mortgaging its property in favour of Applicant bank, the debt amount can be **realised from the sale of the mortgaged property** but not from the **corporate debtor**, i.e. Jaypee Infratech Ltd.

The word debt is defined under subsection (11) of sec 3 of the code which means a liability obligation in respect of the claim which is due from any person and includes a financial debt and operational debt. The word claim is defined under sub-section (6) of sec 3 of the code.

*"Claim" means;*

*(A) a right to payment, whether not such a right is reduced to judgement, fixed, disputed, legal, equitable, secured or unsecured;*

*(B) a 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 judgement, fixed, matured, immature, disputed, undisputed, secured unsecured.*

The word "Corporate Debtor" is defined under subsection (8) of sec 3 which means a corporate person who owes a debt to any person. The creditor is defined under subsection (10) of sec 3.

The creditor means any person to whom the debt is owed and inclusive financial creditor, and operational creditor, a secured creditor, and unsecured creditor and the decree holder.

9.1 Thus on conjoint reading of the above provisions as reproduced above and from the Form C submitted by the applicant, it is evident that neither any debt

Financial debt is owed by the Corporate Debtor to the applicant and



therefore the applicant **does not fall within the definition of a Financial Creditor of the Corporate Debtor** and thus, the claim submitted by the applicant was not admitted for the CIRP of the Corporate Debtor.

9.2 In this case, the applicant has not disbursed the debt along with interest against the consideration for the time value of money. It is also not the case of the applicant that the corporate debtor has borrowed money against payment of interest from the applicant. It is also not the case that the corporate debtor has raised any amount from the applicant under any credit facility. It is not the case of the applicant that there is any liability towards the corporate debtor in respect of any lease or higher purchase contract. It is further not the case of an applicant that any receivables been sold or discounted. It is further not the case of the applicant that any amount has been raised for the corporate debtor under any other transaction having the commercial effect of borrowing to the corporate debtor. It is not the case of the applicant that any derivative transaction has been entered with the corporate debtor. It is also not the case of the applicant that any counter indemnity obligation in respect of a guarantee, indemnity, bond, documentary, letter of credit or any other instrument issued by a bank or a financial institution for the corporate debtor. Further, no amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to above has been issued by the corporate debtor.

10. The Ld. advocate appearing for the Resolution Professional submitted the basic ingredient of financial debt as defined under the code is **that debt along with interest disbursed against time value of money.** From a bare perusal of the Form C submitted by the applicant and the present application filed the applicant, it appears that this is not the **case where the money has been disbursed to the corporate debtor which is payable along with**



interest within a period of time. The contention of the applicant, that the definition of financial debt does not envisage that the disbursement of debt has to be necessary to the corporate debtor is completely untenable in law. The contention of the applicant that under Sec 3 (10) of the code, the scope of debt is not limited to the liability or obligation owed directly by the principal borrower, but also includes liabilities or other obligations of other parties in respect of the debt of the principal borrower is untenable in law.

10.1 . Further, the applicant in its letter dated 12 January 2018 reference number M FG/2018/01/755, has admitted that *"the mortgages have been created by the corporate debtor an account of financial debt extended by ICICI to JAL, a separate legal entity and parent of JIL. Therefore, the mortgages were not created on account of any antecedent liability owed by JIL, the corporate debtor in question. Given the admission on the part of the applicant, there is no liability owed by the corporate debtor to the applicant, and therefore, the claim filed by the applicant does not fall within the purview of financial debt as above."*

11. The Ld. counsel for the applicant has placed reliance on the law laid down by Hon'ble Supreme Court in case of *Rajkumari Kaushalya Devi v. Bawa Pritam Singh*, (1960) 3 SCR 570: AIR 1960 SC 1030 wherein Hon'ble Supreme Court has held that:

*"3. Debt is defined in Section 2(6) as meaning any pecuniary liability and has been restricted by the three sub-clauses in the sub-section concerning the person who might be owing to the debt or to whom the debt might be owed. Sub-clauses (a) and (b) refer to the debts owed by a displaced person as defined in the Act while sub-clause (c) refers to a debt due to a displaced person. Sub-Clause (c) has, therefore, to be taken independently of sub-clauses (a) and (b), for it refers to a creditor who is a displaced person while the other two sub-clauses refer to a debtor who is a displaced person. Under sub-clause (c) a displaced person who is a creditor can recover the debt due to*



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him from any other person, whether a displaced person or not, who is residing in the territories to which the Act extends.

