

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

Company Petition (IB) No. 270/KB/2022

***An application under section 7 of the Insolvency and
Bankruptcy Code, 2016 read with Rule 4 of the Insolvency
and Bankruptcy (Application to Adjudicating Authority) Rule,
2016.***

IN THE MATTER OF:

Refine Alloy Private Limited

[CIN: U27100WB2009PTC136870]

... Financial Creditor/ Petitioner.

Versus

Navdisha Real Estate Private Limited

[CIN: U24116WB1971PTC028066]

...Corporate Debtor/ Respondent.

Date of Pronouncement:23.04.2024

CORAM:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER
(JUDICIAL)**

SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)

Appearances:

For the Petitioner: Ms. Aparajita Rao, Adv.

Ms. Sutapa Mitra, Adv.

For the Respondent: Mr. Sandip Ladda, Adv.

Ms. Tanvi Luhariwala, Adv.

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. This Court congregated through a hybrid mode.

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

C.P.(IB)/270(KB)2022

2. We have heard the Learned Counsels for both parties in full.

3. This petition has been preferred under Section 7 of the Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" by **Refine Alloys Private Limited** hereinafter referred to as "**Petitioner**"/ "**Financial Creditor**" seeking to initiate a Corporate Insolvency Resolution Process (for brevity "**CIRP**") against Navdisha Real Estate Private Limited, hereinafter referred to as "**Respondent**"/ "**Corporate Debtor**" for an alleged default of Rs. 16,70,26,882/- alongwith interest of Rs. 4,70,26,882/- on 31.02.2020.

4. **The Petitioner has averred as under:**

4.1 The applicant is a Financial Creditor (FC in short) who had advanced an amount of Rs. 15.00 Crores to **M/s Balasore Alloys Ltd** the '**Principal Borrower**'. The said loan was disbursed pursuant to a Loan Agreement executed on 25.11.2019 by the Financial Creditor **Refine Alloys Private Limited**, the Principal Borrower **Balasore Alloys Ltd.**, and the Corporate Debtor (CD in short) **Navdisha Real Estate Private Limited** as the '**Security Provider**' who had agreed inter alia to mortgage its properties towards the security of the said Loan.

4.2 A Separate Deed of Mortgage was executed by and between the Financial Creditor **Refine Alloys**

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

C.P.(IB)/270(KB)2022

Private Limited and the respondent **Navdisha Real Estate Private Limited** the purported Corporate Debtor herein as the Mortgagor, on 25.11.2019 under which the Corporate Debtor **Navdisha Real Estate Private Limited** became liable to repay the debt in case of default by the Principal Borrower, **Balasore Alloys Ltd.**

4.3 The Principal Borrower defaulted after payment of Rs. 3.00 crore on 12.03.2021. The Principal Borrower also did not pay any interest on the said loan as agreed. In terms of the Deed of Mortgage, the Corporate Debtor **Navdisha Real Estate Private Limited** became liable to repay the dues of the Financial Creditor.

4.4 A Demand notice was issued to the Corporate Debtor on 30.09.2021 to repay the dues which fell due on the default of the Principal Borrower. In response to the said notice, the Corporate Debtor admitted its default to the Financial Creditor.

4.5 The Financial Creditor has already filed an application under section 7 of the Code before NCLT, Cuttack Bench against the Principal Borrower **Balasore Alloys Ltd.** being numbered as CP (IB) 33 of 2022 (Refine Alloy Pvt Ltd vs. Balasore Alloys Pvt ltd).

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

C.P.(IB)/270(KB)2022

**5. Submissions of the Ld. Counsel for the Financial
Creditor:**

At hearing Ld. Counsel Ms. Aparajita Rao would take us through the following to substantiate her contention:

- 5.1** The Loan agreement dated 5.11.2019 annexed to the petition entered between Refile Alloys Ltd. the Lender, Balasore Alloys Ltd. the Principal Borrower and Navdisha Real Estate Private Limited the Security Provider (or SP), as extracted hereunder to the extent relevant and germane to the lis; with supplied emphasis for clarify:

1. *LOAN AGREEMENT*

THIS LOAN AGREEMENT ("Agreement") is made on this 25th day of November, 2019 at Kolkata

BY AND BETWEEN

REFINE ALLOY PRIVATE LIMITED, a company within the meaning of the Companies Act, 2013, having its office at Trishul Apartment, 35, Rowland Road, Ground Floor, Kolkata - 700 020, herein after referred to as the "Lender"

XXX

AND

BALASORE ALLOYS LIMITED, a company within the meaning of the Companies Act, 2013 having its office at Park Plaza, 71 Park Street, Kolkata - 700 016, herein after referred to as the "Borrower"

AND

IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, (COURT NO.-II)
KOLKATA

C.P.(IB)/270(KB)2022

NAVDISHA REAL ESTATE PRIVATE LIMITED, a company within the meaning of the Companies Act, 2013 having its office at Park Plaza, 71 Park Street, Kolkata-700 016, hereinafter referred to as the "Security Provider" or "SP"

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WHEREAS:

- a. *The Lender is a company engaged in the business of trading of steel and allied products. The Borrower has approached the Lender to provide financial assistance for a sum of upto Rs. 20,00,00,000/- (Rupees Twenty Crores only).*
- b. *The Lender has agreed to provide financial assistance and the Borrower has agreed to obtain the same on the terms and conditions contained herein below.*
- c. *Navdisha, at the Borrower's request and being one of the promoters of the Borrower, has agreed to provide collateral security to the Lender for the financial assistance to be given to the Borrower by the Lender.*

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2. LOAN

- 2.1 *The Borrower agrees to borrow from the Lender and the Lender agrees to lend to the Borrower on the terms and conditions contained herein, an amount upto Rs. 20,00,00,000/- (Rupees Twenty Crores only) ("Loan"), in accordance*

IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, (COURT NO.-II)
KOLKATA

C.P.(IB)/270(KB)2022

with the terms of and subject to the conditions of this Agreement.

