

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
NEW DELHI BENCH
COURT III**

I.A. No. 929/2021
In
IB-1348(ND)/2019

In the matter of:

M/s Nisus Finance & Investment Managers LLP & Anr.

...Financial Creditor

Versus

M/s Earthcon Universal Infratech Pvt. Ltd.

...Corporate Debtor

In the matter of:

Nisus Finance & Investment Managers LLP & Anr

...Applicants

Versus

**Mr. Gaurav Katiyar,
Resolution Professional
M/s Earthcon Universal Infratech Private Limited**

Order delivered on 28th October, 2021

Coram:

**SHRI P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL)
SHRI NARENDER KUMAR BHOLA, HON'BLE MEMBER
(TECHNICAL)**

Applicant

Mr. Shiv Kumar Suri, Mr. Shikhil Suri, Ms.
Shilpa Saini, Ms. Vinishma Kaul & Ms.
Nikita Thapar (Advocates)
Mr. Rishabh Jain (Advocate)

RP



ORDER

Per: NARENDER KUMAR BHOLA, MEMBER (TECHNICAL)

1. The present application has been filed by the Applicants under section 60(5) of Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "IBC") seeking following reliefs:
 - a. Direct the Resolution Professional to consider and accept the claim of Rs. 13,15,49,123/- as financial debt and not as "other debt";
 - b. Set aside the decision of the Resolution Professional of classifying Rs. 13,15,49,123/- as "other debt";
 - c. During the pendency of the present Application, direct the resolution professional not to take any step by classifying Rs. 13,15,49,123/- as other debt;
 - d. Direct reimbursement of sum of Rs. 3,07,845/- to the Applicant No.1 as pre CoC expenses incurred by the Applicant;
2. The facts that led to the filing of the present application are as follows:
 - a. It is submitted that the Applicants are financial creditors and claim their rights by virtue of the Debenture Trust Deed ('DTD') dated 13.06.2017 executed between Applicant No.1, Nisus Finance and Investment Managers LLP as "Facility



Agent/Debenture Holders", Applicant No. 2, Beacon Trusteeship Pvt. Ltd. as "Debenture Trustee", M/s. Earthcon Infracon Pvt. Ltd. in the capacity of the "Issuer Company/Principal Borrower" and the Corporate Debtor, Earthcon Universal Infratech Pvt. Ltd. as a Corporate Guarantor. As per the terms of the said DTD, the Issuer Company was to raise funds up to Rs. 30,00,00,000/- and appointed the Applicant No. 1 as facility agent and appointed Applicant No. 2 as a debenture trustee via Debenture Trustee Appointment Agreement dated 13th June, 2017.

- b. It is further submitted that by way of the DTD, the Corporate Debtor issued and allotted 3000 secured, transferable, redeemable non-convertible debentures in one or more tranches for face value of Rs. 1,00,000/- each on private placement basis against a deposit of Rs. 30,00,00,000/- (Rupees Thirty Crores) by the debenture holders. That via amendments to the DTD dated 20th December, 2017 and 24th December, 2018, the Issuer company/principal borrower raised additional Rs. 20,00,00,000/- (Rupees Twenty Crores Only) and Rs. 2,50,00,000/- (Rupees Two Crores and Fifty Lakhs Only) and issued additional 2250 Debentures. The purpose of raising funds by Earthcon Infracon Pvt. Ltd./Issuer company was to acquire units in real-estate

project to be developed by the Corporate Debtor. The issuer Company failed to make payment of the First Principal repayment instalment along with the interest to the tune of Rs. 13,12,50,000/-.

- c. It is averred that a Deed of Corporate Guarantee was executed between the Corporate Debtor, Issuer Company and Applicant No. 2 dated 13.06.2017, wherein the Corporate Debtor has given its Corporate Guarantee not merely as a surety but as primary obligors for ensuring that in the event Issuer Company fails to fulfil its obligations under the DTD and its amendments thereto, then the Corporate Debtor would be liable to fulfil the financial obligations as a Guarantor under the DTD and the amendments thereto. It is stated that this Ld. Tribunal has admitted Section 7 petition against the Corporate Debtor vide its order dated 08.01.2020.
- d. It is further averred that the Applicants filed their Form C as Financial Creditors for a total claim of Rs. 72,59,20,489/- (Rs. 52,50,00,000/- as Principal amount as decided under the DTD and Rs. 20,09,20,489/- as interest amount). It is stated that erstwhile IRP has not called into question the claim of the Applicants at the time of submission of claim, it is the

