

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (I.B.) No. 156/KB/2022

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

IN THE MATTER OF:

**EPC CONSTRUCTIONS INDIA
LIMITED THROUGH ITS
LIQUIDATOR – ABHIJIT
GUHATHAKURTHA**

... Petitioner/ Financial Creditor

Verses

**M/S MATIX FERTILISER AND
CHEMICALS LIMITED
[CIN: U24120WB2009PLC153272]**

... Respondent/ Corporate Debtor

Date of Hearing: July 26, 2023

Date of Pronouncing the Order: August 29, 2023

CORAM:

Smt. Bidisha Banerjee, Member (judicial)

Shri Balraj Joshi, Member (technical)

Ld. Counsels on Record Appeared Physically/ through Video Conferencing:

For Financial Creditor:

1. Mr. Ramji Srinivasan, Sr. Adv.
2. Ms. Manju Bhuteria, Adv.
3. Mr. Avishek Swaroop, Adv.
4. Mr. Dwaipayan Basu Mallick, Adv.
5. Ms. Arundhati Barman Ray, Adv.
6. Mr. Aditya Vikram Shraff, Adv.

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7. **Mr. Sayantak Sen, Adv.**

For Corporate Debtor:

1. **Mr. Arun Kathpalia, Sr. Adv.**
2. **Mr. Joy Saha, Sr. Adv.**
3. **Mr. Saubhik Chowdhury, Adv.**
4. **Mr. Tirthankar Das, Adv.**

ORDER

Per: Bidisha Banerjee. Member (Judicial)

1. This Court is congregated in a hybrid mode.
2. Ld. Senior Counsel/Ld. Counsels for the Financial Creditor and Ld. Senior Counsels/Ld. Counsels for the Corporate Debtor were heard in full.
3. This instant Petition is filed under **Section 7** of the Insolvency and Bankruptcy Code, 2016 (for brevity “**I&B Code**”) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 by “**EPC Constructions India Limited Through Its Liquidator, Mr. Abhijit Guhathakurtha**” hereinafter referred as **Financial Creditor (Petitioner)** against “**M/S Matix Fertiliser and Chemicals Limited**” [CIN: U24120WB2009PLC153272] having its registered office at Panagarh Industrial Park, P.O. Panagarh Bazar, District – Purba Bardhaman Panagarh Bardhaman, West Bengal 713148, hereinafter referred as **Corporate Debtor (Respondent)**, whereby, the Financial Creditor seeks to initiate an insolvency resolution process (for brevity “**CIRP**”) against the Corporate Debtor.
4. **EPC Constructions India Limited**, (in short “**EPC**”), Financial Creditor herein, bearing its CIN: U99999MH1989PLC053280, has its registered address at Office No 102, First Floor, Kaatyani Business Centre, OFF Mahakali Caves Road, Andheri East, Mumbai 400093 and **Mr. Abhijit Guhathakurta** (Liquidator of EPC) has its registered office at Deloitte India Insolvency Professionals LLP,

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32nd Floor, Tower 3, One International Centre, Senapati Bapat Marg, Elphinstone Road (West), Mumbai.

5. It is claimed that the Corporate Debtor was incorporated on 07/07/2009, having Nominal Share Capital of Rs. 9900,00,00,000/- (Rupees Ninety-Nine Hundred Crore Only) and having Paid-up Share Capital of Rs. 22,15,46,03,370/- (Rupees Twenty-Two Hundred Fifteen Crore Forty-Six Lakh Three Thousand Three Hundred Seventy Only).

6. **Particulars of Alleged Financial Debt:**

1.	ALLEGED AMOUNT OF DEBT GRANTED	Rs. 250,00,00,000/- (Rupees Two Hundred Fifty Crores) term-sheet dated 26/08/2015
2.	AMOUNT ALLEGED TO BE IN DEFAULT	310,00,00,000/- (Rupees Three-Hundred and Ten Crores)
3.	DATE OF DEFAULT	August 26, 2018 The date of default from which the Corporate Debtor defaulted in the payment of redemption amount of Cumulative Preference Redeemable Shares. The amount of Rs. 250 Crore out of the total receivables of Rs. 450 Crore (approx.) as on March/April 2015, was infused as a sub-debt into the capital of the corporate debtor and in lieu of such infusion, 25 Crore CRPS, carrying cumulative dividend of 8% every year, were issued, which was payable at par after three years. The amount of Rs. 310 Crore is outstanding as on date and has been acknowledged as payable debt/liability in the audited balance sheets of the Corporate Debtor

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		up to Financial Year 2020-21 (which are a part of the annual general report)
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7. The Ld. Sr. Counsel/ Ld. Counsel for the Financial Creditor relies upon the following documents in supporting its claim:

- i.** The copy of the liquidation order dated 07.05.2021 passed by the NCLT, Mumbai is annexed as Annexure A, at page 37 to 61.
- ii.** The copy of EPC Contract dated 11.12.2009, copy of Shore Supply Contract dated 29.07.2010, copy of Off-Shore Supply Contract dated 20.08.2010 and copy of EPC Contract dated 29.07.2010 are annexed as Annexure D (Colly), at page 69 to 582.
- iii.** The copy of Term Sheet for issuance of CRPS dated 26.08.2015 is annexed as Annexure R, at page 583.
- iv.** The copy of the Audited Balance Sheets of the Corporate Debtor for the Financial Year 2019-20 and 2020-21 is annexed as Annexure F (Colly), at page 584 to 834.
- v.** The copy of the communication of EPC dated 08.05.2015 is annexed as Annexure G, at page 835.
- vi.** The copy of the Board Resolution of EPC dated 30.07.2015 is annexed as Annexure H, at page 836.
- vii.** The copy of the letter dated 26.08.2015 issued by Matix which encapsulated the terms of the issue of preference shares for the receivables is annexed as Annexure I, at page 337 to 838.
- viii.** The copy of the letter dated 20.08.2018 is annexed as Annexure J, at page 839.
- ix.** The copy of the letter dated 24.08.2018 is annexed as Annexure K, at page 840.
- x.** Copies of Demand Notice dated 27.10.2018 sent by EPC and the Applicant (erstwhile resolution professional) and the response of the Corporate

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Debtor dated 07.12.2018 is annexed as Annexure L (Colly), at page 841 to 981.

- xi.** Copy of the letter dated 01.03.2021 vide which the Applicant issued demand notice to Matix claiming INR 632.71 crores and copy of the letter dated 31.03.2021 vide which Matix requested time from Applicant to respond to demand notice, citing Covid-19 as reason for delay is annexed as Annexure M (Colly), at page 982 to 989.
- xii.** The copy of the order dated 03.03.2022 in IA No.375/2022 filed under the proviso to Sec.33 (5) of the Code seeking permission to initiate action against the Corporate Debtor under the Code is annexed as Annexure N, at page 990 to 994.

8. The Submissions made by the Ld. Sr. Counsel/ Ld. Counsel for Petitioners would be thus:

This Application under Section 7 of I&B Code, 2016 is maintainable:

- 8.1.** The Financial Creditor is seeking CIRP under Section 7 of I&B Code against Corporate Debtor on account of default in redemption and pay-out of Rs. 310 Crore (Indian National Rupees Three Hundred and Ten Crore Only) having become due and payable on account of maturity of 25 Crore Cumulatively Redeemable Preference Shares (in short “CRPS”) having a face value of Rs. 250 crores, since August 26, 2018 plus dividend on Rs 250 Crore @ 8% p.a. till the realization of entire amount.
- 8.2.** That, NCLT, Mumbai, had *vide* its Order dated March 03, 2022, allowed I.A. 375 of 2022, filed by the Liquidator, inter alia, under Section 33(5) of the I&B Code seeking permission to file the application under Section 7 of the I&B Code against **Matix Fertiliser and Chemicals Limited** (in short “**Matix**”).
- 8.3.** The Ld. Counsel for the Financial Creditor submits that the liability of Rs. 310 Crore arises in terms of and pursuant to an **EPC Contract** dated

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29/07/2010 (as amended from time to time), the **On-shore Contract** dated 29/07/2010 and **Off-shore Contract** dated 20/08/2010 respectively executed between EPC and Matix, referred to as "Subject Contracts". In terms of the Subject contracts, pursuant to the works performed, an amount of **Rs. 199.85 Crore** had become due and payable. In addition, there to of **Rs. 120.22 Crore** against certain approved or notified extra work done, an amount of **Rs. 2.65 Crore** towards certain equipment rental as well as a further amount of **Rs. 250 Crore** for the works performed under the aforesaid Subject Contracts was admittedly due and payable commutatively totalling to **Rs. 572.72 Crores** and such amount arose out of mutually accepted contractual terms.

- 8.4.** The Ld. Counsel for the Financial Creditor further submits that in the foregoing circumstances, thereafter the Corporate Debtor proposed to issue 25 crores CRPS with face value of Rs. 10/- each, redeemable at par at the end of three (03) years with 8% dividend cumulatively in respect of receivables to the tune of Rs. 250 crores out of the amount of **Rs. 572.72 crores** (approx.) as on March/April 2015. The aforesaid request made by the Matix was (in principle) agreed to and accepted by EPC on 08/05/2015 vide a letter of even date. Subsequent thereto, the Board of Directors of EPC resolved to make the investment up to Rs. 400 crores into 8% Cumulative Redeemable Preference Shares of Rs. 10/- each of Matix. Pursuant thereto, on 31.07.2015, EPC communicated the aforesaid decision and approval of the Board to Matix vide an email dated 31.07.2015.
- 8.5.** Further, it is submitted that thereafter, post receipt of email dated 31.07.2015 from EPC, the Board of Directors of Matix (Corporate Debtor), in its meeting dated 14.08.2015 approved the allotment of Rs. 25 Crore CRPS of Rs. 10/- each aggregating to Rs. 250 Crores to EPC. Subsequent thereto, the same was also approved by the shareholders of Matix in its Extraordinary General Meeting held on 26.08.2015. In terms of the said

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approvals, Matix issued a letter dated 26.08.2015 to EPC listing the terms and conditions of the issuance of CRPS. The aforesaid CRPS attained maturity on 26.08.2018. It is contended that after the date of maturity, as per the terms of issue, the unpaid dividends at rate of 8% would add to the principal amount. Thus, for each year where the CRPS remains unpaid, an interest of Rs. 20 Crore gets added. Thus, this claim of Rs. 310 Crore is as of add up of 3 year's unpaid dividends along with Principal of Rs. 250 Crore. This, as per the terms, shall continue to accrue until redemption of the CRPS.

- 8.6.** Further, it is contended that after the CRPS become due and payable on 26/08/2018, EPC through the then RP issued a letter dated 20/08/2018 to Corporate Debtor, inter alia, calling upon Corporate Debtor to plan for redemption on the due date and arrange for remittance of redemption proceeds, including dividend, aggregating to Rs. 310 Crore. In response thereto on 24/08/2018, the Corporate Debtor, while admitting the liability of the CRPS redemption proceeds, requested for adjustment of the said liability against its purported claim submitted by it in the CRPS of the Financial Creditor, as after adjustment of the redemption proceeds of Rs. 310 Crore against the claim submitted, the dues towards CRPS would become NIL.
- 8.7.** The Ld. Counsel for the Financial Creditor argues that at this juncture, it needs to be taken note of that Matix, Corporate Debtor herein, did not dispute, in any manner whatsoever, that the redemption proceeds were not due and payable – rather the liability was categorically admitted.
- 8.8.** The Ld. Counsel for the Financial Creditor further argues that the Applicant herein, (then RP of EPC) on 27/10/2018, issued a demand notice to Matix claiming an amount of Rs. 632.71 Crore, which included the redemption amount of Rs. 310 Crore on account of maturity of the CRPS and Rs. 322.71 Crore on account of outstanding receivables for the services

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rendered by EPC under the Subject Contracts for the calendar year 2013, 2014 and 2015.