3. Disbursement

3.1 The Lender shall disburse a sum of upto Rs.15,00,00,000/- (Rupees Fifteen crores only) latest by December 20, 2019 & further Rs. 5,00,00,000/- (Rupees Five Crores only) shall be disbursed in due course as per mutual discussion between the Parties.

4. Interest and Repayment

4.1 It is hereby agreed between the Parties that the Loan so advanced shall carry interest @ 12% per annum.

4.2 The Loan hereby advanced and/or granted to the Borrower shall be repaid by the Borrower making a payment of Rs. 10,00,00,000/- (Rupees Ten crores only) by January 31, 2020 and the balance sum by March 31, 2020.

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5. Security

5.1 The performance by the Borrower of its obligations of repayment and/or payment, as the case may be, of the Loan and interest payable by the Borrower under this Agreement (collectively referred to as "Obligations") is hereby secured by a mortgage of deposit of title deeds by the SP of its right and/or title and/or interest in the space No. 6C situated on the Sixth Floor of the building at Park Plaza,

IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, (COURT NO.-II)
KOLKATA

C.P.(IB)/270(KB)2022

No.71, Park Street, Calcutta - 700 016 containing total area of about 1,851 square feet and the space No. 1A situated on the First Floor of the building at Park Plaza, No. 71, Park Street, Calcutta - 700 016 measuring super built up area of approximately 5,335 square feet (carpet area of approximately 3,931 square feet) along with 3 (three) car parking spaces in the basement of the said building.

5.2 XXX

5.3 The SP is not guaranteeing the obligations of repayment and/or payment, as the case may be, of the Loan and interest payable by the Borrower under this Agreement and is not assuming any liability in respect of the same and will not be liable for the same. The SP is only providing security vide the aforesaid mortgage and will not be liable to the Lender in any other manner whatsoever and the Lender will have right against the SP whatsoever save and except its rights in terms of the aforesaid mortgage.

6. XXX

7. Event of Default and Consequence

7.1 XXX

7.2 Consequences of Event of Default

(a) If an Event of Default occurs, the Lender shall have the right to accelerate the payment, repayment or reimbursement, as the case may

IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, (COURT NO.-II)
KOLKATA

C.P.(IB)/270(KB)2022

be, of the Loan and all other sums payable under the Agreement, whereupon the Lender may by a notice in writing to the Borrower, declare all the principal and interest due thereunder to be payable forthwith. The Lender shall also have the right to enforce the security created in terms of Clause 5 of this Agreement.

Placing the above Ld. Counsel would agree that the loan agreement does bind the respondent **Navdisha Real Estate Private Limited** to repay the debt of the Principal Borrower.

- 5.2** On the same date i.e. **05.11.2019** a Mortgage Deed was executed between **Navdisha** the Corporate Debtor as a Mortgagor and Refine Alloys the Financial Creditor as the Mortgagee, which is extracted hereinbelow as relevant and germane to the lis with emphasis added for clarity.

*This deed of **SIMPLE MORTGAGE** executed at Kolkata on this the 25th day of November 2019 by and between*

NAVDISHA REAL ESTATE PRIVATE LIMITED

XXX

hereinafter called 'Mortgagor'

XXX

And

REFINE ALLOY PRIVATE LIMITED

hereinafter called 'the Mortgagee/Lender'

XXX

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

C.P.(IB)/270(KB)2022

1. *The Mortgagor herein, is the sole and absolute owner of immovable properties morefully described in the schedule hereunder written and hereinafter referred to as **‘the scheduled property’**.*
2. *The Mortgagor herein is promoter of one BALASORE ALLOYS LIMITED, having its registered office at Park Plaza, 71 Park Street, Kolkata-700 016 (hereafter called **‘the Borrower’**).*
3. *By a loan agreement dated 25th November 2019 (the “Loan Agreement”) made between one **‘the Borrower’**, the Mortgagor herein as the Security Provider in therein and the Lender/Mortgagee herein as the lender therein, the Mortgagee has agreed to lend and advance to the Borrower and the Borrower has agreed to borrow from the Mortgagee an amount up to **Rs.20,00,00,000/-**(Rupees Twenty Crores only)(the “Loan”) upon the terms and conditions set out therein against the security by way of mortgage of **the Scheduled properties** by the Mortgagor.*
4. *The Mortgagee has called upon the Mortgagor to create mortgage on the Scheduled properties as and by way of security for repayment of the Loan availed by the Borrower and payment of interest as hereinafter provided.*

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

C.P.(IB)/270(KB)2022

NOW THIS DEED WITNESSETH that pursuant to the execution of said Loan Agreement dated 25.11.2019 and in consideration of the sum upto **Rs.20,00,00,000/-** (Rupees Twenty Crores only) being agreed to be lent and advanced by the Mortgagee to the Borrower on the execution of these presents, the Mortgagor hereby covenants with the Mortgagee that the said sum disbursed by the Lender/Mortgagee subject to maximum of **Rs. 20,00,00,000/-** (Rupees Twenty Crores only) together with interest, costs, charges, expenses and all other amounts payable under the Loan Agreement dated 25.11.2019 (the "**Mortgage Debt**") shall become due and payable on the happening of any one of the following events (hereinafter referred to as the "Specified Event") whichever occurs first, that is to say:

- a. in the event of the Mortgagor selling the Scheduled Properties; or
- b. the Borrower defaults in adhering to the terms and condition of Loan Agreement dated 25.10.2019 and/or
- c. the Borrower defaults in liquidating/repaying the Mortgage debts.