Resolution Professional (RP) who raised questions on the financial Debt/claim payable to the Financial Creditors. It is further stated that vide email dated 12.12.2020, the RP sought the following information from Applicants:

1. *Please provide us a calculation of the coupon (in column 4(c)) of your claim form in excel sheet;*
2. *Please explain how default coupon, Resolution Fee, Facility Management Fee (in column 4 (b, d & e)) is a financial debt in terms of section 5(8) of I & B Code, 2016;*
3. *After triggering CIRP, how Facility Management Fee can be calculated till 30.09.2020;*
4. *Please explain as to why this transaction is not an extortionate credit transaction in terms of section 50 of the I & B Code, 2016.*

e. It is submitted that the Applicants vide email dated 18.12.2020 provided point-wise reply to the query raised by the RP, which are as follows:

- i. *A detailed excel sheet calculation of the coupon in column 4[c] of the claim was provided.*
- ii. *Resolution Fee, Facility Management Fee mentioned in Colum 4 [b], [d] and [e] is the total debt payable with interest to the Applicants since the same arise from the facility guaranteed by Corporate Debtor vide DTD and other guarantee agreements and the same fall under Section 5(8) (b), (c) and (i) of the Code as a "financial debt". That the said amounts fall within the definition of Debenture Outstanding as per the DTD and therefore claimed in Form C. It was pointed out that in a similar transaction, Hon'ble NCLT in the matter of M/s. Nisus Finance and Investment Managers LLP v. M/s. Lokhandwala Kataria Constructions Pvt. Ltd., CP No. 61-*

NCLT-MAH-2017 has recognized the Applicant's claim in its order dated 15.06.2017.

iii. That the facility management fee mentioned in column no. 4(e) was due and payable by the Corporate Debtor on 1st October each year during the tenure or till such time the final payment of debenture outstandings are paid in full. The purpose of facility management fee is for managing the rights and powers of the Debenture Holder/Applicant No.1 facility Management fee will be continued to be charged till all NCDs are completely redeemed, it is the liability which is similar to the nature of interest. And therefore, it is a continuing liability of CD which will be updated with time.

iv. The DTD cannot be said to be extortionate transaction since the same does not fall within the scope of Section 50 of the Code. The credit facility under the DTD is as per the provisions of the Companies Act, 2013 - Ministry of Corporate Affairs, Securities and Exchange Board of India (SEBI). Vide clause 24.5.1(h) of the DTD, upon failure of the Corporate Debtor to repay the secured obligations/debt (first default occurred on March 31, 2019), Corporate Debtor shall become liable to pay certain default interest rates ("coupon rate"). Hence, the total outstanding obligation/debt of Corporate Debtor payable to the FCs is as given in Form C, which is a negotiated rate and acceptable rate under the DTD, has been updated in ROC, NSDL, SEBI and several other statutory bodies as required by the Parties. Furthermore, the case of the Applicant is covered under explanation attached to Section 50. It was also submitted that section 50 considers only those transactions which have taken place within 2 years preceding the insolvency commencement date i.e., 08.01.2020 whereas the DTD has been executed on 13.06.2017 way before the 2-year period.

f. It is further submitted that the Resolution Professional categorised Rs. 13,15,49,123/- as "other debt" based on justification that Resolution fee amounting to Rs. 5,25,00,000/- payable as penalties due to breach of contract, hence, penal in nature and cannot equated

with “time value of money” under section 5(8) of the Code, default coupon rate @ 3% Rs. 1,57,50,000/-, difference between 30% and 18% coupon rate Rs. 5,76,11,623/- and facility management fee Rs. 56,87,500/- total amounting to Rs. 13,15,49,123/-. It is stated that the Applicant no.1 objected to the wrongful classification of the claim vide email dated 04.02.2021 and reiterated that the entire amount of Rs.72,59,20,489/- is admissible under the category of “financial debt” as defined u/s 5(8) of IBC, 2016, hence, RP should revoke his decision communicated vide email dated 09.01.2021.

g. It is averred that the Corporate Debtor being a guarantor falls within clause [i] of financial debt as defined u/s 5(8) of IBC, 2016 for rendering a guarantee for “any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument as per clause [c] of section 5(8). The term “outstanding amounts” is defined in the DTD first schedule, which is as follows:

“shall mean, at any time, the entire outstanding amount due in respect of the debentures including but not limited to the present and future obligations and liabilities under this deed to pay/repay the principal amount of the Debentures, Redemption, Premium, Interest, Prepayment premium, other fees, liquidated damages, costs, charges and expenses (including any fees payable to the Debenture Trustee) and amounts payable in respect of the Debentures under the Transaction Documents.”