The main contention of the applicant in this connection is that mortgage debt is not a pecuniary liability and therefore does not fall within the definition of debt at all. We are of the opinion that there is no force in this contention. The words "pecuniary liability" will cover any liability which is of a monetary nature. Now the definition of a mortgage in Section 58 of the Transfer of Property Act 4 of 1882, shows that though it is the transfer of an interest in specific immovable property, the purpose of the transfer is to secure the payment of money advanced or to be advanced by way of loan or to secure an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability. The money advanced by way of loan, for example, which is secured by a mortgage, obviously creates a pecuniary liability. It is true that a mortgage in addition to creating the pecuniary liability also transfers an interest in the specific immovable property to secure that liability; none the less the loan or debt to secure which the mortgage is created will remain a pecuniary liability of the person creating the mortgage. Therefore a mortgage debt would create a pecuniary liability upon the mortgagor and would be covered by the definition of the word "debt" in Section 2(6). We may in this connection refer to the Displaced Persons (Institution of Suits) Act 47 of 1948, which has been practically repealed by the Act. In that law, suits relating to immovable property were specially excepted under Section 4, but there is no such provision in the Act. Again Section 6 of the Displaced Persons (Legal Proceedings) Act 25 of 1949, which has also been repealed by the Act mentions decrees or orders for payment of money while in Section 15 of the Act which deals with the same matter those words are omitted and the words "proceedings in respect of any debt" are used instead. There can be no doubt in consequence that the Act is a comprehensive law dealing with all kinds of pecuniary liability. We are therefore of opinion that Section 2(6) clearly includes a mortgage debt and under sub-clause (c) thereof a displaced person to whom such a debt is due from any other person, whether a displaced person or not, ordinarily residing in the territories to which the Act extends can take the benefit of this Act."

It is pertinent to mention that the definition of debt, financial debt, financial creditor, a creditor in the present context will be limited to the definition of these words given in the Insolvency in Bankruptcy Code 2016.

12. The Ld. counsel for the applicant has further relied on the law laid down by Hon'ble High Court Gujarat in case of state **Bank of India versus Smt Kusum Vallabhdas Thakkar** MANU/GJ/0303/1991. In this case, a Hon'ble High Court



"the next question that arises is whether such promise to create a mortgage if given by the third party and not by the borrower or the principal debtor is for consideration and is valid. The Ld. trial judge has held that for creating mortgage, the mortgagor must be a debtor and must have right to redeem mortgage on payment of the debt and since the present defendant was not the debtor; she could not create a mortgage in respect of that debt and that the mortgagor should be a debtor, and there must be a relationship of debtor and creditor, the mortgage being a security of the debt. The learned trial judge has also held that there was no consideration for giving this promise of executing the mortgage. Both these aspects are interrelated. By making the promise by Ex.20, defendant has agreed to provide collateral security of legal mortgage to secure payment of all the monies due from M/S Nitin pharmaceuticals. Thus the defendant has promised to discharge the liability of a third person (the debtor) in case of his default. The guarantee is limited to the security offered by the promisor, namely, the mortgage and no further or personal liabilities taken by the promisor. Thus, the promisor has become a surety, and this would be an agreement to offer security for due performance of that promise and to that extent.