- 8.9.** It is further contended that in response thereto, on 27/12/2018, Matix cited its vulnerable economic condition due to a purported accumulated loss of Rs. 5894 million. The balance amount of Rs. 322.71 Crore was sought to be disputed purportedly on the ground of on the non-completion of the assigned tasks under the Subject Contracts. The said notice was followed up by another demand notice dated 01/03/2021 wherein against in response the Corporate Debtor did not dispute the liability and only sought time to respond on account of the COVID restrictions. Thus, according to the Applicants herein, it is unambiguously clear that, the CRPS, which became due and payable on 26/08/2018, continues to remain due and payable due and payable as Matix has continued to default in its obligation of remitting the redemption proceeds aggregating to Rs. 310 Crore on one or the other frivolous grounds.
- 8.10.** It is further claimed that the amount of Rs. 310 Crore is due and payable by Matix to EPC squarely falls within the definition of “debt” as defined under Section 3(11) of the I&B Code. Since the 25 Crore Preference Shares were issued by the Corporate Debtor against a part of the outstanding receivables i.e., Rs. 250 Crore, which were due to paid to EPC under the Subject Contracts, it amounts to infusion in the Matix by EPC and hence a “loan” – redeemable after 03 (three) years. Hence, the aforesaid “debt” is undisputedly a “financial debt” under Section 5(8)(f) of the I&B Code.
- 8.11.** It is argued that the said “financial debt” is an admitted debt/ liability in the books of account of Matix as recent as that Financial Year 2020-21 – and admitted otherwise also as mentioned above. Therefore, non-payment of the aforesaid “Financial Debt”, which had become due and payable since 28/08/2018, amount to “default” as defined under Section 3(12) of the I&B Code.

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8.12. Further, it is argued that while CRPS dues of Rs. 310 Crore were never disputed by Matix, the balance amount of Rs. 322.72 Crore, which continued to remain outstanding, were neither acknowledged nor paid by Matix and in most high handed and fraudulent manner Matix has refused to acknowledge the liability towards the balance amount and the said balance has been miraculously wiped off from the books of accounts to the much chagrin of not only the Applicant (but also all the stakeholders). That such conduct on part of Matix has caused a huge loss to the stakeholders of EPC which is under liquidation.

9. The Ld. Sr. Counsel for the Financial Creditor during his argument relied upon the various Statutory Provisions and cited decisions rendered by various Courts, which are as follows:

a. Preference shares are a ‘financial debt’ having ‘commercial effect of borrowing’ in terms of Sec. 5(8)(f) of the I&B Code:

HDFC Ventures Trustee Company Limited v. Kakade Estate Developers Private Limited, Company Petition (IB) No. 747 of 2022 wherein the Hon’ble NCLT, Mumbai Bench while considering the issue of an investment in the form of Compulsorily Convertible Preference Share (**para 4.1** of the Judgment), held that *the payment of money by the Applicant to the Corporate Debtor towards subscription of CCPS in terms of ‘Exit Route’ is a Financial Debt in terms of section 5(8)(f) of the Code, the liability in respect of such debt arising from the guarantee/ indemnity also squarely falls under ‘Financial Debt’*(**para 4.13.2** of the Judgment). Pertinently, in the instant case, the CD is directly liable to make repayment of dues under CRPS and therefore, the relation of financial creditor and debtor is a direct one.

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b. Judgments passed in the context of Companies Act, 2013 or 1956 cannot be relied upon to infer the purport, meaning and ambit of provisions contained in the Code:

- (i) *Moser Baer Karamchari Union v. Union of India*, Writ Petition (C) No. 421 of 2019 (**para 6.2**), wherein the Hon'ble Supreme Court has held that **Code is a complete code** in itself and the object and purpose of the Code is altogether different than that of the Companies Act, 1956 ("**1956 Act**") or 2013 Act. Code is a new insolvency mechanism, and therefore, the provisions under the Code cannot be compared with that of the earlier regime, namely, the 1956 Act or 2013 Act.
- (ii) *Gujarat Urja Vikas Nigam Limited v. Mr. Amit Gupta and Ors.* Civil Appeal No. 9241 of 2019 (**para 53, 57**), the Hon'ble Supreme Court held that, while interpreting the provisions of the Code, textually similar language in different enactments (being 1956 Act and 2013 Act) cannot be *brought in through the backdoor by a process of disingenuous interpretation.*

c. Balance sheets and financial statement are mandatory to be filed by a company, and therefore, the entries made therein qua admission and liability of debt ought to be considered:

Juxtaposed to the arguments that statutory provisions of Companies Act should not be looked into, the following decisions were referred to;

- (i) *Asset Reconstruction Company (India) Limited v. Bishal Jaiswal and Ors.*, Civil Appeal No. 323/2021, (**para 22**) wherein the Hon'ble Supreme Court held that *filing of a balance sheet in accordance with the provisions of the Companies Act is mandatory and any transgression is punishable by law. Further, there is a compulsion in law to prepare a balance sheet but no compulsion to make any particular admission.*

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- (ii) **Indian Accounting Standard (Ind AS) 32 (para 18, AG 15 and AG 16)**, which provides that a *preference share that provides for mandatory redemption by the issuer for a fixed or determinable amount at a fixed or determinable future date* is a financial liability.
- (iii) **Section 128 to Section 134 of the Companies Act, 2013**: the provisions provide for mandatory character to the financials prepared by a company. It further provides that the *financial statements shall give a true and fair view of the state of affairs of the company and comply with accounting standards notified under Section 133 of the 2013 Act*.
- (iv) **Section 55(2) proviso of the Companies Act, 2013**: the proviso provides that the preference shares can be redeemed either *out of the profits of the company* or *out of the proceeds of a fresh issue of shares*.
10. The Ld. Counsel for the Financial Creditor has proposed that of **Mrs. MEGHA AGRAWAL**, having Registration no.: IBBI/IPA-001/IP-P-01456/2018 - 2019/12272, of 906, I-thum, Sector 62, Noida – 201301, Email ID: Ip.meghaagrawal@gmail.com, as Interim Resolution Professional (IRP) to conduct the CIR process of the Corporate Debtor (Matix). The Written Consent from Mrs. MEGHA AGRAWAL is annexed as **Annexure “C”** at Pages 64-68 of the Company Petition.
11. **Per contra, the Respondent would refute the claim in Reply Affidavit thus:**
- 11.1. The Petitioner (EPC through its Liquidator) under Section 7 of the I&B Code filed the Company Petition is claiming a total amount of Rs. 310 Crore alleged to be in default. It is alleged by the Respondent that the claim of the Petitioner is on account of alleged non-redemption of Rs. 25 Crore Cumulative Redeemable Preference Share (“CRPS”) issued by the

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Respondent to the Petitioner by conversion of an Operational Debt into Preference Shares by mutual agreement between the Petitioner and Respondent.

- 11.2.** That the CRPS issued and allotted by the Respondent to the Petitioner was pursuant to conversion of receivable of the Petitioner, i.e., Operational Debts payable by the Respondent to the Petitioner, into CRPS.
- 11.3.** That there was never any financial debt advanced by the Petitioner to the respondent. The transaction between the parties was a contract under which the Petitioner was obligated to construct a green field fertiliser complex and handover the same to the respondent after completing installation, commissioning and issue final acceptance certificate. Therefore, the receivables of the Petitioner, if any, from the Respondent, at the highest, would be an Operational Debt under the I&B Code.
- 11.4.** The Ld. Counsel for the Corporate Debtor further argues that the allegation made by the Petitioner regarding the failure of Respondent to redeem the CRPS on the date of maturity tantamount to a default in payment of financial debt, is patently erroneous. Section 55 of the Companies Act, 2013 stipulates that a Preference Share can be redeemed by a company only out of profits of the company available for distribution of dividend, or out of the proceeds of fresh equity raised by the company for redemption of the preference shares, whereas, the Respondent has not recorded profits or raised fresh equity at the relevant time for the purpose of redemption. Therefore, there was no obligation on the Respondent to redeem the CRPS issued to the Petitioner. In absence of any such obligation the Petitioners cannot claim that the Respondent is in default.
- 11.5.** The Ld. Counsel for the Corporate Debtor further alleges that the instant Company Petition is nothing but a brazen chance litigation being attempted by the Liquidator of the Petitioner which is contrary to the very scheme, spirit and purpose of the I&B Code.

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- 11.6.** That pursuant to the Order dated March 03, 2022 passed the Ld. NCLT Mumbai Bench in I.A. No. 375/2022 in CP(IB) No. 1832/MB/2017 filed by the Liquidator of the Petitioner, the EPC through its Liquidator filed this present Company Petition under Section 7 of I&B Code, whereas the Observation made by the Ld. NCLT Mumbai in the Order dated March 03, 2022 is contrary to the truncation documents between the parties and also contrary to the settled position of law that a Preference Shareholder is not a Financial Creditor within the scope of Section 5(7) of the I&B Code and as such not binding on this Bench. The NCLT Mumbai Bench could not have pre-judged the dispute while granting permission to a liquidator to initiate proceedings under Section 33(5) and 35(1)(k) of the I&B Code.
- 11.7.** At hearing, the Ld. Senior Counsel, Mr. Arun Kathpalia appearing for the Corporate Debtor would place the following facts germane to the issue raised in the Application:
- 11.8. EPC Contracts between the Parties and failure of the Petitioner to complete scope of works:**
- i.** The Respondent, desirous of setting up a greenfield fertiliser complex with a capacity to produce 1.3 MMTPA urea in the State of West Bengal by establishing an integrated Greenfield Ammonia-Urea Complex at Panagarh Industrial Park, Panagarh, District Burdwan (“Project”) approached the Petitioner.
 - ii.** In the year 2009-2010, the respondent and the Petitioner inter alia executed an EPC Contract dated December 11, 2009 for a total consider of Rs. 3,200 Crore with a completion timeline of 29 months.
 - iii.** The EPC Contract dated December 11, 2009 was further split into the following 3 contracts:
 - a.** Onshore Supply Contract dated July 29, 2010;
 - b.** Engineering & Construction Contract dated July 29, 2010; and
 - c.** Offshore Supply Contract dated August 20, 2010.

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collectively referred to as the “EPC Contracts”.

- iv. Pursuant to the Notice of Commencement dated April 01, 2010 issued by the Respondent, the Petitioner was to complete the project as per the following timeline:

#	Particulars	Onshore Supply Contract	Offshore Supply Contract	Engineering & Construction Contract
i.	Notice of Commencement	1 st April 2010		
ii.	Date of Contract	29 th July 2010	20 th August 2010	29 th July 2010
iii.	Value of Contract	Rs. 3200 crores		
iv.	Schedule as per Contract	18 months	26 months	29 Months
v.	Date of Performance Guarantee by the Petitioner	3 rd August 2010	7 th September 2010	3 rd August 2010
vi.	Date of first advance by the Respondent	4 th August 2010	9 th September 2010	9 th August 2010
vii.	Effective Date	4 th August 2010	9 th September 2010	9 th August 2010
viii.	Completion Date	3 rd February 2012	8 th November 2012	8 th January, 2013

- v. The Petitioner vide communication dated June 11, 2012, informed the Respondent that due to certain changes in the securing of goods and equipment of the project, the value of goods being procured indigenously would be higher than originally envisaged and requested for enhancement of the value of Onshore Supply Contract. Accordingly, vide letter dated June 15, 2012, the Respondent agreed to enhance the value of Onshore Supply Contract by Rs. 100 Crore and consequently reduced the value of the Offshore Supply Contract. A copy of the letters dated June 11, 2022 and June 15, 2022 are annexed as **Annexure “A”** and **“B”** of the Reply Affidavit, respectively.
- vi. On August 27, 2012, the Respondent and the Petitioner agreed upon a Billing Schedule in the relation to the Offshore Supply Contract dated August 20, 2010, whereby break-up of the revised consideration amount of

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Rs. 1590 Crore was agreed upon. A Copy of the Billing Schedule dated August 27, 2012 is annexed as **Annexure “C”** of the Reply Affidavit.