It is therefore, submitted that all the items classified as “other debt” are arising out of the DTD and are outstanding amounts as per the DTD. Therefore, the Resolution Professional cannot exercise his discretion and reject part of the claim as “financial debt” and at the same time admit other part of the claim, when the entire claim is arising out of the terms of the DTD and is an outstanding amount as financial liability of the Corporate Debtor towards the Debenture issued all the terms of the DTD are mutually agreed terms between the parties.

h. The Applicants are also seeking directions from this Hon'ble Tribunal to the CoC for reimbursement of their expenses paid by Nisus Finance & Investment Managers LLP, Applicant No.1 herein, totalling to Rs. 3,07,845/- inclusive of GST @ 18% towards Public Announcement and first month remuneration of Interim Resolution Professional, Mr. Jitender Arora. That the Applicant No.1 proposed a formal resolution to that effect in the 4th meeting of CoC held on 21.01.2021 as Agenda No. 11B, however, the same was rejected by the majority vote of 97%. It is the case of the Applicant that the aforesaid expenses should be reimbursed to it as they form part of CIRP costs and therefore, a necessary direction for reimbursement of



Rs. 3,07,845/- to the Applicant No.1 be given to the Resolution Professional.

3. The Resolution Professional has filed its reply to the application under consideration and raised the objection on following points:
 - a. it is submitted that as per section 71(5) of Companies Act, 2013, the debenture trustees are different from debenture holders. Therefore, any remuneration, fee, cost or expenses payable to debenture trustee or facility agent cannot be treated as amount raised by issue of debentures. Hence, cannot fall under section 5(8) of IBC, 2016.
 - b. It is argued by the RP that the Resolution fee amounting to Rs. 5.25 crore is not due and payable and is premature because as per clause 24.2.21 of DTD the resolution shall happen upon payment of outstanding amount to the debenture holders to the satisfaction of the debenture trustees. Whereas in the present case no payment of defaulted amount has been made to the debenture holders. Hence, it cannot be said that any resolution as contemplated by clause 24.2.21 of DTD has happened. It is further stated that resolution fee is chargeable towards the services provided by facility agent to the debenture holders cannot be treated as “amount raised” by way of issue of debentures. Furthermore, as per DTD the resolution fee is

required to be paid to the facility agent as remuneration to their services and cannot be treated as “amount raised” by way of issuance of debentures under Companies Act, 2013.

c. It is submitted that the facility management fee is the remuneration to facility agent for all the duties performed and services provided by it and cannot be treated as “amount raised” as defined in para 29.2 (m) of DTD, therefore, falls outside the scope of the financial debt in section 5(8) of IBC, 2016.

d. It is further submitted with respect to the classification of “Default Coupon Rate” amounting to Rs. 1.57 crores that this amount is not liability of the CD as the same is arising from clause 24.5.1 (h) (2) of DTD which is not applicable. It is further stated that default coupon cannot be equated with time value as u/s 5(8) of IBC, 2016 the time value should come as “consideration” whereas in the present case Rs. 1.57 crores are liable to pay as “default coupon” i.e., payable on breach of contract and payment made on breach of contract cannot be called as consideration.

e. It is averred that as per section 5(8) of IBC, 2016, upon happening of default, increase of interest rate from 18% to 23% and from 23% to 30% cannot be equated with the time value of money. It is further stated that time value of money is the “price associated

with the length of time that an investor must wait until an investment matures or the related income is earned.” RP also relied on Hon’ble NCLAT judgment namely, **Rajnish Jain v. Manoj Kumar Garg-IRP [2021] 124 taxmann.com 213 (NCLAT)**. The relevant paragraphs of the judgment are reproduced below:

48. the ‘expression time value of money’ has not been defined under the Code and hence one has to revert to the dictionary meaning of the phrase as generally understood. The time value of money concept states that cash received today is more valuable than cash received at some point in the future.

49. NASDAQ Glossary of financial terms defines phrase ‘TIME VALUE OF MONEY’ as the idea that a dollar today is worth more than a dollar in the future because the dollar received today can earn interest until the time the future dollar is received.