Without prejudice to the right of the Mortgagee to take any action on default as herein under provided, and it is agreed and declared that in the event of Borrower committing default in payment of any installment of interest or committing breach of any

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

C.P.(IB)/270(KB)2022

other term of this deed, the whole amount of principal then due with interest thereon will at the option of the Mortgagee become payable forthwith as if the said date had expired.

AND THIS DEED FURTHER WITNESSETH that in consideration aforesaid, the Mortgagor doth hereby transfer by way of mortgage the Scheduled Properties together with all its rights, title and interest (hereinafter referred to as the 'Mortgaged Premises') and described in the schedule hereunder written as a security for repayment and payment of the said Mortgage Debt with a condition that on the Borrower, Mortgagor or his heirs, executors, administrator, assigns repaying/paying the Mortgage Debt due to the Mortgagee in accordance with the provisions contained in the Loan Agreement dated 25.11.2019 and thereupon, the Mortgagee will release the Mortgaged Premises from the mortgage security and shall if so required by the Mortgagor execute a Deed of Release at the cost of the Mortgagor.

Placing the above Ld. Counsel Ms. Aparajita Rao, would argue that although the loan agreement(supra) does not bind the respondent as the security provider or SP, the said respondent has guaranteed payment of debt in the event of default of the Principal Borrower

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

C.P.(IB)/270(KB)2022

M/s BALASORE ALLOYS LIMITED and is therefore bound to repay the debt of the Principal Borrower.

- 5.3** A Notice dated 6.11.2020, issued by the Financial Creditor of Refine Alloy Private Limited to Navdisha Real Estate Private Limited the Corporate Debtor is placed, which reads as under:

“Ref: -Loan Agreement dated 25th November 2019

Kind Attn: - Raj Kumar Khemka

Dear Sir

With reference to the above, we inform that despite our several reminders Balasore Alloys Limited has failed to discharge its obligations of repayment of the loan and interest accrued thereon. As per our records, as on 5th November 2020 a sum of Rs. 13,31,51,592 (Rupees Thirteen Crore thirty-one lakhs fifty one thousand five hundred and ninety two only) is overdue towards loan and interest.

In case of failure, we will be compelled to enforce the security created in terms of clause 5 of the referred agreement.”

- 5.4** A Legal notice dated **30.09.2021**, was served upon the Principal Borrower Balasore Alloys Limited and the present respondent Navdisha Real Estate Private Limited the Corporate Debtor which is extracted hereunder:

To,

1) (M/s) BALASORE ALLOYS LIMITED

XXX

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

C.P.(IB)/270(KB)2022

**2) (M/s) NAVDISHA REAL ESTATES PRIVATE
LIMITED**

XXX

- c) Addressee nos. 1 & 2 are the Group Concerns having their office in the same Premises and both companies have full backing, support, patronage, and control of the Steel Giants Mr. Pramod Kumar Mittal and Mr. Vinod Kumar Mittal (to whom the copy of this letter is being sent since their involvement) and their associates and advisors (collectively **'the Mittals'**).
- d) The Addressee no. 2 being one of the Promoter Company of Addressee no. 1 shall fully secure the entire sum to be given by our client to Addressee no 1 by All That Office Space no. 1A, Super Built Area 5335 sft., on 1st Floor of South Block Building known as "PARK PLAZA" and All That Office Space no. 6C, Super Built Area 1851 sft. on the 6th Floor of the building and All That Office Space no. 6C, Super Built Area 1851 sft. on the 6th Floor of the building and All That 3 covered car parking in the basement of the building all above situated and lying at Premises no. 71, Park Street, Kolkata - 700 016 (all collectively **'said Offices & 3 Car Parks'**) as and by way of Security.
- e) In the event of Default, our client shall have the right to enforce such Security and our client shall be entitled to take all actions as our client may be entitled under the law.

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

C.P.(IB)/270(KB)2022

f) The notices are to be given to Mr. Nikunj Pansari (Addressee-5) for Addressee no. 1 and Mr. Raj Kumar Khemka (Addressee no. 15) for Addressee no. 2 who shall always be available.

g) The Mittals are very reliable persons and the above accommodation is being taken with full knowledge and consent of all the Mittals and in case of any default all the Mittals shall ensure the repayment along with interests.

XXX

B) Upon being deceived as above, our client entrusted and delivered a total sum of Rs.15 Crores to Addressee no.1 in the manner following: -

- a) Rs.8.75 Crores on 29.11.2019*
- b) Rs.1.50 Crores on 30.11.2019*
- c) Rs.4.00 Crores on 7.12.2019*
- d) Rs.0.75 Crores on 16.12.2019*

Rs.15.00 Crores = Total

C) In furtherance to the deception, all the Addressee through Addressee nos. 15 and 5 jointly delivered original Title Deeds of the said Offices and 3 Car Parks to our client.

D) If our client would not have been deceived as above, our client would not have delivered and entrusted the above Rs.15 Crores to you concerned.

XXX

F) When our client intimated you that our client is going to lodge appropriate complaint against all of

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

C.P.(IB)/270(KB)2022

you, you paid a sum of Rs. 3 Crores to our client as on 12.3.2020, but you have paid no money there after inspite of repeated follow ups and reminders.

