

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
COURT - 2

IA/358(AHM)2023
in
CP(IB) 268 of 2020

Order under Section 60(5) IBC

IN THE MATTER OF:

Sheth Developers Pvt Ltd.

.....Applicant

Vs.

AVM Resolution Professionals LLP Vichitra Narayan Pathak

.....Respondent

Order delivered on: 14/05/2024

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)

Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER UNDER RULE 154 OF NCLT RULES, 2016

IA/358(AHM)2024

The instant matter is taken up Suo Moto for rectification of order dated 13.05.2024 under Rule 154 of the NCLT Rules, 2016. After perusal of the said order dated 13.05.2024, it is seen that there is typographical error in mentioning it of declaration of order as 13.06.2024 instead of 13.05.2024. Hence, we hereby correct the said order as under:

“Order Pronounced on 13.05.2024.”

Registry is directed to upload the corrected copy of order.

-Sd-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

CHITRA HANKARE
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
COURT - 2

ITEM No.303
IA/358(AHM)2023
in
CP(IB) 268 of 2020

Order under Section 60(5) IBC

IN THE MATTER OF:

Sheth Developers Pvt Ltd.

.....Applicant

Vs.

AVM Resolution Professionals LLP Vichitra Narayan Pathak

.....Respondent

Order delivered on: 13/05/2024

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)

Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

-Sd-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

CHITRA HANKARE
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-II**

IA No. 358 of 2023

IN

CP(IB) NO. 268 OF 2020

(Under Section 60(5) of Insolvency & Bankruptcy Code, 2016)

IN THE MATTER BETWEEN

Sheth Developers Private Limited
Registered office at:
Ground and Third Floor,
Prius Infinity,
Paranjpe B. Scheme,
Subhash Road, Vile Parle(E)
Mumbai-400057

... Applicant

Versus

AVM Resolution Professional LLP
Mr. Vichitra Narayan Pathak
Having office at:
120, Jharneshwar Colony,
Madhuban Vihar,
Near International Public School,
Hoshangabad Road,
Bhopal-462047

... Respondent

MEMO OF THE PARTIES

ARROW ENGINEERING LIMITED

Registered Office at:

Building No. 7, J Block, Platform Level,
Belapur Commercial Complex,
CBD Belapur
Navi Mumbai

.....Financial Creditor
Petitioner

Versus

Golden Tobacco Limited
Registered office at:
Dajipura post, Amaliya,
Vadodara-390022

..... Corporate Debtor
Respondent

Order Pronounced on 13.05.2024

Coram:

**MRS. CHITRA HANKARE,
HON'BLE MEMBER (JUDICIAL)**

**MR. VELAMUR G VENKATA CHALAPATHY
HON'BLE MEMBER (TECHNICAL)**

Appearance:

For the Applicant : Mr. Navin Pahwa, Sr. Adv. a.w Mr. Jay
Kansara, Adv. & Ms. Adrita Bhuyan, Adv.
For the Respondent : Mr. Anurag Bisaria, Adv.

J U D G E M E N T

1. This is an application for verification of interest on the

Applicant's claim and classification of the Applicant as Secured Financial Creditor under Section 60(5) of the Insolvency and Bankruptcy Code, 2016.

2. The Applicant is doing business of Real Estate projects and is a secured creditor of Corporate Debtor viz. Golden Tobacco Limited. It is stated that the claim of the Applicant is rejected by the Respondent IRP of AVM Resolution Professionals LLP and Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") was initiated against the Corporate Debtor on 7th June, 2022 and the IRP has wrongfully flouted the orders passed by the Tribunal.
3. The applicant stated that he had filed his claim with interest due against the CD. However, On 26th June, 2022, the Respondent refused to recognize Applicant's claim as 'Financial Debt'. On the Application filed by the Applicant bearing IA No. 690 of 2022, this tribunal vide its order dated 16 March 2023 directed the Respondent RP to admit its claim as 'Financial Debt' and it was also directed to consider and decide claim of interest and their claim of secured creditor. However, respondent vide letter dated 20th March, 2023, refused to admit and verify its claim with interest and also stated that the mortgage created was not a

registered document in terms of Companies Act. The Respondent illegally and arbitrarily verified to Rs. 1/- as the contingent of liability of the Corporate Debtor. The intent of Respondent's conduct is to collusion with another Financial Creditor of the Corporate Debtor viz. Arrow Engineering Limited. Further, the letter was issued in violation of Regulation 19(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. In spite of request of Applicant the meeting was not re-scheduled to get the opportunity to the Applicant to be heard by the COC and was conducted within 2 days notice. The said meeting was invalid and therefore any resolution passed would be invalid. Further, the Respondent vide letter dated 23rd March, 2023 wrongfully denied objections raised by the Applicant. The said CoC meeting was held in complete defiance and derogation of the provisions of the CIRP Regulations. Due to rejection of its claim voting share of the Applicant has diluted to 6.66% from 26.50% as the RP had only accepted the principal amount of claim amounting to Rs.132 crores of both the applicant companies in IA 357 and 358 of 2023.