- vii.** In view of delay, in completion of various aspects of the Project by the Petitioner, the Respondent addressed email dated August 31, 2013 inter alia informing the Petitioner that in one week’s time, the Respondent would be left with no option but to take over the balance work to complete the project at the Petitioner’s risk and cost including levy of liquidated damages. A Copy of the email dated August 31, 2013 addressed by the Respondent to the petitioner is annexed as **Annexure “D”** of the Reply Affidavit.
- viii.** There was no improvement in the petitioner’s conduct and therefore, the Respondent was compelled to address email February 06, 2014 inter alia informing the Petitioner that the respondent would be taking over the pending jobs at the risk and cost of the petitioner. A Copy of the email dated February 06, 2014 is annexed as **Annexure “E”** of the Reply Affidavit.
- ix.** Further, communications from the respondent, dated March 13, 2014 and March 20, 2014 failed to elicit any response. The Petitioner neither responded to the said letters not took any steps to complete the Project. Copies of the emails dated March 13, 2014 and march 20, 2014 are annexed as **Annexure “F”** and **“G”** of the Reply Affidavit respectively.
- x.** Upon Petitioner’s failure to complete the works and abrupt abandonment of the project, the Respondent was constrained to address communications dated March 06, 2014, dated March 25, 2014 and dated March 27, 2014 calling upon the Petitioner to handover the project site to the Respondent so that the respondent could complete the pending works solely at the Petitioner’s cost. The Copies of the email dated March 06, 2014, dated March 25, 2014 and dated March 27, 2014 are annexed as **Annexure “H”**, **“I”** and **“J”** of the Reply Affidavit.
- xi.** Accordingly, the respondent took charge of the Project on April 01, 2014 and addressed communication dated April 10, 2014 informing the

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Petitioner of the balance construction work including supplies and pending orders to the tune of Rs. 225 Crore. Copy of the communication dated April 10, 2014 is annexed as **Annexure “K”** of the Reply Affidavit.

11.9. Conversion of Receivables of Petitioner under the EPC Contracts into Cumulative Redeemable Preference Shares (CRPS)

- i.** By around April 2015, the Respondent had completed a significant portion of construction of the project. The Respondent was also facing delay in supply of requisite gas by the gas supplier and was constrained to request its lenders to grant extension of Project completion time by 2 Years which resulted in an increase in the cost for completing construction of the project sanction of additional funding/ debt by the Respondent’s lenders. As per the terms of sanction of debt to the Respondent by its lender, the Respondent was also required to bring in equity for the purpose of drawing additional debt so as to maintain the stipulated debt-to-equity (DER) ratio.
- ii.** The respondent addressed letter dated April 28, 2015 to the Petitioner proposing to convert a portion of their receivables under the EPC Contracts into CRPS for the purpose of meeting the Respondent’s capital infusion requirements. The Respondent’s proposal to convert the receivables, which were operational debts, into CRPS was accepted by the Petitioner vide letter dated May 08, 2015, annexed as **Annexure “L”** of the Reply Affidavit.
- iii.** Vide letter dated July 27, 2015, annexed as **Annexure “M”** of the Reply Affidavit, the Respondent informed the Petitioner that as per the appraisal of the lead bank IDBI bank, there was a cost increase of Rs. 1210 Crore due to the delay of 2 Years and the same was to be funded at existing DER of 2:1 with Rs. 807 Crore as additional debt and new equity of Rs. 403 Crore. Accordingly, the Respondent proposed converting the receivables of the Petitioner of Rs. 400 Crore into CRPS to facilitate the respondent to

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meet the DER requirements. The arrangement was agreed to by the Petitioner vide letter dated July 31, 2015.

- iv.** The board of the Petitioner approved of such arrangement vide a resolution passed at the meeting of its board of directors held on July 30, 2015 and approved the investment of up to Rs. 400 Crore into 8% CRPS of Rs. 10/- each of the Respondent.
- v.** The Respondent called for an EOGM of its members on August 26, 2015 wherein it was inter alia resolved that 40,00,00,000 CRPS will be issued to the petitioner for a total value of Rs. 400 Crore at a face value of Rs. 10/- per share and as per the terms more particularly agreed upon at the meeting.
- vi.** As per its books and accounts, as on August 26, 2015, the Credit Balance/ Outstanding was Rs. 264.55 Crore which included the retention amount which was payable by the Respondent only upon handing over of the completed plant by the Petitioner to the Respondent. Thus, the claim of the Petitioner of the total outstanding amount receivable from the Respondent was approximately Rs. 400 Crore is not correct as the receivable outstanding was Rs. 264.55 Crore. The difference of approximately Rs. 135.54 Crore was on account of the Petitioner applying incorrect rates of billing in respect of supplies under the Offshore Supply Contract which was revised as per the Billing Schedule dated August 27, 2012.
- vii.** As outstanding amount due to the Petitioner on August 26, 2015 was approximately Rs. 264.55 Crore, vide letter dated August 26, 2015, annexed as **Annexure "N"** of the Reply Affidavit, the Respondent confirmed the issuance allotment of 25,00,00,000 8% CRPS of Rs. 10/- each aggregating to Rs. 250,00,00,000/- to the Petitioner redeemable at par at the end of 3 years, by conversion of the outstanding receivables into CRPS. The issuance and allotment of the CRPS by the respondent to the Petitioner was duly filed with the Registrar of Companies vide Form No. PAS-3 (annexed as **Annexure- "O"** of the Reply Affidavit) and is also

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reflected by the Respondent's annual reports. A Copy of the audited financial statements for the year ending March 31, 2016 forms **Annexure – "P"** of the reply Affidavit.

11.10. Commencement of CIRP of the Petitioner and Claim for Redemption of CRPS

- i.** Meanwhile vide an Order dated April 20, 2018, passed by the Ld. NCLT, Mumbai bench in Company petition (IB) No. 1832 of 2017, the CIRP commenced against the Petitioner and Mr. Abhijit Guhathakurtha was appointed as IRP.
- ii.** The petitioner under instructions of the RP who is now the Liquidator, addressed letter dated August 20, 2018 to the respondent through its Chief Financial Officer, asking the respondent to redeem the 25,00,00,000 CRPS issued to the petitioner by conversion of receivables of Rs. 250 Crore on the redemption date i.e., August 25, 2018 for a total amount of Rs. 310 Crore.
- iii.** In response, the respondent vide letter dated August 24, 2018 informed that the Respondent had submitted its proof claim under Form B for an amount of Rs. 377.87 Crore, excluding claim on account of Performance LD (provisional future claim) of Rs. 160 Crore and denied its liability under CRPS.
- iv.** On October 27, 2018, the Petitioner through its Liquidator issued a demand notice which was received by the Respondent on November 14, 2018 making a demand for an aggregate amount of Rs. 632.74 Crore on the respondent including the claim of Rs. 310 Crore under the CRPS
- v.** The respondent vide letter dated December 07, 2018 categorially denied any liability to redeem the CRPS since the respondent has not earned any profit in immediately preceding and the current financial year, rather, it had accumulated losses of Rs. 589.46 Crore.

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11.11. Claim filed by the Respondent, as a Creditors, in the Liquidation proceedings of the Petitioner:

- i.** To complete the pending works, the respondent had incurred expenditure of Rs. 261.55 Crore which the petitioner was obligated to complete.
- ii.** Accordingly vide emails dated January 16, 2018, March 15, 2018 and April 25, 2018, the Respondent informed the petitioner of the expenses and costs incurred.
- iii.** On April 20, 2018, the Ld. NCLT Mumbai bench passed an order initiating CIRP against the Petitioner and appointed Mr. Abhijit Guhathakurtha as IRP of the petitioner and accordingly, the Respondent was precluded from initiating proceedings against the petitioner in view of the moratorium under Section 14 of the I&B Code, 2056.
- iv.** On May 07, 2021, the NCLT Mumbai bench, appointed Mr. Abhijit Guhathakurtha, the erstwhile Resolution professional of the petitioner as the Liquidator of EPC. The respondent submitted its Proof of Claim on June 17, 2021 under regulation 20 of the IBBI (Liquidation process) regulations of 2016 for an amount of Rs. 537,87,00,000/- (inclusive of liquidated damages) and further substantiated the claim vide documents submitted on June 24, 2021, July 26, 2021 and December 28, 2021.
- v.** By an email dated July 28, 2021, the Liquidator of the Petitioner sought to reject the respondent's claim on the ground that the amount claimed could not be verified from the books of accounts of the Petitioner. The Respondent however, vide letter dated October 21, 2021, annexed as **Annexure "T"** of the Reply Affidavit, submitted all the details of the claim of the respondent and various

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communications exchanged to the Liquidator with respect of with respect to consider its claim

- vi. The respondent was compelled to file an Interlocutory Application No. 415 of 2022 challenging the Liquidator's rejection of its claim.
- vii. The Respondent claims that there is no financial debt for an amount of Rs. 310 Crore or any other amount in relation to the CRPS.

11.12. The Ld. Sr. Counsel for the Corporate Debtor (Respondent) in the course of hearing relied upon the various Statutory Provisions and Judgment passed by various Courts, which are as follows:

- a. **Once a Debt is converted into shares, it leads to extinguishment of liability and loses the character of Debt:**

The Ld. Senior Counsel for the Corporate Debtor contends that the Petitioner (EPC through its Liquidator) under Section 7 of the I&B Code filed the Company Petition is claiming a total amount of Rs. 310 Crore alleged to be in default. It is alleged by the Respondent that the claim of the Petitioner is on account of alleged non-redemption of Rs. 25 Crore Cumulative Redeemable Preference Share ("CRPS") issued by the Respondent to the Petitioner by conversion of an Operation Debt into Preference Shares by mutual agreement between the Petitioner and Respondent and **it is a settled position of law that preference Shareholder is not even a creditor of issuing company**. The Petitioner is not a Financial Creditor qua the Respondent within the meaning of Section 5(7) of the I&B Code. The Ld. Counsel for the Respondent further alleges that the CRPS issued and allotted by the Respondent to the Petitioner was pursuant to conversion of receivable of the Petitioner, i.e., Operational Debts payable by the Respondent to the Petitioner, into CRPS. **It is a settled**

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position of law that once a debt has been converted into shares, it irrevocably loses all characters of debt.

Ld. Sr. Counsel relies upon the following judgments supporting his contention as:

(i) Commissioner of Income Tax-V v. Rathi Graphics Technologies Limited reported in 215 SCC Online Del 14470 para 15:

“When pursuant to a settlement the creditor agrees to convert a portion of Interest into shares, it must be treated as an extinguishment of liability to pay interest to that extent. In essence there will be no further outstanding interest to that extent.”

(ii) Canara bank v. IBRCL Limited reported in 2019 SCC Online NCLT 5327 para 32:

“With respect to the claim of the Applicant bank, that the lenders have to be consider reverting to their position from Equity Shareholder to lender once the CDR/SDR fails is unacceptable.”