XXX

*In the facts and circumstances aforesaid all of you are hereby called upon to pay the aforesaid sum of **Principal Due of Rs.12 Crores** and in addition thereto interest thereon @ 12% per annum to be calculated at monthly rests from date you have received such money till the date of payment, which for the period upto 30.9.2021 works out to Rs.3,05,35,995/- and thus the grand total (principal + interest) payable for the period till 30.9.2021 works out to Rs.15,05,35,995/-, within 30.9.2021, and your failure in payment thereof shall further establish the offence of fraud, criminal breach of trust, criminal conspiracy and other allied offences and our client shall initiate appropriate legal proceedings as against all of you and the conspirators as above without any further reference to you.*

Without prejudice to the above, since a Commercial Dispute has also arisen between you and our client, our client is taking steps also for initiating mediation process under the Commercial Courts (Pre-Institution Mediation And Settlement) Rules, 2018.

5.5 The response dated 11.11.2021 from Navdisha Real Estate Private Limited, Corporate Debtor reads as under:

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

C.P.(IB)/270(KB)2022

XXX

“We deny that we are liable to pay a sum of Rs. 12 crore or any part thereof or interest thereon @ 12% per annum to be calculated at monthly rests or that we are liable to pay interest of Rs. 3,05,35,995/- or any part thereof or that we are liable to pay a sum of Rs. 15,05,35,995/- or any part thereof, as alleged or at all. We repeat and reiterate that we have not received any money from your client. Hence, the question of us being liable to make payment of any sum to your client does not, and cannot, arise. The question of us having committed any fraud or criminal breach of trust or criminal conspiracy or any allied offence does not, and cannot, arise in the instant facts and circumstances.

XXX

- 5.6** The Financial Creditor has filed a Section 7 Petition in Cuttack Bench against the Principal Borrower, Balasore Alloys Pvt. Ltd.

6. Submissions of the Respondent:

Per Contra Ld. Counsel for the respondent while vehemently denying the claim would submit as under:

- 6.1** As against the principal sum of Rs. 12 Crore, Borrower has already paid by RTGS the following amounts:

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

C.P.(IB)/270(KB)2022

| Amount | Date | Page No. of the Reply | Exhibit No. |
|---------------------------|--------------------------------------|----------------------------------|------------------------|
| Rs. 5,00,00, 000.00 | 11 th January 2023 | Page No. 36 of the Reply | B |
| Rs. 5,00,00, 000.00 | 16 th February 2023 | Page No. 37 of the Reply | B |
| Rs. 1,00,00, 000.00 | 18 th March 2023 | Page No. 38 of the Reply | B |

Hence no further amount is payable from the Borrower. Such being the position the Financial Creditor can neither seek insolvency against the Principal Borrower nor against the Security Provider Navdisha.

- 6.2** The Petitioner herein has misrepresented and distorted the true and correct facts as regards the Respondent to make out the case as Financial Creditor. Hence, the instant petition is liable to be dismissed on account of suppression of material facts too.
- 6.3** The legal position is well settled that a party who approaches a court must come with clean hands and any mala-fide attempt on the part of any party, disentitles such a party from seeking relief from any court and/or Tribunal.
- 6.4** The present petition is not maintainable, since the Respondent is not a corporate person as defined under

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

C.P.(IB)/270(KB)2022

Section 3(8) of IBC code 2016 but a mere security provider to the purported loan agreement between the Petitioner and the Borrower, Balasore Alloys Limited under the purported loan agreement dated 25.11.2019.

- 6.5** Clause 5.3 of the purported loan agreement dated 25th November 2019 clearly mentions that the present respondent as a security provider is not liable to the petitioners in any manner whatsoever. It reads as:

“The SP is not guaranteeing the obligations of repayment/ and/ or payment, as the case may be, of the loan and interest payable by the borrower under this Agreement and is not assuming any liability in respect of the same and will not be liable for the same”.

- 6.6** The purported loan agreement does not contain any promise to discharge the liability or perform the promise of the Borrower, Balasore Alloys Ltd..

On the contrary, the provision under clause 5.3 absolves and releases the respondent (Navdisha Real Estate Private Limited) from any liability to the Petitioner (Refine Alloys Ltd.).

- 6.7** The purported loan agreement is not a contract of guarantee in any manner whatsoever and the respondent as a Security Provider is not liable to the petitioner.

- 6.8** The Financial Creditor has already filed a separate Company Petition bearing No. 33 of 2022 against the principal borrower Balasore Alloys Limited before Hon. NCLT, Cuttack Bench and the same is pending for

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

C.P.(IB)/270(KB)2022

adjudication. As an afterthought exercise and with a mala fide intention the present petition on the same subject matter has been initiated by the Petitioner before this Bench, which clearly implies the ulterior motives of the Financial Creditor to use the two legal forums for recovery of money.

6.9 According to Section 5(8) of IBC Code, the transaction between a Security Provider to a Corporate Debtor cannot be classified as a “Financial Debt”. The basic element of financial debt is a disbursal against the consideration with the time value of money which is absent. It may include any of the methods for raising money and incurring liability by the modes prescribed in clause (a) to (f) of Section 5(8) but not a security provided by way of a Mortgage.