4. It is further stated that the Applicant are entitled to payment of Rs. 484,21,26,540/- (Rupees Four Hundred

Eighty Four Crore Twenty One Lakh Twenty Six Thousand Five Hundred Forty only) by the Corporate Debtor as Secured Financial. It is also alleged by applicant that the Respondent is in hand in glove with Arrow Engineering one of the creditors and is acting in collusion in scuttling their claim to be admitted. The Respondent has admitted Arrow's claim as Secured Financial Debt including interest in respect of claim in their favour but rejected to treat the Applicant as a Secured financial Creditor and interest despite the Escrow letter showing security interest was created by the Corporate Debtor through a trustee.

5. The Applicant therefore has prayed to remove the Respondent as the IRP by the appointing another IRP, to set aside the letter dated 20th March, 2023, to allow Applicant's claim with interest @ 18% p.a. as per Form-C, admit the Applicant's claim as Secured Financial Debt, to direct Respondent to modify list of CoC with other consequential reliefs.
6. The Respondent filed an Affidavit in reply stating inter-alia that the Respondent submitted that it has an only incidental that he is a partner in the Insolvency Professional Entity though appointed as IRP in the matter

by letter dated 20th March, 2023. The Respondent notified the Applicant's grounds for not verifying and admitting the claim of the Applicant. According, to Respondent after considering MoU as well as in the absence of any express provision for payment of interest under Section 65 of Indian Contract Act,1872, its claim for interest was not admitted. The Respondent has no powers to determine the issue of interest. It is further stated that the Applicant commenced and arbitration before the Hon'ble High Court against the Corporate Debtor for adjudication of its claim for interest and hence till the adjudication of its claim by the Hon'ble Court, the Respondent admitted nominal sum of INR 1/- as the matter is subjudice.

7. The Respondent also stated that claim of Applicant for security interest is contrary to declaration filed by it and even by an Escrow letter, it cannot be accepted on mentioned grounds. The Respondent also replied to the letter issued by Applicant dated 23rd March, 2023. The Respondent denied all the allegations and averments made by the Applicant. It is further stated that the claim of M/s. Arrow Engineering Limited was duly verified and admitted based on the proof submitted in its support. Thus, there was no collusion of Respondent with any Creditor. The

Applicant is not entitled to interest for the reasons mentioned in the reply. It has no base in the MoU or Law. Calculation is presented by the Applicant are erroneous and inflated, hence, prayer for dismissal of the Application.

8. After hearing the application on 28 March 2023, the Tribunal directed that the voting on the resolution plan as and when submitted to the COC shall not be undertaken till the disposal of this (2) IAs and the respondent RP was directed to file reply and applicant to file rejoinder if any within 7 days. There were 17 hearings that took place during the period and various documents replies and rejoinders were filed till the orders were reserved on 9 4 2024 when the matter was listed after hearing the applicant and respondent. An Intervening application filed by Arrow Engineering in IA 1058 of 2023 in this application was disposed off without admitting the applicant as a party in the matter. The applicant filed rejoinders on 19 April 2023, 19 June 2023, 22 June 2023 and a compilation of judgments on 29 August 2023. It also filed a convenience compilation on 4 Oct 2023, response note on the reply of the RP on 1 Nov 2023, pursis on 16 1 2024 and further note on 18 Jan 2024 and written submissions on 28 Feb 2024.

9. The RP filed his reply on 4 April 2023, convenience compilation on 5 July 2023, further note on 6 Sept 2023, short note on 10 Oct 2023, an affidavit on 17 Dec 2023, additional affidavit on 18 Jan 2024 and further reply on 26 Jan 2024.
10. Further, while seeking its admission of both principal and interest, the applicant by affidavit dated 1 Nov 2023 has stated that the IRP without admitting the claim of principal and interest of both the applicants (SRL and SDPL), has misinterpreted the SC order, and even if the MOU is held void for voidable or unenforceable, the intent of the parties is to be implemented by legal means. This stand of the RP that the MOU has not been terminated and hence no interest to be paid as per Clause 9.1 of MOU, is misplaced and untenable which has been categorically recorded by this tribunal under its order. Also, on the statement of IRP in the short note that the CD had denied the liability to pay interest on the sums received by it in terms of MOU and placed reliance on para 5(vii)€ of the affidavit in reply dated 1.8.2012. The applicant contradicts the same by stating that the CD at para 4(p) and 5(x) of the Affidavit in reply dated 1 August 2012 and para 20 of the affidavit in Sur-rejoinder dated Oct 2013 filed in Arbitration petition No.667

of 2012, where under the CD has admitted that the applicant and SRL are entitled to refund of the monies paid by them along with interest thereon. Further the annual report and balance sheet of the CD for the years 2011-12, 2012-13 and 2013-14 (relevant copies enclosed) clearly demonstrates that the applicant was entitled to interest on the amount advanced.