The liability of facility is coextensive with that of the debtor. However, in the present case, the liability of the surety is as otherwise provided by the contract Exh.20. Therefore, the liability of the defendant is as provided in the agreement and to that extent of securing dues by the creation of a mortgage, no personal liability is accepted by the surety. It is, therefore, fallacious to say that the defendant is not a debtor and, therefore, the defendant could not have created a mortgage in favour of the creditor. The defendant has rendered herself liable for the dues of M/S Nitin pharmaceuticals by agreeing to provide security in the form of a mortgage for the dues. Just as the principal debtor can create a mortgage of his immovable properties, the third person can also agree to create a mortgage to secure the dues of the respondent. In that manner, he becomes surety to the extent of the security or the mortgage. If that were not so, the present commercial and banking transactions would not be possible and would be hampered to a great extent. In the present day word of commerce, a person may not have sufficient security offer for obtaining advances from a financial institution is even though satisfying the requirements. In such cases, he draws upon resources of others by asking them to give a guarantee and also security for the performance of that guarantee, and it is a perfectly a legitimate and legal way of conducting such commercial transactions. -- Thus even though there is no consideration to the third-party surety for a mortgage, the consideration of having done anything for the benefit of the principal debtor is sufficient consideration."

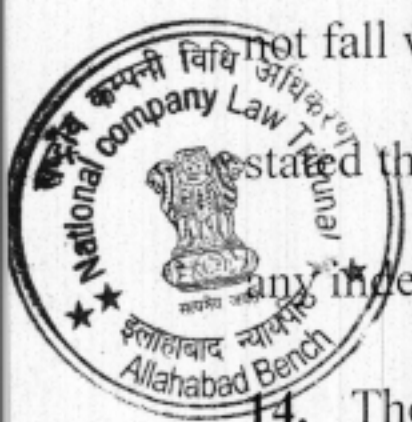
Relying on above case law counsel for the applicant submitted that in case of

there is an element of the time value of money. We are not



convinced with the analogy given by the learned counsel because in our view the corporate debtor has created a mortgage of his property in favour of third-party without any consideration of time value of money.

13. The contention of the applicant that mortgage created by the corporate debtor can be termed as either a guarantee or indemnity is not tenable. In terms of the mortgage deeds the corporate debtor has created a mortgage over its immovable properties, which is neither money borrowed against payment of interest nor indemnity or a guarantee as claimed by the applicant and therefore, the same does



not fall within the definition of the financial debt in terms of sec 5 (8) of IBC. It is stated that the corporate debtor has neither issued any guarantee nor has provided any indemnity to the applicant in respect of the financial assistance granted to JAL.

14. The Resolution Professional further submitted that the mortgage deed shows that the corporate debtor has only agreed to create a mortgage in favour of the applicant towards the financial assistance granted to its holding company, i.e. JAL. On perusal of mortgage it is clear that the corporate debtor has neither given any guarantee to repay or any indemnity qua the repayment of the loans granted by the applicant to JAL. The definition of Mortgage Debt as per the mortgage deed dated 7 March 2017 is as under:

“Mortgage debt shall mean the principal amount of the facility, all interest therein additional interest, default interest, liquidated damages, fees, costs, charges, expenses, any other amounts due and payable to secured parties under the transaction documents, premia on prepayment, costs, charges, and expenses and other monies whatsoever stipulated in or payable together with other debts and liabilities of JAL to lender under the transaction document and/or these presents.”

It is important to point out that sec 124 of the Indian contract act defines a “Contract of Indemnity” as being a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the the conduct of any other person. In the instant case, as per the Mortgage deed the

repayment obligation of the loan granted to JAL by the applicant is upon JAL as stated above and therefore, no contract of indemnity as claimed by the applicant has been entered even by conduct of the corporate debtor, and therefore, the contention of the applicant that the applicant is a financial creditor of the corporate debtor is completely untenable in law.

15. From a conjoint reading of Sections 5 (7), 5 (8), 3 (11), 3 (6) and 3 (8) and Regulation 13, 14 of CIRP Regulations, it is clear that the claims are invited from the creditors of the corporate debtor i.e. financial creditors, operational creditors and other creditors, and not from any person or the creditors of the holding company of the corporate debtor, who is not under corporate insolvency Resolution Process. The Resolution Professional is required to verify the claims received from all the three categories of the creditors, by the regulation 13 of the CIRP Regulations and the statutory forms in which the claims are submitted. The Code, therefore, clearly envisages that claims are to be invited from the creditors of The Corporate Debtor and not as contended by the applicant. The Regulation 36 (2) (a) of the CIRP Regulations requires the Resolution Professional to place the liabilities of the corporate debtor in different classes while preparing the information memorandum of the corporate debtor in terms of sec 29 of the code.