6.10In **Anuj Jain vs. Axis Bank Limited & ors**, reported at **[2020] ibclaw.in 21 SC**, the Hon’ble Apex Court has explicitly opined that “debts in question are in the form of a third-party security; to secure the loans/ advances/ facilities obtained from the Lenders is not and cannot be a covered under the expression ‘financial debt’ as defined under Section 5(8) of the IBC; and hence, the Said Lenders (being the mortgagees) are not the ‘financial creditors’. Further, that in order to qualify as a ‘financial creditor’ a basic element of disbursal of amount against the consideration of time value of money must be there.

6.11The purported board resolution dated 16th June 2022 passed in the favour of Mr. Rohit Gupta Director of the financial Creditor purported to have been signed by

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

C.P.(IB)/270(KB)2022

another Director Mr. Divyam Agarwal (Director) is invalid and illegal inasmuch as the Petitioner has failed to lodge on record any document from which the said Director Mr. Divyam Agarwal has derived the power to appoint Mr. Rohit Gupta.

- 6.12**The purported loan agreement executed, on a stamp paper Rs.20/- for an amount of Rs. 20,00,00,000/- (Rupees Twenty Crore) clearly hits the provision of the West Bengal Stamp Act 1922. It is neither notarized nor stamped hence it is directly hit by Section 35 of Indian Stamp Act 1899 and as an instrument is not stamped, it will not be admissible in Evidence for any purpose and need to be sent for impounding is mandatory in law.
- 6.13**Further, that the Petitioner is not entitled to enter into lending transactions through 11th April 2019 as it is barred under the provisions of RBI act, Banking Regulations Act, Section 73 & 74 of the Companies Act read with Section 23 of the Contract act.
- 6.14**The said petition is hit by the 1st Novation of the Purported Loan Agreement dated 25th November 2019 and Settlement Agreement dated 9th January 2023. The Petitioner has entered into and executed a Settlement Agreement dated 9th January 2023, whereby it has been clearly stated that the Settlement Agreement shall prevail over all other agreements including the purported loan agreement dated 25th November 2019. Resultantly, the purported original alleged loan agreement has become redundant for all purposes and as such the present petition which is founded on the

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

C.P.(IB)/270(KB)2022

loan agreement dated 25th November 2019 also becomes redundant and the purported loan agreement dated 25th November 2019 stands totally extinguished. The provisions of section 62 of the Indian Contract Act clearly lays down the implications of the novation of a contract.

6.15The rudimentary tenets of the IBC are maximization of value of assets by the Resolution Process and to promote of entrepreneurship and balancing the interests of all stakeholders including alteration in the order of priority of payment of Government dues. Therefore, this Tribunal cannot act as a forum for recovery of money.

6.16The Petitioner not having paid any duty on the Mortgage deed as per Bengal Stamp Act, cannot invoke a deed which is not enforceable in law.

7. We have considered the rival contentions, perused the records and considered the true import of the legal provisions and precedents.

8. Our Analysis and Findings:

8.1 Obligation of Respondent Security Provider

i. Clause 5.3 of the loan agreement stands already extracted supra. Clause 5.3 which is relevant of the loan agreement says that:

"The SP is not guaranteeing the obligations of repayment and/or payment, as the case may be, of the loan and interest payable by the borrower

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

C.P.(IB)/270(KB)2022

under this Agreement and is not assuming any liability in respect of the same and will not be liable for the same.”

Therefore, inarguably and irrefutably, in terms thereof the respondent (SP) cannot be held liable to repay the loan of the Principal Borrower i.e. Balasore Alloys Ltd. The agreement was entered into by Refine Alloys with open eyes, fully aware of its implications.

- ii.** Further, the Petitioner as a Financial Creditor having already preferred a Section 7 petition against the Principal Borrower, ought not to have preferred this petition seeking Insolvency against the respondent (SP) who is merely a security Interest Provider. We would note that it is not a guarantor. It has only provided a collateral security with no liability to repay.

8.2 Financial Debt:

- i. Section 5(8) of the Code defines “Financial Debt” as under:

Financial debt means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

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

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

C.P.(IB)/270(KB)2022

- c) *any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- d) *the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- e) *receivables sold or discounted other than any receivables sold on non-recourse basis;*
- f) *any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*
- g) *any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*
- h) *any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
- i) *the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”*

A bare perusal of the above definition explicates the need of a “disbursal” of an amount by a Corporate debtor against a consideration for the time value of money. There is no disbursal of any sum by the

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

C.P.(IB)/270(KB)2022

respondent Security Provider, against a consideration for the time value of money.

- ii. In absence of any clause in the loan agreement that binds Navdisha the respondent SP to repay the dues of the Principal Borrower, Balasore, neither the Petitioner can be termed as a “financial creditor” of the Respondent nor the respondent a “Corporate Debtor” in the transaction.
- iii. Hon’ble Supreme Court in **Anuj Jain vs. Axis Bank Limited (Supra)** has succinctly held that debts in question are in the form of a third-party security; to secure the loans/ advances/ facilities obtained from the Lenders is not and cannot be a covered under the expression ‘financial debt’ as defined under Section 5(8) of the IBC.

8.3 Lenders right to enforce a security interest:

Clause 7.1 of the agreement clearly speaks of the Lender’s (Refine Alloy Private Limited) right to enforce the security created in terms of Clause 5, which can be enforced not under IBC but under SARFAESI. Hence this present petition is not maintainable on that score too.

Moreover, the petitioner by its letter dated 6.11.2020 has agreed to enforce the security created in terms of clause 5 of the loan agreement hence it is bound to take proper recourse under the SARFAESI ACT and not under IBC.