11. Further, the applicant stated that in the Annual Report and balance sheet mentioned that the company has in the MDRS (Modified Debt Restructuring Scheme) submitted to the Operating Agency (OA) appointed by BIFR in July 2013 sought for refunding above advances and also the advances of Rs. 40,75,00,000 received from a strategic investor against Vile Parle Property along with interest, if any as decided by BIFR by selling the said property. Further title deeds of the property are held in Escrow Account with the Solicitor till the completion of obligations specified in the MOU.

12. Further, while contending the payment of claim with interest to Arrow Engineering (Other Financial Creditor), the applicant has stated that the IRP has relied upon the letter dated 10.10.2011 executed between the CD and Arrow's letter to contend that Arrow was entitled to

payment of interest. However, Arrow's letter does not specify any rate of interest whatsoever. Despite the same, the IRP has verified Arrow's claim with abnormal interest. Further, the IRP admitted the Arrow's claim for interest on the basis of the letter dated 26.06.2012 addressed by Arrow to the CD treating it as part of the agreement between the two. While the suspended management of CD in its application IA No. 491 of 2023 has clearly disputed the existence of this letter. Hence the action of RP in accepting the claim with interest of Arrow Engineering and not considering their claim is complete mala fide. It is also stated that this letter was never provided before any proceedings by Arrow Engineering in any proceedings before NCLT, NCLAT or Supreme Court and Hon'ble High Court of Mumbai. Even when the application was admitted by NCLAT filed by Arrow Engineering on the basis of a letter which did not contain interest portion and the letter of CD dated 26.6.2012 and the cheque was only towards principal disbursed which was admitted by Arrow Engineering.

13. Ld. Sr. Counsel for the Applicant relied upon following judgments:

- i. Bhagwati Oxygen Ltd. Vs. Hindustan Copper Ltd. (2005) 6 SCC 462***
- ii. Hindustan Construction Co. Ltd. Vs. State of***

- iii. Jammu & Kashmir (1992) 4 SCC 217
Secretary, Irrigation Department, Govt. of Orissa
and others vs. G.C. Roy (1992) 1 SCC 508**

All these rulings are with respect to powers of arbitrator to grant interest.

14. The Ld. Counsel for the respondent RP also relied upon following citations :

- i. Shapporji Pallonji and Co. Pvt. Ltd. Vs. Kobra West Power Company Ltd. And Ors. In Company Appeal (AT) (INS) No.816 of 2019.**
- ii. Anheuser Busch Inbev India Limited Vs. Mr. Pradeep Kumar Sravanam in Comp.App. (AT) (CH)(Ins.) No.12 of 2023.**
- iii. SSMP Industries Ltd. Vs. Perkan Food Processors Pvt. Ltd. In CS(Comm) 470 of 2016 & CC(Comm) 73 of 2017**
- iv. Anil Kumar Vs. Allahabad Bank & ors. In Company Appeal (AT) (INS) No.786 of 2020.**
- v. NUI Pulp and Paper Industries Pvt. Ltd. Vs. M/s. Roxcel Trading GMBH in Company Appeal (AT) (INS) No.664 of 2019.**
- vi. Tarsem Singh Vs. Sukhminder Singh in SLP© No.4639 of 1998 reported in (1998) 3 Supreme Court Cases 471**
- vii. Ram Nagina Singh Vs. Governor-General in Counsel in Original Civil Suit No.1572 of 1946 reported in 1949 SCC Online Cal 90: AIR 1952 Cal 306**
- viii. State of Haryana & Ors. Vs. Narvir Singh and another in Civil Appeal No. 9030 of 2013 reported in (2014) Supreme Court Cases 105.**

15. Perused all the submissions, detailed and repeated submissions made by both the parties. This bench had relied upon various documents to verify the submissions as

the applicant and the respondent were driving the dispute to an end of disrupting the further process of CIRP, especially due to the interim order dated 16 March 2023, which stalled any further approval by COC of any resolution plans, without disposing off these IAs by the Tribunal. Meanwhile this Tribunal, pending these IAs and matters related to other IAs (total 21 pending IAs), had directed the RP to continue the process of obtaining resolution plans, if any, granted selective continuation of the CIRP period in view of the same (certain plans were received including of the applicant) and consideration of pending Claims based on the merits of the case. Certain action has also been suggested against the IRP by the disciplinary committee of IBBI and an IA filed against the extension of RP's tenure is still pending. The main contention of the applicant and the respondent have been on two issues: The Applicant claims consideration of Interest and Secured Financial Creditor status. The orders which were passed on March 16 March 2023 kept both these issues open for further decision, while considering the applicant as a financial creditor.