(iii) Anup Jhunjhunwala v. Adea Powerquips Private Limited reported in 2023 SCC Online NCLT 7 para 23, 24, 27

(iv) Karnataka State Financial Corporation v. Namasthe Exports Private Limited 2020 SCC Online NCLT 3185 para 7

b. A Preference Shareholder is not a creditor or financial creditor of a Company

(i) Radha Exports v. KP Jayaram reported in (2020) 10 SCC 538 para 42:

“The definition of ‘financial debt’ in Section 5(8) makes it clear that ‘financial debt’ means a debt along with interest, if any, disbursed against the consideration for time value of money and would include money raised or borrowed against the payment of interest; amount

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raised by acceptance under any acceptance credit facility or its dematerialised equivalent; amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument; 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; receivables sold or discounted other than any receivables sold on non-recourse basis or any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing.... The payment received for shares, duly issued to a third party at the request of the payee as evident from official records, cannot be a debt, not to speak of financial debt. Shares of a company are transferable subject to restrictions, if any, in its Articles of Association and attract dividend when the company makes profits.”

(ii) Aditya Prakash Entertainment Private Limited v. Magikwand Media Private limited reported in 218 SCC Online Bom 551 para 9:

“In this case, there is no dispute to the fact that petitioner was a shareholder holding preferential redeemable preference shares. The only question that requires to be considered is whether petitioner would be a creditor of the company. Sub-section 1 of Section 80 says, subject to the provisions of this section, a company limited by shares may, if so, authorised by its articles, issue preference shares which are, or at the option of the company are to be liable, to be redeemed. Proviso, however, states that no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption. This aspect, in my view,

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shows that where redeemable preference shares are issued but not honoured when they are ripe for redemption, the holder of those shares does not automatically assume the character of a "creditor". The reason is that his shares can be redeemed only out of the profits of the company which would otherwise be available for dividend, or by afresh issue of shares. This is a limitation which is not applicable to any other creditor of the company. The shareholders of redeemable preference shares of the company do not become creditors of the company in case their shares are not redeemed by the company at the appropriate time. They continue to be shareholders, no doubt subject to certain preferential rights mentioned in Section 85 of the Companies Act, 1956. If they do not become the creditors of the company, they cannot apply for winding up of the company under Section 433(e) of the Companies Act, 1956."

(iii) Lalchand Surana v. M/s Hyderabad Vanaspathu Ltd. reported in 1988 SCC Online AP 290 para 6:

"The only question is whether, in case of failure of the company to repay the amount due thereunder, such shareholders become "creditors". It is in this context that proviso (a) to sub-section (1) of section 80 becomes relevant. Sub-section (1) of section 80 says that subject to the said section, a company limited by shares may, if so authorised by its articles, issue (i) preference shares which are to be redeemed, or (ii) preference shares which are liable to be redeemed at the option of the company.... This aspect, in my opinion, shows that where redeemable preference shares are issued but not honoured when they are ripe for redemption, the holder of those shares does not automatically assume the character of a "creditor". The reason is that his shares can be redeemed only out of the profits of the company which would otherwise be available for dividend, or

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by afresh issue of shares. This is a limitation which is not applicable to the case of an ordinary creditor. In the face of this position in law, and in the absence of any authority on the subject, I hold that the holders of redeemable preference shares do not and cannot become creditors of the company in case their shares are not redeemable by the company at the appropriate time. They continue to be shareholders, no doubt subject to certain preferential rights...

(iv) State Bank of India v. Alstom Power Boiler Ltd. reported in 2003 SCC Online Bom 321 para 25:

"The right given under clause (b) of Sub-section (2) is "to vote on every resolution placed before the company at any meeting." In our opinion, the words "before the company at any meeting" refer to a meeting of the company i.e., a meeting of the members of the company.... A preference share is not a debt instrument. Preference share amount is a capital and not a debt. Thus, in the meeting of the creditors, it would not be possible to assign a value to the vote of a holder of preference share."

(v) Hindustan Gas & Industries Ltd. v. Commissioner of Income Tax reported in 1978 SCC Online Cal 410 para 4, 10, 11, 12, 13:

“... obtaining capital by issue of shares is different from obtaining loan on debentures and that a loan obtained cannot be treated as an asset or advantage for the enduring benefit of the business of the assessee....”

“... the holder of a redeemable preference share did not stand on the same footing as a creditor and could not sue the company for redemption of the shares as an ordinary creditor...”

“Consequently, when the date for the redemption of redeemable preference shares has passed, their holders cannot sue the company

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for the repayment of their capital as creditors though they may petition for the winding up of the company as shareholders.”

(vi) Teq Green Power XIII Private limited v. REMC Limited reported 2023 SCC Online Del 1718 para 20 and 26:

“... However, in the facts of the present case, the tenderer has decided to exclude preference shares from the definition of net worth on a wrong notion that preference shares is a liability which is contrary to the Sections in Companies Act. Only when the preference shares are redeemable at the instance of the shareholders then only the preference shares can be called as a liability and not in all cases. Preference shares are redeemed out of profits or out of a fresh issue meant for the purpose and not from the existing share capital....”

(vii) National Corporative Development Corporation v. Assistant Commissioner in Income Tax Circle 13(1) reported in 2011 SCC Online Del 5029 para 10 and 11:

“... Similarly, a preference share holder stands on a different footing from a person who has advanced monies to another. An "advance" has been defined in the Black's Law Dictionary as "to pay money or render other value before it is due; to furnish something before an equivalent is received or to furnish money for a specific purpose understood between the parties, the money or some equivalent to be returned" etc. Thus, an advance is also quite different from preference shares in nature and character.

c. There is no obligation to redeem preference shares when the company has not made any profit and dividend has not been declared

(i) M.F.R. D’Cruz v. K.N. Vishwanathan reported in (1941) 54 LW 745: AIR 1941 Mad 806:

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“No dividend shall be payable except out of the net profits arising from the business of the company.

10. No dividend can be paid unless the company makes profits. This company never made any profits, but always incurred losses. No dividend can therefore be paid. The priority of the preference shares for payment of 7 1/2 per cent. is in regard to dividend. As there were no profits which could justify a dividend, there can be no dividend payable to the preference shareholders. The contention put forward on behalf of the preference shareholders is that each share is entitled to a sum equivalent to 7 1/2 per cent. from the amount of the capital. That would amount to interest being payable each year. Neither the Memorandum nor the Articles provide for any interest. In my view, as there were no profits no dividends could be declared and were not declared; nothing is payable to the preference shareholders in respect of dividend or interest and they are entitled only to repayment of the actual share capital. There will be an order accordingly.”

d. A Written contract must be interpreted on its terms alone and any other evidence to interpret the same must be excluded

(i) Roop Kumar v. Mohan Thedani reported in (2003) 6 SCC 595:

“It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy....”

“Both Sections 91 and 92 are based on “best-evidence rule”. It would be inconvenient that matter in writing made by advice and on consideration, and which finally import the certain truth of

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agreement of parties should be controlled by averment of the parties...”

(ii) Rajasthan State Industrial Development & Investment Corpn. v. Diamon & Gem Development Corpn. Ltd. reported in (2013) 5 SCC 470

“A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein...”

e. Accounting Standards and entries in the balance sheet cannot override the contract between the parties

(i) Union of India v. Assn. of Unified telecom Service Providers of India reported in (2020) 3 SCC 525:

“... Accounting standards make it clear that it does not provide for straitjacket formula for accounting but merely provides for guidelines to maintain the account books in systematic manner.”

(ii) Cyrus Investments Private Limited v. M/s Tata Sons Ltd. reported in 2017 SCC Online NCLT 77 para 57:

“ ... When the statute defines preference shareholding as part of the issued share capital, can it be said that since Accounting Standards saying that redeemable shareholding shown as debt in the company, therefore, the definitions given under Companies Act and the rights created under Companies Act are redundant? It cannot be like that. Preference Shareholding will never become a debt and a shareholder can never wear the hat of creditors. The Petitioners have been arguing redeemable preference shares as debt, if so, any right has

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been conceived to the preference shareholders at least to make a demand for recovery for their investment before the period envisaged while issuing redeemable preference shares. If Company has gone into losses, can it be possible to preference shareholder to ask for recovery on par with creditors? So this limited argument of the Petitioners highlighting the practice in Accounting Standards will not make any case to obfuscate the mandate of the statute.”

(iii) Kedarnath Jute Mfg. Co. Ltd. v. Commissioner of Income tax (Central), Calcutta reported in (1972) 3 SCC 252 para 8

(iv) Durga Builders (P) Ltd. v. Motor and general Finance Ltd. reported in 2013 SCC Online Del 5165

f. I&B Code, is a complete code in itself

(i) Innoventive Industries Ltd. vs. ICICI Bank reported in (2018)1SCC407

“... the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority...”

“On the other hand, the Insolvency and Bankruptcy Code, 2016 is an Act to consolidate and amend the laws relating to reorganization and insolvency resolution, inter alia, of corporate persons...”

(ii) Embassy Property Developments Pvt. Ltd. vs. State of Karnataka reported in (2020) 13 SCC 308:

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*“It is beyond any pale of doubt that IBC, 2016 is a complete Code in itself. As observed by this Court in M/s. **Innoventive Industries Limited v. ICICI Bank**, MANU/SC/1063/2017: AIR 2017 SC 4084 it is an exhaustive code on the subject matter of insolvency in relation to corporate entities and others. It is also true that IBC, 2016 is a single Unified Umbrella Code, covering the entire gamut of the law relating to insolvency resolution of corporate persons and others in a time bound manner. The code provides a three-tier mechanism namely (i) the NCLT, which is the Adjudicating Authority (ii) the NCLAT which is the appellate authority and (iii) this Court as the final authority, for dealing with all issues that may arise in relation to the reorganisation and insolvency resolution of corporate persons. In so far as insolvency resolution of corporate debtors and personal guarantors are concerned, any order passed by the NCLT is appealable to NCLAT Under Section 61 of the IBC, 2016 and the orders of the NCLAT are amenable to the appellate jurisdiction of this Court Under Section 62. It is in this context that the action of the State of Karnataka in by-passing the remedy of appeal to NCLAT and the act of the High Court in entertaining the writ petition against the order of the NCLT are being questioned.”*

12. Submission in Rejoinder by the Ld. Sr. Counsel for Financial Creditors as:

12.1. The instant Petition under Section 7 of Code is maintainable at the instance of a preference shareholder and the claim of Financial Creditors fall under ‘financial debt’:

- a.) CRPS in the instant case is in the nature of an amount having commercial effect of borrowing, as provided under Sec. 5(8)(f) of the Code, and therefore, a “**financial debt**”. The agreed terms and conditions would be evident from the letter dated 28.04.2015

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whereby CD approached FC with a request *to consider converting the amounts outstanding from CD under EPC Contract as “Subordinated Debt”* and mentioned that *this would be a bridge arrangement*. CD also committed that *as and when [CD] raise equity, the same will be earmarked for paying of this subordinate debt of [FC]*. The said terms and conditions were accepted by FC *vide* Letter dated 08.05.2015 issued by FC, forming a contract.