8.4 Simple Mortgage is compulsorily registrable:

- i. Section 58 of the Transfer of Property Act defines the terms:

**“Mortgage”, “mortgagor”, “mortgagee”,
“mortgage-money” and “mortgage-deed” as under:**

(a) A **mortgage** is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) **Simple mortgage.**—Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) **Mortgage by conditional sale.**—Where, the mortgagor ostensibly sells the mortgaged property—on

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

C.P.(IB)/270(KB)2022

condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale: Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

- ii. The opening words of the Mortgage Deed dated 05.11.2019 is “This deed of **SIMPLE MORTGAGE**”. It shows that it is a **simple mortgage**.
- iii. **Section-59 of the Transfer of Property Act** envisages that “*Where the principal money secured is one hundred rupees or upwards, a mortgage [other than a mortgage by deposit of title-deeds] can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by [a registered instrument] signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property*”.

Therefore, Section 59 of the Transfer of Property Act, specifically excludes mortgage by deposit of title deeds from compulsion of getting registered. A mortgage by deposit of title deeds may be effected orally, but when

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

C.P.(IB)/270(KB)2022

the parties reduce it to writing, and the writing itself constitutes a contract of mortgage, which essentially creates the mortgage, then the mortgage has to be by way of a registered deed.

- iv. Thus a **simple mortgage without registration** is not legally enforceable.

8.5 Forum under IBC cannot be converted into a forum for recovery:

- (i) The settlement agreement entered into between Balasore Alloys Ltd. the Principal Borrower (first party), Refine Alloy Private Limited (second party) and Navdisha Real Estate Private Limited (confirming party) says:

**“NOW THIS SETTLEMENT AGREEMENT
WITNESSETH THAT AND IT IS HEREBY
AGREED:**

- (1) The First party admits to and agrees to pay the Settlement Amount in 3 (Three) instalments to Second Party in the following manner which the Second Party has accepted:

(a) First Instalment- *Within Seven days of execution of the instant Agreement the First party will pay an amount of Rs.5,00,00,000/-(Rupees Five Crore only).*

(b) Second Instalment- *On or before 10.02.2023 Rs.5,00,00,000/-(Rupees Five Crore only).*

(c) Third Instalment- *On or before 10.03.2023 Rs.6,28,69,110/-(Rupees Six Crores Twenty-eight*

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

C.P.(IB)/270(KB)2022

Lacs Sixty-nine Thousand One Hundred Ten only) towards balance Settlement Amount. The Parties have agreed that Interest for delay/ Prepayment if Instalment will be calculated & will be paid or returned separately.

(2) The Second Party agree that it shall on receipt of the First and Second instalments (as mentioned in clause 1(a) and 1(b) hereinabove) either through RTGS/DD, the copy of this Settlement Agreement will be placed before the Hon'ble NCLT Cuttack and Hon'ble NCLT, Kolkata (against the confirming party)/ other courts and tribunal with a prayer for withdrawal of the pending case lying before NCLT all other court/ tribunal (s).

(3) XXX

(4) XXX

(5) XXX

(6) (b) Similarly The Second Party will file an Application seeking withdrawal of the said Petition i.e. CP (IB) No. 270/KB/2022 before the Hon'ble National Company Law Tribunal, Kolkata. The Second Party shall be entitled to revive the said Petition CP(IB) No. 270/KB/2022 in the event of any default of the terms of the present Consent Terms in the instant Agreement on the part of the First Party.

(ii) It is evident from pages 36-38 of the reply that the 1st two transfers of 5 crores each and an additional amount of 1 crore has been paid to the Petitioner by Balasore Alloys Ltd. on 11.01.2023, 16.02.2023,

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

C.P.(IB)/270(KB)2022

and 18.03. 2023 in terms of the settlement agreement. Therefore, ideally Refine Alloys, the second party, should have withdrawn the present petition.

(iii) Further, the repayment of 11 crores by Balasore the Corporate Debtor against the principle sum Rs. 12crore, being evident this forum cannot be converted into a forum for recovery of balance dues.

9. Statutory Provisions Applicable:

9.1 A security interest shall not include a personal guarantee:

A. Provisions under Insolvency and Bankruptcy Code, 2016.

1. A **'Creditor'** defined u/s 3(10) includes:

- (i) a financial creditor,
- (ii) an operational creditor,
- (iii) a **secured creditor**,
- (iv) an unsecured creditor and
- (v) a decree holder.

2. A **Secured Creditor** is defined u/s 3(30) as *a creditor, in favour of whom security interest is created.*

3. **'Security interest'** as defined u/s 3(31) *is a right title or interest or claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes:*

- (i) a mortgage;

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

C.P.(IB)/270(KB)2022

- (ii) a charge;
- (iii) a hypothecation;
- (iv) an assignment;
- (v) an encumbrance;

and any other agreement or arrangement securing payment or performance of any obligation of any person.

4. But, under the proviso to Sec 3(31), a “security interest” shall not include “performance guarantee”.

5. Therefore, assuming for a moment that the applicant is a financial creditor in whose favour a security interest is created, under proviso of Sec-3(31), a security interest cannot include a performance guarantee, therefore the applicant is not a secured creditor qua the guarantor.

9.2 Mortgage vis-a- vis charge

- (i) While the provisions under Transfer of Property Act, are not contrary to IBC, however, if benefit is to be taken under IBC, it can be done only if there was a contractual arrangement/transaction creating security interest in favour of the Creditor It has to be a security interest which is “created” as such.