16. The RP after the orders were passed and directions issued, urgently convened a meeting of the COC within 2 days by

issuing a notice on 20 March 2023 and convening the meeting on 23 March 2023, got the approval ratified for not giving the status of secured financial creditor to the applicant and also sent a reply to the applicant on the same date (23 March 2023) denying all allegations and refusing to consider the plea for accepting their claim with interest. The stated 3rd COC meeting was attended by 5 financial creditors representing 99.98% voting share & RP stated that he convened short notice meeting as decided in the meeting dated 10th July 2022 COC had unanimously resolved in favor of a shorter notice period of two days. The RP is also observed to have not consented to convene a meeting of COC as the applicant had only 6.66% of voting share on 6th April 2023 and in fact had sent a letter on 20th March 2023 itself in this regard. Further he stated that the process of admitting any one of the claimant who was in similar footing cannot be compared and re-considered (Arrow Engineering). Apparently, the RP had not taken note of 16th March 2023 orders of this Tribunal as the matter to treat the interest and secured status needed a detailed examination.

17. A perusal of all the annual reports and financial statements submitted by the Applicant and RP only reveal that the

Principal amount accepted from applicant has been admitted as due and payable due to the MoU which was being made invalid both by BIFR and the Hon'ble Supreme Court. The Hon'ble Supreme Court orders in this regard was holding that the MOU was void with *inter alia* that “no right would accrue to the (Applicant) on the basis of the said MOU”. Hence the RP only considered Rs 66 crores due and payable to the claimant. However due to the pending arbitration before the Hon'ble High Court had provided for a notional amount of Rs 1 in case the interest is decided in their favour, which is a part of accounting requirement, when the matter is in dispute.

18. It is an admitted fact that the applicant entered into MoU with CD dated 26.12.2009 for development of property and advanced an amount of Rs. 66 crore to the CD. Initially the claim of applicant was not admitted by the respondent, however, in view of order dated 16.03.2023 by this Tribunal holding that his claim for principle amount was admitted upon verifying the claim of applicant. Though the principle amount was admitted the claim was re-examined but the interest was disallowed.
19. The applicant relied upon certain covenant of MoU dated 26.12.2009 Clause 9.1 of MoU states as under”

“In the event that (A) GTL was unable to obtain approval of its shareholders to this MoU within two months final the date of execution of these presents or which such extended time as the Developers may at their discretion agree or (B) If GTL is unable to (1) pay all dues and complete all formalities under the labour agreement arrived between GTL and the Labour Union or (2) make encumbrance or (3) execute and register the irrevocable Joint Development Agreement and irrevocable Power of Attorney in favour of the developers or (4) fulfil its obligations under the MoU within 6(six) months from the execution this MoU or within such extended time as the Developers may at their discretion agree;

Then the Developers will have an option to terminate this understanding by giving 2 (two) days’ notice upon such termination GTL shall refund all amount paid by the developers to (or an behalf of) GTL till such date together with interest thereon 18 per cent (eighteen per cent) per annum from the date of termination till the date of refund.”

20. Clause 17 of the MoU provides as under;

“ in the event, any provision of this Agreement is declared by judicial or any other competent authority, quasi-judicial or administrative to be void, voidable, illegal or otherwise

unenforceable, or indications of the same are received by either of the Parties from any relevant competent authority/ies, the Parties shall construe the concerned provision of the Agreement in a reasonable manner which achieves the intention of the parties without illegality.”

According to the applicant in view of clause 17 of intention of the parties was to refund the amount with interest at the rate of 18 per cent per annum, when the MoU becomes or void.

21. The respondent while rejecting claim of the applicant relied upon order passed by Hon’ble Supreme Court declaring MOU void and, thereafter, no termination of MoU by the parties. The RP also relied upon Section 65 of the Contract Act. The RP also stated that CD has denied its liability to pay interest. According to the respondent, he is not competent to adjudicate the amount payable and the matter is pending before arbitrator for adjudication.
22. In this regard, it is necessary to see the order passed by the Hon’ble Supreme Court in the matter of Director General of Income Tax VS. M/s GTC Industries Ltd. In Civil Appeal No. 5038 of 2016 on 12.05.2016. In it, the applicant has filed the intervening application. In this appeal, while

deciding the scope of intervening applicant, the Hon'ble Supreme Court made certain observations regarding MoU and their intervening application was rejected. It was observed by the Hon'ble Supreme Court that the agreement i.e., MoU was in violation of the scheme, the arrangement with the interveners entered into by the Company loses its legal force and no right would accrue interveners on the basis of said agreement." Thus the MOU was declared void on May 12, 2016.

23. The intervening application of applicant was only considered by the Hon'ble Supreme Court and on that context the MoU was observed. According to the applicant as per directions of the Hon'ble Supreme Court the applicant cannot seek specific performance of MoU only.