- b.) Pursuant to the said contractual arrangement, CD allotted 25 Crore Cumulative Redeemable Preference Shares (“CRPS”) to FC aggregating to INR 250 Crores, with the following terms:
- (i) @Rs. 10/- per share,
 - (ii) redeemable at par at the end of 3 years. However, Company at its sole discretion, may redeem CRPS at any time within 3 years from the date of issue.
 - (iii) Annual Dividend Rate (Cumulative) @8% in first year, @8% in second year and 8% in third year.
- c.) Essence and / or substance of the contract / arrangement unequivocally agreed between the parties, was that, *firstly* the dues owed by CD to FC would be converted into a ‘subordinated debt’, and *secondly*, the debt would be repaid upon raising of equity by CD which would be earmarked for the said purpose. Issuance of CRPS was only the form through the arrangement was implemented.
- d.) The allotment letter dated 26.08.2015 for issuance of CRPS read with the contract entered between CD and FC by virtue of terms proposed by CD *vide* letter dated 28.04.2015, agreed to by FC *vide* letter dated 08.05.2015, makes it apparent that *firstly*, the ‘subordinated debt’ was transacted through issuance of CRPS, and *secondly*, the amount under CRPS was repayable from the equity raised by CD within a period of three years at CD’s option or at the end of three years.

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Undisputedly, as per the financial statements of the CD, it did raise money from equity after allotment of CRPS in FY 2015-16. However, it never fulfilled its contractual obligation to repay the CRPS, either during the tenure of three years or even at the end of three years.

- e.) Further, it is an admitted and undisputed fact that,
- i. the liability towards CRPS has been classified as “**unsecured loan**” in the financials of the CD;
 - ii. the liability towards dividend is separately shown as “**financial liability towards creditors for capital expenditure**”;
 - iii. CD *vide* letter dated 24.08.2018 had not only admitted to its dues, but also made a unilateral set-off of the amounts due under the CRPS, without any recourse to Section 55 of the 2013 Act;
 - iv. CD raised equity of more than **INR 385.32 Crore subsequent to the issuance of CRPS to FC**, and in spite of agreed terms and conditions that the outstanding dues of FC shall be paid when CD brings equity, CD failed and defaulted in making payment of the outstanding dues.

As such, it is evident that there is a financial debt and there is a default. In these circumstances, the Application filed by FC should be admitted

- f.) Further, the question of whether preference shares are a ‘financial debt’ is not more *res integra* as the Hon’ble NCLT, Mumbai Bench in *HDFC Ventures Trustee Company Limited* (supra) (para 4.13.2) while considering the issue of an investment in the form of Preference Share, held that the CCPS transaction ***had the commercial effect of borrowing***.

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- g.) The judgements relied upon by the CD to argue that preference shares are not a 'financial debt' are all judgments passed in winding up proceedings under 1956 Act, in writ petitions regarding tender matter and under tax statute and are, thus, completely inapplicable in the instant case in view of *Gujarat Urja* (supra) and *Moser Baer* (supra).
- h.) The following judgments relied on by CD are not applicable in the instant case:
- i. *Radha Exports v. KP Jayaram* reported in (2020) 10 SCC 538, para 42] does not decide whether preference shareholder can maintain an application under Section 7 or not. In fact, the question was a loan provided to a promoter of the corporate debtor be treated as a debt of the Corporate Debtor. There were allegations of fraud and forgery and that the application was barred by limitation. Para 42 of the judgment, relied on by CD merely answers the question as to whether the share application money received as a loan by the promoter were for issuance of shares would amount to a debt to the company. **The said judgment does not deal with preference shares.**
 - ii. *Aditya Prakash Entertainment Pvt. Ltd. v. Magikwand Media Pvt. Ltd.* reported in 2018 SCC Online Bom 551, para 9; *Lalchand Surana and Ors. V. Hyderabad Vanaspathy Ltd.* reported in 1988 SCC Online AP 290, para 6 and *State Bank of India v. Alstom Power Boilers Ltd. and Ors.* [2003 SCC Online Bom 321, para 25] are the judgments passed in an application for winding up under the Companies Act 1956 and the ratio of the said judgments cannot be applied in an application filed under Section 7 of the IB Code in view of the judgment of the Hon'ble Supreme Court in *Moser Baer* and *Gujarat Urja*.

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- iii. *Hindustan Gas and Industries Ltd. v. Commissioner of Income Tax* reported in 1978 SCC Online Cal 410, para 4, 10, 11, 12, 13 and *National Cooperative Development Corporation v. Assistant Commissioner of Income Tax* reported in 2011 SCC Online Del 5029, para 10-11, were the judgments passed in respect of matter relating to tax and the ratio of the said judgments cannot be applied in an application filed under Section 7 of the I&B Code in view of the judgment of the Hon'ble Supreme Court in *Moser Baer* and *Gujarat Urja*.
- iv. *Teq Green Power XIII Private Limited v. REMC Limited*, reported in 2023 SCC Online Del 1718, para 20 and 26] was a judgment passed in a writ petition in respect of a tender matter wherein the question pertained to eligibility of the bidder and as such, the ratio of the said judgments cannot be applied in an application filed under Section 7 of the I&B Code in view of the judgment of the Hon'ble Supreme Court in *Moser Baer* and *Gujarat Urja*.
- v. *Tata Capital Financial Services Limited v. McNally Bharat Engineering Company Limited*, CP (IB) No. 843/KB/2019 was a judgment, though in respect of Section 7 of I&B Code, the same cannot be applied in the instant case as the said judgment was passed relying on the decisions rendered in respect of winding up proceedings under the Companies Act, 1956.

12.2. The argument of the Corporate Debtor that once debt is converted into shares, it leads to extinguishment of debt and loses the character of

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debt, is contrary to law and inapplicable in case of redeemable preference shares:

- a.) The equity shares, unlike redeemable preference shares, are not liable to be redeemed or repaid. Therefore, the judgments relied upon by the CD to argue that the conversion of debt into shares extinguishes the debt, pertain to equity shares are inapplicable.
- b.) Further, it is argued that the three judgments in *Commissioner of Income Tax v. Rathi Graphics Technologies Limited* reported in 2015 SCC Online Del 14470, para 15; *Canara Bank v. IVRCL Limited* reported in 2019 SCC Online NCLT 5327, para 32 and *Karnataka State Financial Corporation v. Namasthe Exports Private Limited* reported in 2020 SCC Online NCLT 3185, para 7 were all in respect of equity shares and not preference shares. Therefore, any reliance upon such judgments to decide the present case is irrelevant.
- c.) The fourth judgment reported in *Anup Jhunjunwala v. Adea Powerquips Private Limited* reported in 2023 SCC Online NCLT 7, para 23, 24, 27 is not applicable in the instant case as the said judgment was under Section 9 of the Code, and thus, had nothing to do with preference shares.

12.3. To counter the contention of the CD that it has no obligation to redeem preference shares as the CD has not made any profit or has not declared dividend, and as such redemption of CRPS is barred by Section 55 of Companies Act, 2013:

- a.) Section 55 of the 2013 Act only provides as to the manner in which preference shares can be redeemed i.e., *out of the profits of the company or out of the proceeds of a fresh issue of shares made for the purpose of such redemption.*

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- b.) In the instant case, the preference shares were to be redeemed **not** out of the profits, but out of the proceeds of fresh issue of shares, which contractual arrangement is evident from the letter dated 28.04.2015 issued by the CD and acceptance letter dated 08.05.2015 issued by the FC. The CD had already committed for such equity to be *earmarked for paying of this subordinate debt of FC.*
- c.) It is an admitted position that fresh issue of equity was made after the issuance of the CRPS and the same would be evident from the balance sheets of the CD. In spite, the CD defaulted in making redemption of CRPS. The argument of the CD that the equity was raised prior to maturity of the CRPS is also of no relevance as the terms and conditions on which CRPS was issued clearly mentions that the equity which would be raised *will be earmarked for paying of the subordinate debt of [FC]* and in any event, the terms clearly provided that the CD at its sole discretion may *redeem CRPS at any time within 3 years from the date of issue.*
- d.) Further, the reliance placed by CD on *MFR D'Crux v. K N Vishwanathan* reported in (1941) 54 LW 745, AIR 1941 Mad 806, pg. 748] is as the said judgment merely deals with a situation wherein redemption was required out of profits, and not out of fresh issue.

12.4. The contention of CD that the entries in the balance sheets were reflected as the Accounting Standards required the CD to do so and the same cannot override statute:

- a.) The contention of the CD that Accounting Standards cannot override the statute is untenable as the statute i.e., the 2013 Act itself provides that Accounting Standards should be followed. The judgments relied on by the CD in *Union of India v. Assn. of Unified Service Providers of India* reported in (2020) 3 SCC 525, para 65, 76, *Cyrus Investment Pvt. Ltd. v. Tata Sons Ltd. and Ors.* Reported in 2017

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SCC Online NCLT 77, para 57-60 and *Kedarnath Jute Mfg. Co. Ltd. v. Commissioner of Income Tax* reported in (1972) 3 SCC 252, para 8 are not applicable. The statute provides that the financial statements of the company should provide *true and fair* picture of the affairs of the company. The statute also provides that if there is deviation from the Accounting Standards, reasons should be assigned for such deviation.

- b.) The entries in the balance sheet in respect of CRPS in the instant case, being “**unsecured loan**” is correct, true and fair, and therefore no reason was called for any deviation from the Accounting Standards. In *Bishal Jaiswal* (supra) (**para 22**), the Hon’ble Supreme Court held that *filing of a balance sheet in accordance with the provisions of the Companies Act is mandatory and any transgression is punishable by law. Further, there is a compulsion in law to prepare a balance sheet but no compulsion to make any particular admission.* As such, the admission of the dues in relation to CRPS as being an “**unsecured loan**” is true and fair admission of the liability of CD. Therefore, for the CD to argue that such mandatory prescription under the Act recognized by judgments of the Hon’ble Supreme Court, has no bearing, would render the 2013 Act and the said judgments otiose.
- c.) Further, since the equity was admittedly raised by CD, as also reflected in the balance sheet of the CD, the said amount had become due and payable in terms of Section 55(2) proviso of the 2013 Act.

12.5. The contentions of the Corporate Debtor that the letters dated 28.04.2015 and 08.05.2015 cannot be relied on in view of Section 91 and 92 of the Indian Evidence Act is contrary to the stand taken by the CD and factually incorrect:

- a.) CD has, itself, relied upon letter dated 28.04.2015 and the said letter was filed by CD as ‘**Annexure – L**’ to its Affidavit-in-Reply. The

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terms and conditions on which FC agreed to convert a part of its outstanding dues into CRPS and CRPS were issued would be evident from the said letter dated 28.04.2015 and acceptance of the said terms by FC is evident from the letter dated 08.05.2015. Therefore, for the CD to argue that the very contract and its terms entered between the parties, being the said letters, should not be looked into, is completely malicious and incorrect. The argument of CD to look into the form in disregard of the substance of contract is unknown to law, and therefore, deserves to be rejected.

- b.) Further, the purported bar under Section 91 and 92 of the Indian Evidence Act is inapplicable in the instant case as the said provision, in fact, requires the content of the contract entered through the said letters to be taken into account, which are in consonance and not at variance with the allotment of CRPS by CD to FC *vide* letter dated 26.08.2015.

12.6. The contention of the CD that CRPS was in the nature of investment, and hence, not a 'financial debt' is a position contrary to the Code

- a.) It is submitted that the Hon'ble NCLAT in *Nikhil Mehta and sons v. AMR Infrastructure*, CA (AT) (Ins) No. 7 of 2017 (para 20 to 24) and *Shailesh Sangani v. Joel Cardaso and Ors.*, CA (AT) (Ins) No. 616 of 2018 (para 6 & 9), has clearly held an investment to be a 'financial debt'. Therefore, such an argument of CD is not well found in the legal position under the Code.