[Bhel vs. Anil Goel, Liquidator of Visa Power (NCLAT) reported at]

- (ii) **Third party security:** For a person to be designated as a financial creditor of the corporate debtor, it has

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

C.P.(IB)/270(KB)2022

to be shown that the corporate debtor owes a financial debt to such person.

Anuj Jain Interim Resolution Professional For Jaypee Infratech Limited vs. Axis Bank Limited.

The applicant creditor has miserably failed to demonstrate that Navdisha owes a financial debt to it.

(iii) **A mortgage as a security interest u/s 58** of the Transfer of Property Act is a “transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability”.

(iv) **Section 100 of the Transfer of Property Act 1882** defines ‘Charge’ as: “where an immovable property of one person is by an act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter is said to have a charge on the property”.

The security given here is thus in the nature of a “charge”.

A security interest to be made enforceable by law requires to be registered. Registration is a manner of giving “public notice”. Sections 77-81 of the Companies Act and Sec.- 26 C of SARFAESI Act applies.

(v) A charge u/s 2(16) of the Companies Act 2013 is an interest or lien created on the property or assets of or

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

C.P.(IB)/270(KB)2022

any of its undertakings or both as security and includes a mortgage.

In ***Volkswagen Finance vs. Shree Balaji Printopack***, the Hon'ble NCLAT held that registration of security interest (charge by way of hypothecation with Motor Vehicle Authority u/s 51 of MV Act) was not sufficient; a charge had to be registered in accordance with Section 77 of Companies Act, 2013 in order for a creditor to be treated as a secured creditor.

(vi) **Registration of charges under the Companies Act 2013.**

- a) Section 77 of the Companies Act, 2013 mandatorily requires Registration of charges.
- b) Primary responsibility to register the charge is on "borrower".
- c) Sub-section 3 envisages that notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator appointed under this Act or the Insolvency and Bankruptcy Code, 2016 as the case may be or any other creditor unless it is duly registered under sub-section(1) and a certificate of registration of such charge is given by the Registrar under sub-section (2).

(vii) **Deemed notice of a registered charge under Section 80**

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

C.P.(IB)/270(KB)2022

A. Where any charge on any property or assets of a company or any of its undertakings is registered under section 77, any person acquiring such property, assets, undertakings or part thereof or any share or interest therein shall be deemed to have notice of the charge from the date of such registration.

B. Registration of charge with MCA; when

i. If Borrower is a company, registration is mandatory.

ii. If Borrower is an LLP, it is optional

(viii) The purported security given herein being in the nature of a charge is compulsorily registrable under section.

10. Security Interest under The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act).

(i) Viewed from a different angle, a “**Borrower**” as defined in Section 2(1)(f) can be any person who:

(a) has been granted financial assistance by a financial institution;

(b) Who has given a guarantee;

(c) Created any mortgage or pledge as security for financial assistance granted by bank/ financial institution; and

(d) Has raised funds through issue of debt securities;

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

C.P.(IB)/270(KB)2022

The respondent Navdisha has neither been granted financial assistance nor has it raised funds. However, it has given a guarantee to a party who has raised funds. Hence, Navdisha cannot be termed as a “Borrower”

(ii) **Forms of security interest** under SARFAESI-Section 2(1) (zf) thereof defines “security interest” as a right, title or interest created upon property. Forms of security interest includes:

(a) A mortgage.

(b) A charge.

(c) A hypothecation.

(d) An assignment

(e) and any other right, title or interest on tangible/intangible asset to secure payment.

(iii) **Enforcement of security interest u/s 13 of SARFAESI Act:**

A **Security Interest** can be enforced by a secured creditor in whose favour any **security interest** has been created in the following manner:

A. Notice:

Upon default by “borrower”, secured creditor may notify the “borrower” to discharge the liabilities within 60 days from the date of notice.

B. Measures of enforcement:

- i. Take possession of the secured assets, including right to transfer.
- ii. Takeover the management of borrower’s business, including right to transfer.

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

C.P.(IB)/270(KB)2022

- iii. Appoint any person to manage the secured assets in possession of secured creditor.
- iv. Require through notice, a person who has acquired secured assets from borrower, to pay the secured creditor.

(iv) **Consequences of Non- Registration of Security Interest under SARFAESI Act, 2002:**

Section 26D right of enforcement with registration of security interest and lays down that a secured creditor which has not registered the security interest cannot exercise the right of enforcement under SARFAESI.

- (v) Assuming that the financial creditor “Refine Alloys” is a “secured creditor”, to enforce its security interest, it could have taken possession of the secured assets of the security provider Navdisha. Having failed to take recourse to the provisions under SARFAESI Act 2002, the Financial Creditor (Refine Alloys Ltd.) has waived its right of enforcement of Security Interest. It cannot have recourse under IBC against Navdisha, the security interest provider, who is not even a “borrower”.
- (vi) In the aforesaid backdrop, it is noted that in the subject transaction:
 - a. If a “charge”, it created over the property of the respondent, it ought to have been created in a manner known to law, made enforceable under section 77 of the Companies Act in absence of which it is not enforceable.

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

C.P.(IB)/270(KB)2022

- b. In absence of any formal creation of charge the lender cannot be termed as Financial Creditor to the Security Provider. Hence, this Section 7 petition is not maintainable.