24. This Tribunal on 16.03.2003 passed an order which reads as under."

"The said MoU has lost its legal force and no joint development agreement was executed. The issue as to whether the debt is secured or unsecured has also not been examined by the Respondent and it will be premature to decide on this issue. Thus, we wish to decide only on the issue whether

the said advance as on the date should be treated as operational debt or as financial debt by the Respondent. As stated earlier, no joint development agreement was signed and no goods or services were rendered by the applicant companies. Thus, debt cannot be classified as operational debt. On failure to execute the joint development agreement, as per MoU, the debt had acquired the nature of interest-bearing refundable advance and, therefore, it gathers the character of a financial debt for the reasons stated in foregoing paras.”

It is clearly directed that the date had acquired nature of interest bearing refundable advance. Thus, it is specifically made clear that the interest is to be awarded from the date of debt given by the applicant. Moreover, the MOU also specifies that whenever the Joint Development Agreement could not be executed or when the agreement was declared by the Hon'ble Supreme Court as void MoU, it has got status of termination and thus the amount is refundable with interest at the rate of 18 per cent per annum. It is specifically mention

in the MoU that if the agreement is declared void the provisions of agreement should be construed in a reasonable manner. The reasonable manner shall be taken into consideration that as the amount was advanced to the applicant on termination or declaration as void, the amount to be refunded with interest.

25. The applicant also relied upon reply affidavit filed by CD before the Hon'ble Bombay High Court or Arbitration Petition No. 667 of 2012 dated 01.08.2012. Wherein the CD admitted that the applicant is entitled to refund monies paid by them along with interest at Para No. 4(P) which reads as under:

“Without prejudice to the above and assuming without admitting that Respondent Company has committed any breach or default under the terms of the MoU, in that event also as per the terms of the MoU, Petitioner is not entitled to seek any specific relief and call upon the Respondent Company to execute the Development Agreement. At best as per the terms of the MoU, Petitioner will be entitled to refund of the amount paid along with the interest and no other relief whatsoever,

hence the relief sought by the Petitioner restraining the Respondent Company to deal with its assets cannot be granted and the Petition deserves to be rejected.”

26. The annual reports for the year 2011-2012, 2012-2013, 2013-2014 and the Balance Sheet of CD also demonstrates that the applicant is entitled to interest on the said amount. The CD mentioned in the balance-sheet that the company has proposed that the money received under the MoU be refunded along with interest as approved by the BIFR. It has also mentioned further that “the company has in the MDRS submitted to the OA appointed by BIFR in July 2013 sought for refunding advances and also advances of Rs. 40,75,00000/- received from strategic investor against Vile Parle property along within interest, if any, as decided by the BIFR by selling the said property”. Thus, the RP overlooked admission given by the CD. Even otherwise, irrespective of MoU, it is a financial debt. Interest kicks in only when there is default. Hence, the debt and date of default should be from the date of MoU as it becomes the return of principal and interest agreed based on time value of money. Intention of borrower was to repay amount with interest. So we allow the borrowed funds to be

repaid in terms of Contract Act as per agreement. We therefore, hold that the applicant is entitle to interest @ 18% per annum from the date of MoU i.e 26.12.2009.

27. As regards secured status sought by the applicant/s, the same has been examined in the light of various judgments: The Hon'ble NCLAT in the matter of Indiabulls Housing Finance Ltd. Vs. Mr. Samir Kumar Bhattacharya [CA(AT) (INS) 830 of 2019. The relevant extract is reproduced below:

“It is thus clear that the CoC had made it clear that in absence of charge being registered, the appellant could not be treated as secured financial creditor. Although the transaction is stated to be of 2012, it is clear that the charge was not got registered either by the corporate debtor or the appellant till now on 03.10.2019 which is after the resolution plan was approved on 04.07.2019. Section 77 of the Companies Act, 2013 required the charge to be registered and the appellant had an option to resort to even section 78 of Companies Act, 2013, if there were any grievances. Not having done so, when CIRP started trying to rely on the equitable mortgage without a charge created, we do not find there was any error in the CoC meetings which in its wisdom did not recognize

creation of security”.

28. The applicant/s are a company incorporated under provisions of companies act, permitted by their memorandum and association and board resolution created a tripartite memorandum of understanding dated 26th Dec 2009 (page1 to 15 of compilation) and the corporate debtor (public limited company - respondent). The memorandum is a stamped document signed on 26 De 2009 wherein the respondent CD GTL as the owner of certain property at Vile Parle Mumbai as defined in the MOU decide to re develop the property as it was shifting its production to another part of the state, thereby entering in to an arrangement or understanding with the two real estate developers (developers) granted certain development rights in relation to the property and decide to jointly develop the said properties. In consideration of the same certain amounts were to be paid by the applicants as specified. The applicant decides to grant the applicants full and free transferable and assignable development rights in respect of the said property subject to certain conditions which were partially complied by the applicants (financial terms). The respondent also confirmed that there were no claims or litigations on the property, which however subsequently

was disputed and certain orders were passed by Hon'ble Supreme Court in the matter relating to Income tax Department and there is another case pending before the Hon'ble High Court of Mumbai.