13. Submission made by Ld. Sr. Counsel for the Corporate Debtor in Sur-Rejoinder in replying the Rejoinder of the Financial Creditor:

- 13.1.** The Ld. Sr. Counsel for the Corporate Debtor admits that the Respondent has issued to the Petitioner 25 crores CRPS of Rs. 10% having a coupon rate of 8% pursuant to conversion of an operational debt under a contract

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for services. The Petitioner has received and accepted such share certificates without any demur or objection. With such allotment of shares (CRPS) on 30.07.2015, the financial statements of the Respondent for FY 2015-16 duly reflect such allotment in the share capital in accordance with the applicable GAAP accounting standards. The Petitioner has never offered to return the said shares or applied for the cancellation thereof. The CRPS held by the Petitioner is, as per the Petitioner's own records, including its audited financial statements, an "investment" in the Respondent. The Petitioner has exercised rights as a shareholder after claiming redemption of the CRPS by participating in shareholder meetings. In the circumstances, the Petitioner cannot claim to be both shareholder and creditor of the Respondent.

13.2. The Ld. Sr. Counsel for the Corporate Debtor argues that:

(i) Preference Shareholder is also a Shareholder

- a.** It is the case of the Petitioner that the CRPS is an instrument "*having the commercial effect of borrowing in terms of section 5(8)(f) of the I&B Code*". This submission is erroneous, untenable and contrary to the very notion of a preference share which forms part of the share capital of the company and is in no manner a form of debt or financial debt.
- b.** It is an admitted fact that the Petitioner is a preference shareholder of the Respondent having 25 crores shares.
- c.** The preference shareholder has all the rights of an equity shareholder and in addition thereto has certain preferential rights to share in the profits available for dividend and for return of capital in priority to that of an equity shareholder.
- d.** 'Preference Shares' are not defined, or described or discussed in the I&B Code which itself will demonstrate that a claim based on non-

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redemption of 'Preference Shares' cannot form the basis of a claim under Section 7 of I&B Code.

- e. While a preference share is not defined under the I&B Code, one must then look into its definition and meaning assigned to preference shares under the Companies Act. Companies Act is a complete code enacted to consolidate and amend the law relating to companies and the legislature was conscious of this fact in drafting the I&B Code. It is accordingly that Section 3(37) of the I&B Code states that "*words and expressions used but not defined in this Code but defined in the ...Companies Act, 2013(18 of 2013) shall have the meanings respectively assigned to those Acts.*" Therefore, the definition and relevant provisions of the Companies Act must be looked into in order to determine whether a preference share is an instrument "having the commercial effect of borrowing" as contended by the Petitioner.
- f. Thus, the only difference between an equity share and a preference share is essentially that a preference shareholder has a preferential right to – (a) a share in the profits of the company that are available for dividend; and (b) return of capital of the company in priority to equity shareholders in the event of the company's liquidation.
- g. As per Section 2(55) of the Companies Act, 2013, "*every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository*", ***whether equity shares or preference shares*** is defined as a member of the company.
- h. Therefore, it is an indisputable position that the Petitioner who was issued and allotted 25 crores CRPS having face value of INR 10/- each is a member/shareholder of the Respondent and that the CRPS are preference shares within the meaning of Section 43 of the Companies Act that form part of the share capital of the Respondent.

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The instrument/ share certificate in respect of the CRPS issued to the Petitioner is at Page 858 of the Company Petition at Vol-6.

- (ii) **No Absolute Right to Redeem a Preference Share**
- a. CRPS can be redeemed only from specific sources of funds unlike a debt which is an unconditional obligation to repay.
 - b. In support of the proposition that the issuing company cannot resort to any other source of funds to redeem preference shares or pay the dividend attached thereto including for instance, borrowing funds for the purpose of redemption, reliance is placed on *M.F.R. D’Cruz v/s K.N. Vishwanathan (1941) 54 LW 745, AIR 1941 Mad 806 (pg. 748)*.
 - c. This is for the simple reason that redemption of preference shares in any manner other than as specified under Section 55 of the Companies Act would tantamount to a preferential payment to shareholders in priority to creditors of the company, which would be in contravention of law, specifically even the waterfall under Section 53 of the I&B Code which prohibits such an act. **When paid out of profits, the lenders/ financial creditors are not affected, which highlights that CRPS is not a debt.**
 - d. Admittedly, the circumstances requiring redemption of the CRPS in terms of Section 55 of the Companies Act has not occurred namely:
 - (A) The Respondent has not earned profits and therefore has not declared any dividend since August 2018 when the CRPS matured.
 - (B) The Respondent has not raised any equity for the purpose of redemption of any preference shares since August 2015 when the CRPS was issued and allotted to the Petitioner. In fact, the

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Respondent has not raised any equity after August 2018, when the CRPS matured.

(iii) Admission of Petitioner That the Amount Claimed is An “Investment” And Not A Debt/ Loan Having The Commercial Effect Of Borrowing

- a.** It is the Petitioner’s case that the arrangement between the parties was allegedly to convert the receivables under the EPC Contract into a form of subordinated debt/ extended credit/ bridge arrangement. The Petitioner contends that the **letters dated 28.04.2015** (Letters exchanged between the Respondent and the Petitioner) and **the letter dated 08.05.2015** (contending that the receivables under the EPC contract were to be converted into subordinate debt or extended credit/bridge arrangement) constitute the complete agreement between the parties and the “substance” of the transaction.
- b.** In the Financial Year 2015-16, CRPS reflects as an “*investment*” made by the Petitioner in the Respondent under the category of ‘non-current investment’ in the audited financial statement of the Petitioner [Annex A @ Page 7/29/64 of Additional Affidavit]
- c.** The second proviso to Section 47(2) of the Companies Act, suggest that upon the happening of certain events, preference shareholders will have a right to vote on all the resolutions placed before the company. Therefore, preference shareholders also being entitled to voting rights on par with equity shareholders cannot be deemed to be creditors of the Company.
- d.** In fact, the Petitioner has on multiple occasions exercised its right as a shareholder of the Respondent.

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e. It is a settled position of law, as also enshrined in Section 91 of the Indian Evidence Act, 1872, that a written contract must be interpreted on its terms alone and any other evidence to interpret the same, must be excluded. In this regard, the Respondent seeks to rely on the following judgments:

- i. *Roop Kumar v/s Mohan Thedani [(2003) 6 SCC 595] (para 17 to 19)*
- ii. *Rajasthan State Industrial Development & Investment Corpn. v/s Diamond & Gem Development Corpn. Ltd. [(2013) 5 SCC 470] (para 23)*

(iv) **Associate Company**

- a. At Page 14 of the Company Petition, the Petitioner describes itself to be an ‘Associate Company’ of the respondent No.1.
- b. The relationship between the parties was contractual, the Petitioner would not have described itself to be an Associate Company of the Respondent.
- c. The Petitioner describes itself as an Associate Company by reason of being a shareholder of the Respondent thereby clearly disowning any debtor-creditor relationship between the parties.

(v) **The Petitioner’s Claim is not a Debt, much less a Financial Debt**

- a. The claim of the Petitioner arises on the basis of the Cumulative Redeemable Preference Shares (CRPS). It is a settled position of law that, the said CRPS are part of the share capital of the issuing company and not a form of financial debt.
- b. Section 5 (8) of the I&B Code defines and lists out the forms and categories of ‘Financial Debt’. The definition of Financial Debt being a “means and includes” definition is inclusive and therefore

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there can be no form or species of Financial Debt outside of Section 5(8) of the I&B Code. 'Preference shares' are not a form of financial debt listed in sub-clauses (a) to (f) of Section 5(8) of the I&B Code.

- c. The case of the Petitioner that the CRPS is an instrument "*having the commercial effect of borrowing in terms of section 5(8)(f) of the I&B Code*" is baseless and not supported by any law or precedent in support of the proposition that 'Preference Shares' are financial debt 'having the commercial effect of borrowing'.
- d. It is the Petitioner's case that vide letter dated 24.08.2018 issued by the Respondent to the Petitioner offering a set-off of the CRPS redemption against the balance amounts payable by the Petitioner to the Respondent is an admission and acknowledgment of liability by the Respondent. *[Annex. K @pg. 840 of CP-Vol-6]*

(vi) **Section 53 I&B Code**

- a. Under Section 53 of the I&B Code, repayment of "debt" to various stakeholders in sub-clauses (b) to (e) is followed by sub-clause (f) providing for payment of "any remaining debts and dues."
- b. It is only thereafter that sub-clauses (g) and (h) provide for distribution to preference shareholders followed by equity shareholders. In other words, preference shareholders and equity shareholders would be entitled to payment only after all remaining debts and dues of the company are discharged.

(vii) **Balance Sheet indicates Carried Forward Losses**

- a. In the present case, no incidence has occurred for redeeming the CRPS. The Respondent has neither had profits available for dividend nor proceeds from fresh issuance of shares which was made for the

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purpose of redemption at the time of maturity of the CRPS. The Respondent was incurring losses at the time of maturity of the CRPS and has been incurring losses as can be seen from the balance sheets of the Respondent: -

- i. For FY 2018-19 and 2019-20 **[Annex F colly @ pg. 625 of CP Vol-5.]**;
 - ii. For FY 2020-21 **[Annex. B @ pg. 26/41 of the Sur Rejoinder-Vol.1]**; and
 - iii. For FY 2021-22 **[Annex. C @ pg. 74/91 of the Sur Rejoinder-Vol.1]**.
- b. The Petitioner's contention is that the Respondent has earned profit before tax of INR 562.83 crores in FY 2021-22 and is therefore liable to pay dividend in respect of the CRPS. This submission of the Petitioner is incorrect and contrary to the fourth proviso of Section 123(1) of the Companies Act which states that "*no company shall declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profit of the company for the current year.*" As per the audited balance sheet for FY 2021-22, that the Respondent has an accumulated loss of INR 867.71 crores and therefore the Respondent is not permitted to declare any dividend. **[Annex. C @ pg. 74/88 "other equity" @ pg. 91 of Sur Rejoinder-Vol.1]**.
- c. The Petitioner has sought to rely on the judgment of *Moser Baer Karamchhari Union v/s Union of India 2023 SCC Online SC 547 (para 56)* which is a judgment on whether the amount to be paid to the workmen should be as per the waterfall mechanism under the I&B Code or the Companies Act, to state that the I&B Code is a complete code and cannot be compared to the earlier regime. The Petitioner has also sought to rely on the Hon'ble Supreme Court judgment of

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Gujarat Urja Vikas Nigam Limited v/s Amit Gupta & Ors. (Civil Appeal No. 9241 of 2019) in respect of the interpretation of Section 60(5) of the I&B Code to say that when a new legislation is enacted then an old legislation which was sought to be replaced, cannot be given a back door entry.