11. Legal Precedents

- (i) In *Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Limited [2020] ibclaw. in 21 SC*, Axis Bank ("**Axis**") had provided financial assistance to Jaiprakash Associates Ltd. ("**JAL**"), the holding company of Jaypee Infratech Ltd. ("**JIL**"). JIL had mortgaged its several properties as collateral securities for the advanced made by Axis to JAL. Subsequently, when CIRP was initiated against JIL, Axis claimed to be a financial creditor of JIL and demanded its inclusion in the committee of creditors with voting rights. This claim was rejected by the Interim Resolution Professional of JIL. As a result, Axis filed an application before the National Company Law Tribunal ("**NCLT**"), which upheld the decision of the Interim Resolution Professional. Later, the National Company Law Appellate Tribunal ("**NCLAT**") had allowed Axis's appeal, as a result of which JIL preferred an appeal before the Supreme Court.

One of the issues before the higher fora was whether Axis could be treated as a financial creditor in the CIRP of JIL based on the third-party mortgage created to secure JAL's loans. Hon'ble Court undertook a detailed analysis of the concept of 'financial debt' defined under Section 5(8) of IBC

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

C.P.(IB)/270(KB)2022

and revisited its judgment in the case of ***Swiss Ribbons (P) Ltd. v. Union of India [2019] ibclaw.in 03 SC***. While doing so, the Hon'ble Apex Court noted that one element which is common in all the items mentioned in sub-clauses (a) to (i) of Section 5(8) is the existence of debt that has been disbursed against the consideration for time value of money. Further, "the definition cannot be construed in a manner wherein the existence of 'disbursement' can be done away with merely because 'consideration for time value of money' is present". The judgment rendered by the Apex Court itself in ***Pioneer Urban Land & Infrastructure Limited v. Union of India [2019] ibclaw.in 13 SC*** was relied upon to hold that "every secured creditor is a creditor and every financial creditor is also a creditor, but every secured creditor may not be a financial creditor". The thin line distinguishing both was derived from the reasoning that financial creditors are involved in assessing the viability of a corporate debtor from the very beginning. This involvement may be missing in case of a third-party security. Accordingly, "a third party to whom a corporate debtor does not owe a financial debt cannot be treated as a financial creditor for the purpose of CIRP". Therefore, the claim of Axis was rejected. Following the same analogy, the claim of the present applicant deserves to be rejected.

- (ii) In ***Phoenix ARC Pvt. Ltd. v. Ketulbhai Ramubhai Patel (2021) ibclaw.in 04 SC*** L&T Infrastructure Finance Company ("**L&T**") had entered into a facility agreement with Doshion Limited ("**DL**"). Under the Schedule named

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

C.P.(IB)/270(KB)2022

“Security Creation”, a non-disposal undertaking was issued by the board of directors of Doshion Veolia Water Solutions Private Limited (**“Corporate Debtor”**) in favour of L&T, wherein the former undertook that 100% of their shares in Gondwana Engineers Limited (**“GEL”**) shall not be disposed so long as any amount remained outstanding under the facility agreement. A pledge agreement was executed between the Corporate Debtor and L&T whereby 40,160 shares of GEL were pledged as a security. Subsequently, the right, title and interest, including with respect to the security, in the facility were assigned to Phoenix ARC Pvt. Ltd. (**“Phoenix ARC”**). DL eventually failed to repay as per the terms of the facility agreement. In a separate set of events, an application under Section of the IBC was filed against the Corporate Debtor which was admitted by the NCLT. As a corollary, Phoenix ARC filed its claim with the appointed Resolution Professional (**“RP”**), and the latter opined that the debt owed to Phoenix ARC is in nature of a security and hence, cannot be admitted as a financial debt. When the matter went before the NCLT, it was argued by Phoenix ARC that the pledge of shares is in nature of a guarantee which would make it a financial creditor of the Corporate Debtor. The NCLT rejected such a view, as a corollary of which Phoenix ARC preferred an appeal before the NCLAT and subsequently the Apex Court.

Before the Hon’ble Supreme Court, Phoenix ARC argued that the liability of the Corporate Debtor is co-extensive to that of DL because the former is a surety of the latter.

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

C.P.(IB)/270(KB)2022

Hence, the creditor has a right to pursue a remedy against the surety before proceedings against the principal debtor. In other words, *“any security that would permit the right of action against the third party that is not the borrower, would amount to guarantee”*. Reliance was placed on Section 123 of the Indian Contract Act, 1872 (**“Contract Act”**). On the other hand, the RP argued that Section 5(8) of IBC includes only guarantee, and not any other instrument in the nature of guarantee. Accordingly, the issue before the Hon’ble Apex Court was whether Phoenix ARC was a “financial creditor” within the meaning of Section 5(8) of IBC on the strength of the pledge agreement. The Hon’ble Court noted that a” contract of guarantee means a contract to perform the promise, or discharge the liability of a third person in case he commits a default. The pledge agreement in question is limited to pledge of 40,1160 shares as security, and the Corporate Debtor has not promised to discharge the liability of DL. It was ultimately concluded by the Court that “at best Phoenix ARC will be a ‘secured creditor’ of the Corporate Debtor, but not a financial creditor”.

12. Our Inference:

In terms of the foregoing discussions, we would infer that:

- i. Applicant **Refine Alloys** is not a Financial Creditor qua the respondent **Navdisha Real Estate Private Limited**.
- ii. A Charge created if any is not enforceable.

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

C.P.(IB)/270(KB)2022

iii. Respondent Navdisha Real Estate Private Limited is not liable to discharge its liability on any alleged default of the Principal Borrower, Balasore Alloys Limited.

13. Accordingly, this Petition being **C.P. (IB) No. 270/KB/2022** fails and **is rejected**.

14. A Certified Copy of the order, if applied for with the Registry, be supplied upon the requisite compliances.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

Order Signed on the 23rd Day of April 2024

A.S. LRA