On the above basis, we are of the view that The Resolution Professional has correctly rejected the claim of the applicant on the ground that the Applicant is not a financial creditor of the corporate debtor concerning the Mortgages and the Mortgaged Debt. The resolution professional has rightly observed that guarantee and indemnity are distinct documents under the relevant laws and the mortgages executed by the corporate debtor are not like guarantee and indemnity. The basic ingredient of the financial debt as defined under the Code is that debt along with interest disbursed against time value of money lacks in the impugned transaction.



Hon'ble NCLAT in the case of *Nikhil Mehta and Sons Vs. AMR Infrastructure Ltd. Company Appeal (AT) (Insolvency) No. 07 of 2017* has given the interpretation of the word Financial creditor in connection with I&B code, 2016.

Hon'ble NCLAT held that:

"the opening word of the definition clause which indicate that a 'financial debt' is a debt along with interest which is **disbursed against the consideration for the time value of money** and may include any of the events enumerated in sub-clause (a) to (i). Therefore, it is to be seen whether the amount paid by the appellants to the Corporate Debtor, fulfil the other condition of "disbursement against consideration of time value and money", to come within the definition of "Financial Creditor" having satisfied that the Corporate Debtor raised the amount through a transaction of sale and purchase of agreement having commercial effect of a borrowing (Section 5(8) (f)).

25. The agreement shows that the respondent agreed to complete the construction of shopping mall on or before December 2009, in all respects. And was required to complete and handover the shop in the shopping mall before the said date. It is not the case of the respondent that the construction was stopped or delayed on account of factors beyond the control of the respondent, as stipulated in the later part of the Memorandum of Understanding. It was agreed upon by the respondent that since the appellants have paid most of the amount the respondent was ready to pay "monthly committed returns" to the appellants. However, as the appellants were not required the monthly return till December 2008 i.e. for 9 months so the Respondent-Corporate Debtor undertook to make a consolidated payment of Rs. 99,600/- less TDS. For every calendar month the Corporate Debtor was liable to pay committee return w.e.f. January 2009 till the date of handing over of the possession to the appellants. Therefore, it is clear that the amount disbursed by the appellants was "against the consideration of the time value of the money" and "the Respondent-Corporate Debtor raised the amount by way of sale - purchase agreement, having a commercial effect of borrowing." This is also clear from annual returns filed by Respondent and not disputed by the Respondent-Corporate Debtor in their annual returns, wherein the amount so raised/borrowed has been shown as 'commitment charges' under the head "Financial cost". The financial cost includes "Interest of loans" and other charges. Therefore, the 'commitment charge', which include interest on loan, shown against the head "Financial cost" having accepted by the Corporate Debtor in their annual return, we hold that the appellants have successfully proved that they are 'financial Creditor' within the meaning of Section 5(7) of the 'I & B Code'."

—Sd—



Therefore, by the mortgage created by the corporate debtor, as collateral security for the debt of its holding company, i.e. Jaiprakash Associates Ltd ( "JAL") in favour of the Applicant i.e. ICICI Bank , the applicant cannot be treated as Financial Creditor of the Corporate Debtor. Therefore in our view, Resolution Professional has rightly rejected the claim of the applicant, which was filed by the Applicant in the capacity of Financial Creditor of the corporate debtor, i.e. Jaypee Infratech

Ltd("JIL").



### Order

The Company Application No. 81 of 2018 is rejected. A party shall bear the cost themselves.

Dated:09.05.2018

—Sd—

**SAROJ RAJWARE,**  
**MEMBER (T)**

—Sd—

**V.P. SINGH,**  
**MEMBER (J)**