- d. The reliance of the Petitioner on the above-mentioned judgments is ex-facie misplaced. The Respondent is relying on the Companies Act in respect of provisions relating to the CRPS which is only governed under the Companies Act and not under the I&B Code. Further, the I&B Code under Section 3(37) specifically stipulates reliance on the Companies Act in respect of such words and expressions which are not defined in the I&B Code.
- e. For the proposition that the non-redemption of preference shares does not result in preference shareholders becoming creditors or the carrying value of preference shares and dividends becoming a debt, reliance is placed on: -
- a. *Radha Exports v/s KP Jayaram (2020) 10 SCC 538 (paras 42); and*
 - b. *Aditya Prakash Entertainment Pvt. Ltd. v/s Magikwand Media Pvt. Ltd. 2018 SCC Online Bom 551 (para 9)*
 - c. *State Bank of India v/s Alstom Power Boilers Ltd. & Ors. 2003 SCC OnLine Bom 321 (para 25)*
 - d. *Hindustan Gas & Industries Ltd. v/s Commissioner of Income Tax [1978 SCC OnLine Cal 410 (paras 4, 10, 11, 12, 13)]*
- f. In fact, in the case of *Tata Capital Financial Services Limited vs. McNally Bharat Engg. Company Limited* [Order dated 10.02.2020 in C.P. (I.B.) No. 843/KB/2019] (“*McNally Bharat*”) a petition under Section 7 of the I&B Code filed by a holder of CRPS seeking to

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initiate CRPS on the basis that failure to redeem the CRPS constitutes default in payment of a financial debt **was rejected by a coordinate bench of the Hon'ble National Company Law Tribunal Kolkata.**

- g.** It is therefore an incontrovertible and settled position of law both under the winding up regime of the Companies Act, 1956 and under the I&B Code that a holder of CRPS can under no circumstance seek to initiate insolvency proceedings against the issuing company. The decision of a coordinate bench of this Hon'ble Tribunal in *McNally Bharat*, as stated above, in categorically holding that a CRPS is not a financial debt under Section 5(8) of the I&B Code is binding on this Bench. By the principle of *stare decisis*, even in the event this Hon'ble Bench is in disagreement with the ratio with *McNally Bharat*, it cannot allow the present Company Petition and the only option available to this Bench would be to refer the issue to a larger bench, as held by the Hon'ble National Company Law Appellate Tribunal in the case of ***DLF Phase-IV Commercial Developers Limited and Ors. [CA(AT)(Ins)No. 180 of 2019 dated 19.08.2019 (para 4)].***
- h.** For the proposition that a debt upon conversion into shares is extinguished, reliance is placed on: -
- I. The Delhi High Court judgment in *Commissioner of Income Tax – V vs. Rathi Graphics Technologies Limited 2015 SCC Online Del 14470 (paras 15 and 16)***
 - II. The NCLT Hyderabad Bench judgment in *Canara Bank v. IVRCL Limited 2019 SCC OnLine NCLT 5327 (paras 32 and 33)***
 - III. The NCLT Kolkata Bench judgment in *Anup Jhunjunwala v. Adea Powerquips Private Limited 2023 SCC OnLine NCLT 7 (paras 23 and 27)***

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IV. The NCLT Bengaluru Bench judgment in *Karnataka State Financial Corporation v. Namasthe Exports Private Limited* 2020 SCC OnLine NCLT 3185 (para 7)

(viii) Accounting Standards

- a. The Petitioner has sought to rely on the financial statements of the Respondent, which have been prepared as per Ind AS 32, to contend that a financial instrument or financial liability as per Ind AS amounts to a financial debt under the I&B Code, notwithstanding the applicable provisions of law. It is also the case of the Petitioner that the balance sheet of the Respondent for FY 2018-19 refers to the fact that the Respondent has not redeemed the CRPS and does not state that the Respondent does not state that it has not earned profit. **[Annex. D @ pg. 162 of the Additional Affidavit of the Respondent]** Reliance has been placed on para 22 and 48 of the judgment of the Hon'ble Supreme Court in *ARCIL v/s Tulip Star Hotels Limited & Ors. (Civil Appeal No. 84-85 of 2020)* in this regard. This contention is untenable.
- b. An instrument/ agreement has to be seen for itself to determine whether it constitutes a Financial Debt or not. Accounting Standards cannot determine this for many reasons. Consider the present case, admittedly till FY 2016-17, this very Preference Shares were reflected under the head of share capital **[Annex P pg. 72 at pg. 88 of Affidavit in Reply]**. Thereon, from 2017 onwards, without there being any change in the terms or nature of the CRPS, only because of the change in the accounting standards in the financial statements, the CRPS are classified under a different heading.
- c. It is also the Petitioner's case that the balance sheet of the Respondent, having been prepared in accordance with the relevant

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provisions of the Companies Act, present a true and fair picture of the state of affairs of the Respondent and that the same shows that the Respondent is allegedly indebted to the Petitioner. It is also the case of the Petitioner that the auditors have applied themselves while preparing the balance sheets for the Respondent and have rightly determined the CRPS as a liability.

- d.** In the Balance Sheet of the Respondent for FY 2015-16 [**Annex P pg. 72 at pg. 88 of Affidavit in Reply**], the **CRPS are shown as part of share capital** in the audited financial statement of the Respondent.
- e.** The CRPS are also shown as **investment** in Financial Statement for FY 2015-16 of the Petitioner. [**Annex D @ Pg. 7/29/64 of Additional Affidavit of the Respondent**].
- f.** In the Balance Sheet of the Respondent for FY 2016-17 – [**Annex B @ 92/121/127/129/ of Additional Affidavit**] as a result of change in accounting standards in the Financial Year 2016-17 from GAAP to Ind AS, the CRPS were transferred from share capital to financial liability.
- g.** Treatment of an instrument in the financials as per applicable accounting standards do not determine the legal liability/ obligation of the issuing company.
- h.** The Petitioner has sought to rely on the financial statements of the Respondent, which have been prepared as per Ind AS 32, to contend that a financial instrument as per Ind AS amounts to a financial debt under the I&B Code.
- i.** However, the Ind AS 32 is merely the guiding principles to be followed from an accounting perspective and does not determine the nature of the liability which has to be determined on the basis of the underlying documents and applicable provisions of law. The treatment under an accounting standard does not change the express

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terms of an agreement. The Hon'ble Supreme Court has expressly held that "*Accounting standards make it clear that it does not provide for a straightjacket formula for accounting but merely provides for guidelines to maintain the account books in systemic manner.*" [*Union of India v. Assn. of Unified Telecom Service Providers of India (2020) 3 SCC 525 para 65*]

- j.** Further, in 2016, the Ministry of Corporate Affairs issued the Companies (Auditor's Report) Order, 2016 ("CARO") which deals with matters to be included in the statutory auditor's report. Clause 3(ix)(a) of CARO requires the statutory auditor to mandatorily include a statement as to "*whether the company has defaulted in repayment of loans or other borrowings or in the payment of interest thereon to any lender*". Accordingly, the statutory auditors of the Respondent have in their statutory audit report for FY 2018-19 onwards provided the lender wise details in respect of loans or borrowings on which the Company has defaulted during the relevant year and most pertinently does not include the name of the Petitioner or any reference to the CRPS. Had the liability under the CRPS been on the same footing as a liability under a 'financial debt' owed to a bank/ financial institution, an amount of INR 310 crores would have been reported to be in default under the CRPS in the statutory auditor's report.
- k.** For the proposition that treatment under prescribed accounting standards do not determine the nature of an instrument or the liability arising thereunder reliance is placed on:
- i. *Union of India v. Assn. of Unified Telecom Service Providers of India (2020) 3 SCC 525 (paras 65, 76)*
 - ii. *Cyrus Investments Pvt. Ltd. & Anr. V. M/s Tata Sons Ltd. & Ors. 2017 SCC OnLine NCLT 77 (paras 57-60)*

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iii. *Kedarnath Jute Mfg. Co. Ltd. v/s Commissioner of Income Tax (Central), Calcutta (1972) 3 SCC 252 (para 8)*

- I. In view of the above, the mere classification of the CRPS under Financial Liability in the Balance Sheet of the Respondent for the purposes of compliance with the classification norms of Ind AS does not render the liability under the CRPS as a financial debt for the purposes of I&B Code and reliance of the Petitioner. Therefore, the reliance by the Petitioner on the balance sheets of the Respondent to contend that there is a financial debt is misplaced and contrary to law.

14. Analysis and Finding:

14.1. Ld. Senior Counsels/ Ld. Counsel for the parties were heard, records and written arguments perused, implications of the statutory provisions and judicial pronouncements considered.

14.2. The issues that have cropped up for determination are as follows:

- (i) *Whether a Preference Shareholder is a Creditor of a Company.*
- (ii) *Whether an application under Section 7 of I&B Code filed by a Preference Shareholder is maintainable.*
- (iii) *Whether Cumulatively Redeemable Preference Shares (“CRPS” for brevity) was in the nature of an investment or a financial debt having commercial effect of borrowing.*

14.3. We have noted that it is the case of the Financial Creditor that CRPS is an instrument having the commercial effect of borrowing in terms of Section 5(8)(f) of the I&B Code. The Section 5(8)(f) of the I&B Code provides that **“Financial Debt”** refers to a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing. The Financial Creditor claimed that the default amount of Rs.

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310 Crore is due and payable by the Corporate Debtor (Matix) to the Financial Creditor (EPC) falls within the definition of “Debt” as defined under Section 3(11) of the I&B Code. It is an admitted fact that the petitioner is a preference shareholder of the Respondent having 25 Crores shares and the preference shareholder has all the rights of an equity shareholder and in addition thereto has certain preference rights to share in profits available for dividend and for return of capital in priority to that of an equity shareholder.

14.4. It is evident that ‘**Preference Shares**’ are not defined in the I&B Code. Therefore, one must then look into its definition and meaning assigned to preference shares under the Companies Act. Companies Act is a complete code enacted to consolidate and amend the law relating to companies and the legislature was conscious of this fact in drafting the I&B Code. It is accordingly that Section 3(37) of the I&B Code states that “*words and expressions used but not defined in this Code but defined in the ...Companies Act, 2013(18 of 2013) shall have the meanings respectively assigned to those Acts.*” Therefore, the definition and relevant provisions of the Companies Act must be looked into in order to determine whether a preference share is an instrument “*having the commercial effect of borrowing*” as contended by the Petitioner.

14.5. Further, **Section 43 of the Companies Act, 2013** defines the two types of shares that constitute share capital namely equity share capital and preference share capital as follows:

“(i) “equity share capital”, with reference to any company limited by shares, means all share capital which is not preference share capital;

“(ii) “preference share capital”, with reference to any company limited by shares, means that part of the issued share capital of the company which carries or would carry a preferential right with respect to—

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(a) payment of dividend, either as a fixed amount or an amount calculated at a fixed rate, which may either be free of or subject to income-tax; and
(b) repayment, in the case of a winding up or repayment of capital, of the amount of the share capital paid-up or deemed to have been paid-up, whether or not, there is a preferential right to the payment of any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company;”

14.6. It is explicit that in comparison with an equity shareholder, a preference shareholder has a preferential right to – (a) a share in the profits of the company that are available for dividend; and (b) return of capital of the company in priority to equity shareholders in the event of the company’s liquidation. As per Section 2(55) of the Companies Act, 2013, “*every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository*”, **whether equity shares or preference shares** is defined as a member of the company. The Petitioner who was issued and allotted 25 crores CRPS having face value of INR 10/- each is thus a member/shareholder of the Respondent and the CRPS or the preference shares within the meaning of Section 43 of the Companies Act, 2013 form part of the share capital of the Respondent.

14.7. Further, Section 47 of the Companies Act 2013 reads which is reproduced verbatim as:

“47. Voting rights. — (1) *Subject to the [provisions of section 43, sub-section (2) of section 50, and Sub-section (1) of section 188]—*

(a) every member of a company limited by shares and holding equity share capital therein, shall have a right to vote on every resolution placed before the company; and

(b) his voting right on a poll shall be in proportion to his share in the paid-up equity share capital of the company.

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(2) Every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares and, any resolution for the winding up of the company or for the repayment or reduction of its equity or preference share capital and his voting right on a poll shall be in proportion to his share in the paid-up preference share capital of the company:

Provided that the proportion of the voting rights of equity shareholders to the voting rights of the preference shareholders shall be in the same proportion as the paid-up capital in respect of the equity shares bears to the paid-up capital in respect of the preference shares:

Provided further that where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before the company.”