50. in Nikhil Mehta & Sons v. AMR Infrastructure Ltd. [2017] 84 taxmann.com 163/143 SCL 278 (NCLAT), this Hon’ble Tribunal has dealt with the issue of interpretation of the phrase “time value of money” as follows:

“The key feature of financial transaction as postulated by section 5(8) is its Consideration for time value of money. In other words, the legislature has included such financial transactions in the definition of ‘financial debt’ which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black’s Law Dictionary (9th edition) the expression ‘Time Value’ has been defined to mean “the price associated with the length of time that an investor must wait until an investment matures or the related income is earned. “In both the cases, the inflows and outflows

are distanced by time and there is a compensation for time value of money".

f. It is also argued that at the time of issue of debentures the predominant contractual function of clause 3 of part - II of second schedule (available at page 129 of LA.) of the DTD was to deter Principal borrower from breaking the terms and conditions of the debentures. The essence of clause 3 of part – II of second schedule available of the DTD is of a pre-estimate of damages/penalty. Payment of 23% and 30% interest stipulated operates as "in terrorem" which involves the idea of punishment as against the consideration as defined in Indian Contract Act, 1872. The aforesaid submission is also fortified from the fact that if the Corporate Debtor could pay the money on due dates, no penal interest @ 23% or 30% was liable to be paid to the applicant. Hence, prayed that the present application may be dismissed and allow the Resolution Professional to delete the amount of Rs. 5.25 crores collated as Resolution fee and amount of Rs. 1.57 crores collated as default coupon from the head of "other debt".

4. The Applicants also filed a written submission and reiterated all the content of application and further argued on the following points:

I. Insolvency Law Committee in its report dated 26th March 2018 has interpreted "time value of money" to mean



compensation i.e., interest, default interest or the price paid for the length of time for which money is disbursed. This may be in the form of interest the Committee says. The Committee also says use of the word “includes” in the definition of “financial debt” under Section 5(8) means that the kinds of financial debts illustrated are not exhaustive. Section 5(8) of the IBC, 2016 is clear that any amount raised pursuant to a debenture and guarantee in relation to such obligation is covered as financial debt debenture.

- II. The Applicants relied on judgment of Hon’ble Supreme Court in the matter of **Anuj Jain, IRP for Jaypee Infratech Ltd. Vs Axis Bank Ltd. (2020 SCC Online SC 237)**. The relevant extract of the judgment is as follows:

“43. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become ‘financial debt’ for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursement against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part

even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein."

III. It is argued that RP has no adjudicatory power and placed their reliance on **Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17- Para 88; ArcelorMittal India (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1-Para-80**. It is stated that each of the documents are unquestioned and CD has acted upon them. Reliance is placed on Section 31 of Specific Relief act, 1963 and sections 43, 45, 47, 49, 50 of IBC, 2016.

IV. It is also agreed that rates of interest/default contractually agreed have to be honoured and Applicants also quoted the order of this Adjudicating Authority of Mumbai Bench namely, **M/s Nisus Finance and Investment Managers LLP v. Lokhandwala Kataria Constructions Private Limited [Company Petition No. 61/I&BP/NCLT/MAH/2017]**. The relevant extract of the order is as follows:

"13 In the backdrop of this factual situation for one thing is clear that any liability in respect of any guarantee or indemnity to any of the items referred to 8 in sub clauses (a) to (h) of definition clause of financial debt (Section 5(clause 8)) will amount to financial debt. Taking of funds by issuing debentures being construed as financial debt under Clause (c) of the same clause, for this Corporate Debtor having admittedly given guarantee to repay the entire liability in the event default committed by Vista in making repayment, the liability fastened upon the

Corporate Debtor to repay the entire financial debt as agreed between the parties will amount to due outstanding against this Corporate Debtor as well. It is an undisputed fact that Vista issued debentures on subscription of the aforementioned money and also defaulted in redeeming the first tranche of debentures fell due on 30th September 2016.”

“15. As to another point i.e. about computation of the debt, the interest rate has been set out in the Debenture Trust Deed, the Corporate Debtor and others agreed to pay internal rate of return of 23% as a redemption premium and thereafter to pay penal rate to include redemption value, henceforth this levy of interest being as agreed by the parties to the debenture trust deed, today the corporate debtor cannot go back from the covenant stating that the interest is to be calculated basing on ratio decided by Hon’ble Supreme Court over a dispute in respect to awarding damages u/s. 73 & 74 of Indian Contract Act. Awarding damages is not a contractual obligation; it is only an eventuality that crops up when right for claiming damage is accrued to the party. Here, there being an exclusive understanding between the parties to pay interest as agreed upon in the event of default, this Bench has no discretion to compute the interest ignoring the contractual arrangements entered between the parties.”