29. Further, within a month of getting the necessary resolution approved by the shareholders of the respondent, it will execute a formal Joint Development Agreement in favor of the Developers incorporating all the terms and conditions spelt out in the MOU. Further in para 6.4 it states that the developers(applicants) shall be entitled to freely assign its rights herein granted upon payment of the whole of the consideration specified therein. Further in Para 6.5 of MOU, the respondent stated that it shall within 48 hours upon execution of this MOU, deposit all original documents of title in relation to the said property with Mr M L Bhakta, Senior Partner, M/s Kanga and Co, Advocates and Solicitors, in escrow pending execution of the Joint Development Agreement. The escrow agent shall handover the original document to the developers on execution of the Joint Development Agreement.
30. Further in Para 9.2 of the MOU, the respondent undertakes that in the event of termination of this MOU by the developers, they shall not enter into any transaction for any

disposal or alienation of the said property or any part thereof till the amounts payable by them to the Developers have been paid and discharged. Further in Para 12 of MOU it stated that “it is agreed that on or after execution of this MOU, GTL shall not create any third party rights or any other interest of any kind in the said property.

31. Further in Para 17 the MOU states that “in the event, any provision of this Agreement is declared by judicial or any other competent authority, quasi-judicial or administrative to be void, voidable, illegal or otherwise unenforceable, or indications of the same are received by either side of the parties from any relevant competent authority/ies the parties shall construe the concerned provision of the Agreement in a reasonable manner which achieves the intention of the parties without illegality.

32. Further on the security interest created by way of a deposit of title deeds of property in Vile Parle to the Escrow Agent agreed upon at the signing of MOU by the CD and the applicant/s the RP has refused to consider the same as it is not registered under the Registration Act, 1908, no charge created as per Section 78 of the Companies Act and it cannot be provided as evidence. It is also observed from submissions that there is a stay and litigation in the matter

and the Trustee who has been in possession of the title deeds, who is authorized to release the property on payment of the amount due or signing of the Joint Development Agreement, has not consented to release the same. The deposit of title deeds is a private arrangement between the CD and the applicant and the property belongs to the CD. It has no legal basis as no charge has been created and declared void by the Hon'ble Supreme Court.

33. The MOU dated 26th Dec 2009 signed between the CD and the applicants was intended to develop a property at Vile Parle Mumbai owned by the CD through the applicants at a monetary consideration of Rs 542.70 crores and a schedule of pre payment was drawn and the balance was to be paid after the developers obtain the approvals including of secured creditors, executing and registering an Irrevocable Joint Development and registering an Irrevocable Power of Attorney in favour of the Developers or its nominees and the CD handing over vacant and peaceful possession of the said property to the applicants. It also had certain caveats to be fulfilled by the CD and monetary consideration to be paid by the applicants for executing the Joint Development agreement and register the same in the office of sub registrar of assurances. These were not fulfilled by both

applicant and respondent and the MOU stands as a stamped un-registered document.

34. The CD had not fulfilled or complied with the caveats needed as per MOU nor the applicants terminated this understanding until the matter was taken up before Arbitration and considered void by BIFR and Hon'ble Supreme Court. The reason for the RP not considering the interest is also due to the lapse or absence of any document to support this termination, while he had held the view that the MOU became a void document and cannot be executed of its conditions. The petitioners refused to release the documents held with the escrow agent, issued necessary instructions and had filed an arbitration petition under Sec 9 of the Arbitration & Conciliation Act, 1996 before the Hon'ble High Court of Mumbai claiming dues along with interest which is still pending.

35. The CD had flouting the norms is observed to have during the process of rehabilitation/restructuring of the sick unit through an appropriate financial package during the BIFR process entered in to such agreements with the two applicants including Arrow Engineering. Its net worth had also turned negative and had various dues, mortgaged the same property under dispute to another seller, had tax and

other dues with government authorities. This route for raising funds which was observed on monitoring by BIFR and the MOU was declared void and the applicants could not progress in developing the project through Joint Development Agreement and did not part with further funds. The orders passed by the Hon'ble High Court in Commercial Suit No.782 of 2017 on 14 Oct 2019 (filed by Arrow Engineering Vs Golden Tobacco) also mentions that the agreement was in violation of the scheme, the arrangement with the aforesaid interveners entered in to by the company loses its force and no right would accrue to these interveners(applicant) on the basis of said agreements. Further the attachment of secured creditors had the attachment benefits, while the claims of other realty companies (applicant) were negative by the Hon'ble Supreme Court. Further Mr Sunil Kumar Dhandhanian, DGM of the CD had admitted liability to the extent of the principal sum in case of Arrow Engineering.

36. As regards Arrow Engineering which entered in to a similar MOU stated to have been executed on 22 July 2011 for the purpose of assisting the CD who decided to develop individually its project, financially and for marketing ability and an amount of Rs 41.75 crores between 3 June 2011 to

29 Aug 2012 was stated to have been advanced against an agreed amount of Rs 300 crores. On this the Arrow Engineering had charged interest at 18%, along with loss of profits of Rs 2,337 crores thereby a total claim of Rs 2,337 crores was made.