Thus, a Preference Shareholder is a Member and Shareholder of a company who is also entitled to enjoy voting rights in every resolution placed before the company.

14.8. Further, the Section 55 of the Companies Act envisages that **Preference Shares can only be redeemed out of** – (a) **the profits of the company** which would otherwise be available for dividend; or (b) **the proceeds of a fresh issue of shares made for the purpose of such redemption. Section 55 of the Companies Act, 2013** defines the “**Issue and redemption of preference shares**”, which are reproduced verbatim as below:

(1) No company limited by shares shall, after the commencement of this Act, issue any preference shares which are irredeemable.

(2) A company limited by shares may, if so authorised by its articles, issue preference shares which are liable to be redeemed within a period not

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exceeding twenty years from the date of their issue subject to such conditions as may be prescribed:

Provided that a company may issue preference shares for a period exceeding twenty years for infrastructure projects, subject to the redemption of such percentage of shares as may be prescribed on an annual basis at the option of such preferential shareholders:

Provided further that—

(a) no such shares shall be redeemed except out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of such redemption;

(b) no such shares shall be redeemed unless they are fully paid;

(c) where such shares are proposed to be redeemed out of the profits of the company, there shall, out of such profits, be transferred, a sum equal to the nominal amount of the shares to be redeemed, to a reserve, to be called the Capital Redemption Reserve Account, and the provisions of this Act relating to reduction of share capital of a company shall, except as provided in this section, apply as if the Capital Redemption Reserve Account were paid-up share capital of the company; and

(d) (i) in case of such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133, the premium, if any, payable on redemption shall be provided for out of the profits of the company, before the shares are redeemed:

Provided also that premium, if any, payable on redemption of any preference shares issued on or before the commencement of this Act by any such company shall be provided for out of the profits of the company or out of the company's securities premium account, before such shares are redeemed.

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(ii) in a case not falling under sub-clause (i) above, the premium, if any, payable on redemption shall be provided for out of the profits of the company or out of the company's securities premium account, before such shares are redeemed.

(3) Where a company is not in a position to redeem any preference shares or to pay dividend, if any, on such shares in accordance with the terms of issue (such shares hereinafter referred to as unredeemed preference shares), it may, with the consent of the holders of three-fourths in value of such preference shares and with the approval of the Tribunal on a petition made by it in this behalf, issue further redeemable preference shares equal to the amount due, including the dividend thereon, in respect of the unredeemed preference shares, and on the issue of such further redeemable preference shares, the unredeemed preference shares shall be deemed to have been redeemed:

Provided that the Tribunal shall, while giving approval under this sub-section, order the redemption forthwith of preference shares held by such persons who have not consented to the issue of further redeemable preference shares.

Explanation. — For the removal of doubts, it is hereby declared that the issue of further redeemable preference shares or the redemption of preference shares under this section shall not be deemed to be an increase or, as the case may be, a reduction, in the share capital of the company.

(4) The capital redemption reserve account may, notwithstanding anything in this section, be applied by the company, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

Explanation. — For the purposes of sub-section (2), the term "infrastructure projects" means the infrastructure projects specified in Schedule VI.

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14.9. Thus, Section 55 is explicit that if the issuing company is not making profits which are available for dividend or has not raised any equity investments specifically for the purpose of redemption of preference shares, then the preference shares cannot be redeemed. Thus, shareholders cannot receive any payment before the debt of the company is fully discharged, unless preference shareholders are paid out of dividend/ profits of the company and thus, the non-redemption of preference shares does not result in preference shareholders becoming creditors or the carrying value of preference shares and dividends becoming a debt. **Therefore, a Preference Shareholder cannot step into the shoes of a creditor of the Company unless their Preference Shares become redeemable in above terms.**

14.10. Preference Shares versus Equity Shares:

- a) As evident from the foregoing enumeration, 'Preference shares' also referred to as preferred stock are company stock which get priority over equity shares in terms of repayment of dividends. The Preference Share Holders are the first to receive pay out in case the Company decides to pay its investor any dividends. The proviso to Section 43 (iii) (a) of the Companies Act, 2013 is reproduced verbatim as: *“that in respect of dividends, in addition to the preferential rights to the amounts specified in sub-clause (a) of clause (ii), it has a right to participate, whether fully or to a limited extent, with capital not entitled to the preferential right aforesaid;”*
- b) **Preference Share Holders** thus have preference over equity shareholders to receive dividend pay-out as per Section 43 of the Companies Act, 2013 and have right to vote in case of extra ordinary event as per Section 47 (2) of the Companies Act, 2013.
- c) **Cumulative Preference Shares** are those that allow a missed dividend payment to be cumulatively added to the next one and become payable when the Company is in profits. Cumulative

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preference shares entitle their holder to a fixed rate of dividend, and if any dividend is not paid on the due date, the arrears remain payable and will accumulate. The preference shareholders must receive their arrears of dividend before any ordinary share dividend can be paid to equity shareholders.

d) Advantages of issuer of Cumulative Preference Shares:

Cumulative Preference Shares allow the issuer the freedom to defer their dividend pay-outs. In case of a company lacks enough dividend funds, they are not obligated to pay their investor and can defer this payment.

e) Advantages to Cumulative Preference Shareholders:

Their position as shareholder is more secured than others. These have advantage of claiming a company's assets first.

They have right to claim dividend payments.

They thus hold a priority position over other shareholders in the company.

They get priority in the Liquidation Process as per Section 53 of the I&B Code to get their investment back in the event of Company's Liquidation.

f) Cumulative Redeemable Preference Shares (CRPS) whether a equity:

Cumulative Preference Shares allow the investor to reap missed dividends.

When Company declares dividends, Preference Shares give the buyer preference over common equity shareholder.

Paying dividend to preference Shareholder is not compulsory unless the company is in profit. [As per Section 43 of the Companies Act, 2013]

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It is not obligatory for a Company to pay dividend as dividend is usually a part of the profit that the company shares with its shareholders.

Thus, CRPS is in the nature of an investment and not a debt unless it becomes redeemable.

14.11. We have also noted the following **Statutory Provisions**:

Section 2(55) of the Companies Act, 2013 defines “Member” as under:

A “member”, in relation to a company, means—

- (i) *the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;*
- (ii) *every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;*
- (iii) *every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository;*

Section 2(84) Companies Act, 2013 defines “Share” as:

“a share in the share capital of a company and includes stock”;

The Provisions supra indicate that even a Preference Shareholder is Member of a Company and entitled to share its “Profit” in the form of “dividends” **when the Company makes profit which would otherwise be available for dividend; or proceeds of a fresh issue of shares made for the purpose of such redemption.** Thus, unless the Company earns profits, no dividend is payable against CRPS.

14.12. Further, **Section 3(11) of the I&B Code** defines “*debt*” as “*a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.*” **Thus, if payment against**

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CRPS is not due, no liability can be said to arise. Further, **Section 3(12) of the I&B Code** defines “*default*” as “*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*”.

The necessary corollary would be that unless CRPS is payable, non-payment against CRPS cannot be termed as a default.

14.13. Further, **Section 7 (1) of the I&B Code** envisages that “*a financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred*” and it is a settled law that existence of a debt and default is *sine qua non* to maintain an application under Section 7 of I&B Code, 2016. In the event, no payment (debt) is due, no default is established.

14.14. The petitioner has referred to us the Balance Sheet and Financial Statement to contend that Respondent has earned profit and therefore it was obliged to issue dividend whereas their right to seek such issuance arose in 2018. The Balance Sheet of 2018-19 to 2020-21 manifests losses incurred and the 4th proviso to Section 123 of the Companies Act 2013 manifestly indicates that no dividend is payable out of losses and unless the CRPS becomes redeemable it cannot be termed as a “debt”, much less a “financial debt”.

14.15. Whether an Application under Section 7 of I&B Code filed by a Preference Shareholder is maintainable:

We have already discerned that the non-redemption of preference shares does not result in preference shareholders becoming creditors or the carrying value of preference shares and dividends becoming a debt, for the purpose reliance is placed on: -

a. *Radha Exports v/s KP Jayaram (2020) 10 SCC 538 (paras 42); and*

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- b. Aditya Prakash Entertainment Pvt. Ltd. v/s Magikwand Media Pvt. Ltd. 2018 SCC Online Bom 551 (para 9)*
- c. State Bank of India v/s Alstom Power Boilers Ltd. & Ors. 2003 SCC OnLine Bom 321 (para 25)*
- d. Hindustan Gas & Industries Ltd. v/s Commissioner of Income Tax [1978 SCC OnLine Cal 410 (paras 4, 10, 11, 12, 13)]*

14.16. Further we rely upon the decision in **Tata Capital Financial Services Limited vs. McNally Bharat Engineering Company Limited** reported in **MANU/NC/2656/2020** that:

“38. What are the rights of Preference Shareholders is dealt with under section 55 of the Companies Act, 2013. Preference shareholders like the applicant can enjoy preferential right in dividend payment as agreed in between the subscriber and issuer nevertheless the issuer doesn't generate revenue. It appears to us that non-payment upon demanding early redemption as per the terms of subscription agreement cannot be termed as default in repayment of a debt so as to file an application under section 7 of the Code. Admitting this application under section 7 of the Code no doubt would contravene section 55 the Companies Act, 2013. Section 55 of the Companies Act, 2013 mandates that preference shares can only be redeemed in the manner, and after fulfillment of the conditions, prescribed in the terms of issue.”

“39. It is clear that though according to Section 55 of the Companies Act, the redeemable Preference Shares cannot be taken as a "debt" and shall always remain shares and could be redeemed only out of the profits of the company or when there is a new issue of the redeemable shares of the Company the old redeemable shares can be paid off. Preference shares cannot be classified as a liability unless it is redeemed. Truly the applicant/subscriber opted for

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redemption but the CD/the issuer never allowed the request and therefore it cannot be classified as a debt.’

“40. From the various judgments referred to and relied upon by the Ld. Counsel for the Corporate Debtor it is amply clear that the repayment of "Redeemable Preference Shares", is not a debt and its redemption can be allowed to be made out of only from the profits of the Company. The provisions of the Companies Act do not permit redemption of the shares as a "debt", in that event the applicant could not have been treated as a Financial Creditor.’

“41. It is also true that as per the existing provisions of the Company law and the judgments on the issue, a holder of Redeemable Preference shares cannot sue the Company for redeeming its shares except out of the profit of the Company or out of the proceeds of a fresh issue of shares made for the purposes of such redemption. On a combined reading of section 55 of the Companies Act, 2013 read with Rule 9 of the Companies (Share Capital) Rules, 2014 and Section 5(7) & (8) of the Code, a preference share holder cannot be classified as a financial creditor falling under section 5(7) of the Code and the applicant's claim is not a financial debt under section 5(8) of the Code.”

14.17. Therefore, a Preference Shareholder is not a Financial Creditor unless the Preference Shares (here the “CRPS”) become due for redemption.

- 15.** Such being the factual and legal position, we are constrained to hold that no case of any “debt” due to the Applicant and no existence of “default” on the part of Respondent within the meaning ascribed to the terms “debt” and “default” in the Code, is made out. In the aforesaid backdrop, we hold that this Petition, filed under Section 7 of IBC, 2016, is not maintainable.

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16. Hence, we **reject** the prayer and accordingly **dismiss** this Company petition filed by EPC (Financial Creditor, herein). Liberty is however granted to the Petitioner to seek other remedies as may be available to it under any other law.

17. Urgent Certified copy of the Order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This order is signed on the 29th Day of August, 2023

Bose, R.K. [LRA]