V. The Applicants also placed their reliance-on-**Reliance Commercial Finance Ltd. v. Maharashtra Vidyut, 2017 SCC Online NCLAT 10590-** Paras 2.2 and 3. It was held by Hon’ble NCLAT that Corporate Debtor was liable to pay loan amount and default interest thereon and the said amount is financial debt. The Applicants further relied on paragraph 20, 21, 23, 24 and 25 of judgment in the matter of **Nikhil Mehta v. AMR Infrastructure, 2017 SCC Online NCLAT 859.** It was

held by Hon'ble NCLAT that financial costs include interest of loans and other charges. Hence, in the light of the above, the applicants prayed that prayers sought in the Application may be allowed.

5. The Resolution Professional also filed its written submission and reiterated all the arguments as stated in the Reply and further argued on the following points:

i. Reliance placed by applicants on *Swiss Ribbons (P) Ltd. v. UoI* to show RP has no adjudicatory powers is not applicable in the present circumstances and facts of the case, as the same is applicable in case of disputed claims and cannot IRP/RP cannot denude its duty to collate the undisputed claims.

ii. The Resolution Professional also quoted the judgment of Hon'ble Supreme Court in the matter of **Anuj Jain v. Axis Bank Limited, SC [2020] 114 taxmann.com 656 (SC)**- para 43. It was held by Hon'ble Apex Court that an inclusive definition is also required to satisfy the main portion. Hence, prayed that in the light of the above submissions application may be dismissed.

6. We have heard the counsels for both the parties, perused the contents of IA and reply and also written submissions and case laws



relied upon by them. As may be seen the entire case revolves around following four dues which emanate from the Debenture Trust Deed (DTD)/Terms of Debenture Agreement and which according to Applicant herein have been wrongly classified by RP as "Other Debt" instead of "Financial Debt":

- | | |
|---|-------------------|
| a) Resolution Fee | Rs. 5,25,00,000/- |
| b) Facility Management Fee | Rs. 56,87,500/- |
| c) Default coupon rate @ 3% | Rs. 1,57,50,000/- |
| d) Difference between 30% & 18% (coupon rate) | Rs. 5,76,11,623 |

7. In this connection the relevant clauses of Section 5 (8) of the Insolvency & Bankruptcy Code, 2016 as applicable to the transactions covered by Debenture Trust Deed/Terms of Debentures are reproduced below:

"(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—

***** ***** *****

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

***** ***** *****

(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;”

7. Now we shall deal with nature and justification behind each of the aforesaid dues in terms of the Debenture Trust Deed/Terms of Debenture Agreement. As regards Resolution Fee, admittedly the same is to be paid for the services rendered by Debenture Trustee/Facility Agent (acting for the benefit of the Debenture Holders) to take prompt action for enforcement of security in case of “default” and recover the same from the defaulting party i.e., Corporate Debtor. However, a perusal of clause 24.2.21 of DTD indicates that the said amount is to be paid *“when debenture holders have been fully paid the outstanding amount to the satisfaction of the debenture trustees”*. This shows that though this amount is not directly linked with time value of money or the rate of return as agreed upon between the parties, however, the same is covered under clause (i) of subsection 8 of Section 5 of the Code when a conjoint reading of clauses (c) and (i) is undertaken. In view of this we are of the considered view that the amount of Resolution Fee payable under DTD has to be treated as amount raised by way of debentures and thereby as “Financial Debt”.



8. For the same reason as stated in preceding para the amount of Facility Management Fee being also covered by clause (i) read with clause (c) of sub-section 8 of Section 5 of the Code. Accordingly, we are of the view that the amount of "Facility Management Fee" has to be considered as part of "Financial Debt".

9. As regards the amounts due to Default Coupon Rate and Difference between 30% & 18% totalling to Rs. 7,33,61,623 is concerned, it is seen that these are the amounts arising on account of default interest/penal interest voluntarily agreed upon by the CD and the Applicants herein. These dues are in extension/addition of the basic interest rates already provided for in the Debenture terms are meant to ensure timely payment of principal amount and interest thereon by CD. Therefore, they are also for consideration for time value of money. Accordingly, the said amounts need to be made part of "Financial Debt" instead being clubbed/shown as "Other Debts".

10. To sum up, for the reasons mentioned in preceding paras, the Interim Application is allowed and Resolution Professional may take necessary steps to accept the claim of Rs. 13,15,49,123/- as "Financial Debt" and not as "Other Debt" and carry out consequential amendments/revision in voting share of the Applicants in the CoC. The RP is further directed to reimburse sum of Rs. 3,07,845/- to the



Applicant No.1 as pre-CoC expenses incurred by the Applicant after following due process of Law.

11. The present Application is disposed of in terms of above directions.



(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL)



(P.S.N. PRASAD)
(MEMBER JUDICIAL)