37. The Hon'ble NCLAT while approving the insolvency petition of Arrow Engineering had considered in its order the debt amounting only to Rs.40.75 crores as advance from Arrow Engineering which was also on the basis of its balance sheet (order dated 2.12.2021). In the information filed by Arrow Engineering Limited in the Ministry of Company Affairs, their balance sheet shows an amount of Rs.54.64 crores only till March 31 2021. He also further states that the RP had no power to adjudicate the claim especially when the admitted amount is Rs 40.75 crores and they had filed a complaint before EOW in the matter that the letter dated 26.6.2012 was forged and such letter was never issued and EOW has issued summons and enquiry is in process. Further RP has classified the claim of Arrow Engineering Limited as a Secured Financial Creditor. It is submitted that even though he has prevailed upon to RP by email dated 6 July 2022 to reconstitute the COC after including all other financial creditors claim which has been

rejected and restricting the claim of Arrow Engineering to Rs 40.75 crores it has not been done.

38. From the foregoing facts and submissions mentioned, it is evident that, there was deposit of documents of title submitted to an escrow agent returnable on payment of full amount under the terms of the MOU. There was transfer of property subject to fulfilment of certain conditions by both the parties, of which the applicants did not pay the full consideration. There was no Joint Development Agreement entered subsequent to this MOU and the claim is now for the partly paid consideration and seeking secured status on the property which had an inbuilt clause to transfer the rights subject to fulfilment of certain conditions. Further as mentioned in Para 6.5 of MOU, the applicants had not made the full payment as per terms of the MOU and the Trustee who merely was deposited the titles to be handed over to applicants on execution of Joint Development Agreement which did not take place nor did the entire amount of the consideration paid. Now, the respondent CD is under CIRP admitted under Sec 7 of IBC. The MOU becoming void, no other agreement is possible for consideration of further pursuing development rights. There was breach by both the parties both financially and on the

property to be exchanged.

39. From the submissions and documents produced we cannot determine or agree that the Transfer of Property under the Act the documents were lodged with the escrow agent. There is a stamped document of MOU but no other document has been produced to legally consider this deposit of document if it is to be considered as Transfer of Property which would have been done possibly on execution of Joint Development Agreement which did not take place. We are not examining whether the stamped MOU was registered or whether as per the stamp duty payable. In view of Sec 77 of the Companies Act 2013, it is incumbent on a company to have the charge registered in favor of the security interest holder which has not been done and no initiative taken either by applicant/s or the respondent who are all to comply. This exchange of the document for whatever reasons when there were various credit facilities availed and the respondent CD was under BIFR scheme was to vitiate the credit discipline or terms and conditions which has been questioned not allowed by BIFR and MOU quashed by the Hon'ble Supreme Court.

40. As per the documents submitted, the respondent CD and applicants wrote a letter dated 26 Dec 2009 to the trustee

mentioning the MOU and deposited the title deeds to be held in escrow pending completion of the obligations of the parties specified therein. It also states that the title deeds to be handed over to the developers once the Joint Development Agreement is executed amongst them in terms of the MOU and the same is registered in the office of the sub registrar of assurances. As per documents submitted and submissions made this condition was not met. The applicants merely hold a negative lien on the property when the full amount was not paid and there has been direction sought by RP and also by the CD earlier to the Trustee to release the documents as the Supreme Court had struck down the MOU. However, the trustee has refused to release unless the amount is paid.

41. The applicants hold on the property in the trustee is not valid as per law it cannot be considered. Rights are not transferred even though there was intention and there was no charge created whatsoever as per Companies Act. Other than that it is a negative lien on the property which has to be released on consideration of the claim by the RP. Further stand without releasing the stated document by the Trustee holder of the property to the RP would amount to be illegal act. The RP would be directed not to release the property to

any other or create charge, but consider the claim of the applicant as per eligibility including principal and interest due and payable as the intention of the CD to pay back the amount taken is acknowledged and there is an amount of 18% mentioned in the agreement even if was not provided by CD earlier in the balance sheet, the amount of interest is considered due and payable. The deposit of titles did not fructify in to transfer of documents due to partially fulfilled conditions and non-execution of Joint Development Agreement. The RP has to take over the asset on consideration of claim amount as per eligibility adjudicated by this Authority. The status sought cannot be executed, in absence of any document which would include Registration of the Transfer Deed or creation of mortgage more particularly creation of charge in terms of the Companies Act

42. Based on the above discussion, we come to the following conclusions:

- i) The applicant has lent the amount to the CD for the purpose of Joint Development of a real estate project which was not the core activity of the respondent, who was a sick industrial unit, under rehabilitation scheme with BIFR with various other liabilities.

There is no provision of interest in the balance sheet, the MOU has been considered null and void and has not been implemented.

- ii) The CD had parted with his title deeds but the mortgage has not been created and the deposit of title deeds cannot be considered as a valid creation of charge as it is not registered and there are litigations, other statutory authorities who have claimed the property. The MOU was subject to certain conditions, the amount was partly paid collateralizing the transaction but not a valid charge has been created.
- iii) The claim of the applicant at this stage is to be considered as unsecured financial creditor as decided in the March 16 2023 order of this tribunal, leaving these two issues open for further decision based on the reports of RP. Thus, by admitting the applicant as financial creditor by interim order. The RP cannot and should not have adjudicated the claim of the applicant on his own, instead of by this Tribunal.
- iv) The RP as per submissions and the records provided has accepted inflated claims of one of the financial

creditor, Central Bank of India, even though it was a decreed debt and orders passed by BIFR. It is also alleged that the RP was erstwhile Sr. Officer of Central Bank of India, due to which he has considered such an inflated claim in favour of Central Bank of India. This allegation is of very serious nature and require detailed investigations.

v) The RP has constituted the CoC and conducted the affairs, accepted inflated claims in respect of two financial creditors namely Arrow Engineering and Central Bank of India. The CoC has been restrained from taking any decision on voting and IBBI has initiated disciplinary action and directed the COC to take a decision. The voting percentage arrived out of such inflated claims allows the RP and vested interests of any such creditors to allow the process to run with violations by setting the voting strength on inflated self-adjudicated claims. As regards the claim of Central Bank of India, it is observed that it is a decreed debt of DRT awarded in 2004. No inflated claim with interest can be submitted as per BIFR order as the DRT, Delhi order was final.

iii) The claims and constitution of COC has to be re-

verified after forensic audit. The claims of the three main creditors to be considered for voting in the COC and consideration of claims for payment constitute the major disputes in this resolution process:

- a) the principal amount namely the two applicants Suraksha and Sheth builders considered at Rs 132 crores;
- b) The claim of Arrow Engineering is restricted at Rs.41.70 crores till submission of Audit Report by KPMG.
- c) The secured status of all the creditors claims needs to be verified of the charge except the applicant.
- d) The claim of Central Bank of India will be re-examined in the light of the decree passed by DRT and the BIFR by the new RP including legal position, limitation etc.
- e) The RP has to be discharged of his duties immediately, strong action is to be separately recommended to IBBI after completion of the forensic audit. He is directed to hand over charge to the new RP immediately.
- f) In Shri Gopal Chaudhary, RP Vs. SREI Equipment Finance Ltd. Company Appeal (AT) (INS) No.1443 of

2022, the Hon'ble NCLAT held that the Adjudicating Authority being the appointing authority of insolvency resolution professional has jurisdiction to remove resolution professional.

- g) A detailed forensic audit needs to be done immediately of the claims accepted, interest payable, its rate and status given to the claimants as secured financial creditors. We are appointing KPMG to do the said forensic audit within a period of one month.
- h) The re-constituted CoC will function based on the voting right arrived after the forensic audit of claims.
- i) The existing claimants list be continued subject to short verification by the new RP.
- j) The new RP to do a due diligence as to whether any of these claimants are related parties or facilitated claim through fake invoices / letters to initiate insolvency process.
- k) All resolution plans received as on date would be put up before newly constituted CoC after the report of KPMG is submitted to this Tribunal and approved.

- 1) No further extension of CIRP would be granted unless compliance of this order is made. Till that time, the process of resolution plan is to be kept pending.

43. Hence, we pass following order:

ORDER

- (A) Application is partly allowed.
- (B) The applicant is entitled to claim interest @ 18% per annum on the debt amount from the date of disbursement till its realization. The applicant is not granted secured creditor status as prayed in the application.
- (C) The Resolution Professional Shri Vichitra Narayan Pathak is discharged of his duties and new Resolution Professional Shri Sanjay Borad, IBBI IPA 003/00441/2023-2024/4324 is appointed as Resolution Professional as directed in IA 357 of 2023. He is directed to take over the work of present Resolution Professional and the CIRP process ahead. However, the present Resolution Professional Mr. Vichitra Narayan will be assisting the new Resolution Professional with all the documents of claims and for the conduct of forensic audit till this

Adjudicating Authority considers to relieve him after receipt of the report of KPMG and constitution of new CoC.

- (D) The CoC will not continue any process of any fresh resolution plans (other than already received) and will be reconstituted after the forensic report.
- (E) The orders of 16 March 2023 staying any voting by CoC by this Tribunal continues, including receipt of any fresh resolution plans other than those received as on the date of this order.
- (F) The registry is directed to place copy of report of KPMG received in IA 357 of 2023 in this IA No.358 of 2023.

This IA stands disposed-off. The necessary compliance to this order will be done by filing application in the CP(IB) 268 of 2020 by the new RP appointed by this order.

-Sd-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

CHITRA HANKARE
MEMBER(JUDICIAL)