IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-IV

CP (IB) No.747MB-IV/2022

Under Section 7 of the I&B Code, 2016

In the matter of:

HDFC Ventures Trustee Company Limited

[CIN: U65991MH2004PLC149329]

…Financial Creditor/Applicant

V/s

Kakade Estate Developers Private Limited

[CIN: U70102PN2007PTC129608]

...Corporate Debtor/Respondent

Order Dated: 29.03.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Zal. T. Andhyarjuna, Sr. Counsel a/w Mr. Aditya Shiralkar, Ms. Nanki Grewal and Ms. Manasi Joglekar, Advocate

For the Respondent(s) : Mr. Ankita Singhania, Advocates

ORDER

Per: Prabhat Kumar (Member Technical)

1. This is an application bearing C.P. (IB) No. 747/MB/C-IV/2022 filed by HDFC Ventures Trustee Company Limited, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Kakade Estate Developers Private Limited, Corporate Debtor on 18.06.2022.

1.1. The Application is filed by HDFC Ventures Trustee Company Limited, the Financial Creditor, claiming total default of Rs. 133,75,89,041/- (Rupees One Hundred Thirty Three crore Seventy Five lakh Eighty Nine thousand & Forty One only), being amount payable under Consent award amounting to Rs. 120.00 crores and Interest accrued thereupon till 31.05.2022. The date of default is 25.08.2021 as per Part IV of form 1, when the Corporate Debtor failed to pay a sum of Rs. 75,85,71,429/- (Rupees Seventy One crore Eighty Five lakh Eighty Seventy One thousand & Four Hundred Twenty Nine only) i.e. first tranche of amount due under Consent Award. Subsequent to this default, the Financial Creditor vide notice dated 27.08.2021 called upon the Corproate Debtor to pay entire amount under the Consent award consequent to occurrence of event of default.

2. The Applicant submits that the Corporate Debtor *inter-alia* entered into an Amended and Restated Share Subscription and Shareholders Agreement dated 14th May 2008 ("ARSSHA") with the Financial

Creditors under which the Financial Creditors gave a certain amount to the Corporate Debtor for implementation of an ongoing real estate project at Village Bhugaon, Pune. Subsequently, the parties to the ARSSHA entered into a Supplementary Share Subscription and Shareholders Agreement ("Supplementary SSHA") under which the Financial Creditors gave an additional amount to the Corporate Debtor. The Corporate debtor failed to comply with the terms of these agreements and hence, a binding term sheet was executed. However, the Corporate Debtor once again failed to pay the amount under the binding term sheet. Thus, the Corporate Debtor failed to pay the exit consideration under the ARSSHA, Supplementary SSHA as well as failed to comply with the terms of the binding term sheet. Therefore, the Financial Creditors invoked the arbitration clause under the ARSSHA. Subsequently, a Consent Award dated 19th January 2021 based on the Consent Terms was passed by the Arbitral Tribunal appointed by the parties to ARSSHA and Supplementary SSHA. The Corporate Debtor defaulted in making payments under the Consent Award within the stipulated time period. The brief details of the facts are narrated here under –

2.1. The ASSHA was executed between the (i) Financial Creditors, (in) IIRF Holdings XIV Limited Petition (iii) IL & FS Trust Company Limited on the one hand; and (iv) the Corporate Debtor, Kakade Estate Developers Private Limited ("KEDPL"), (v) Mr. Sanjay Dattatray Kakade (vi) Mrs. Usha Sanjay Kakade (vii) Kharadi Properties Private Limited (viii) Kakade Retailing Private Limited on the other hand on 14th

May, 2008. The parties at (v) to (viii) are Promoters of the Corporate Debtor.

2.2. In essence, under the ARSSSHA, the Financial Creditors gave the amount of Rs.72,86,65,720/- to the Corporate Debtor, which amount was to be repaid by the Corporate Debtor and/or its Promoters before 31.3.2014, by providing an "Exit" to the Financial Creditors under the ARSSSHA.

2.3. Upon default the minimum (Internal Rate of Return - IRR) payable by the Corporate Debtor and/or its Promoters to the Financial Creditors on the said Amount was fixed at 15% p.a. compounded annually or the Fair Market Value whichever was higher, subject to applicable laws, under the ARSSSHA.

2.4. The borrowed amount itself was required to be utilized for the implementation of the ongoing real estate project at Village Bhugaon, District Pune, Maharashtra, India being developed by the Corporate Debtor.

2.5. *Against the money received by the Corporate Debtor, it allotted "Compulsorily Convertible Preference Shares (CCPS) (Series C)"* to the Financial Creditors under the ARSSSHA.

2.6. The Supplementary SSHA was executed between the parties to the ARSSHA on 11th July, 2008, under which the Financial Creditors gave an additional sum of Rs. 15,00,00,000 to the Corporate Debtor and was allotted Compulsory Convertible Cumulative Preference Shares of Rs. 10 each (CCPS-series D) at a premium of Rs. 9990.

2.7. The Corporate Debtor and/or its Promoters failed to provide an exit to the Financial Creditors in terms of the ARSSHA read with the Supplementary SSHA on or before 31st March, 2014.

2.8. In 2015, given that there was a "Default" and the Corporate Debtor, Mr. Sanjay Dattatray Kakade, Mrs. Usha Sanjay Kakade, Kharadi Properties Private Limited and Kakade Retailing Private Limited had failed in their obligation to develop the Project and provide an exit to the Financial Creditors, a binding term sheet was executed in 2015 ("Term Sheet").

2.9. The Corporate Debtor, Mr. Sanjay Dattatray Kakade, Mrs. Usha Sanjay Kakade, and Kharadi Properties Private Limited and Kakade Retailing Private Limited once again failed to provide an exit under the said binding term sheet. The Term Sheet contemplated an exit consideration of Rs.156,81,60,000/- (Rupee One Hundred and Fifty-Six Crores Eighty-One Lakh Sixty Thousand) which carried an **IRR** of 17% from 10th March 2015 which would increase to 21% in case of a default.

2.10. The Financial Creditors invoked the remedies available under Clause 16.4(a) and Clause 19.6(a) of Petition the ARSSHA on 1st August, 2019, and served a legal notice upon the Corporate Debtor through their Advocates.

2.11. The disputes were then referred to arbitration before the Learned sole Arbitrator, Justice CK Thakker (Retd.), Former Chief Justice of the Supreme Court of India and the parties to

the arbitration proceedings arrived at a settlement and signed the Consent Terms ("Consent Terms").

2.11.1. According to the Consent Terms, a total sum of Rs. 72,85,71,429/- ("First Tranche Amount") was agreed to be paid by the Corporate Debtor to the Financial Creditors on or before the expiry of 9 months from the execution of the aforesaid Consent Terms and further, a sum of Rs. 47,14,28,571/-("Second Tranche Amount") was agreed to be paid by the Corporate Debtor to the Financial Creditors on or before the expiry of 15 months from the execution of the aforesaid Consent Terms. The two tranche amounts, aggregating to Rs. 120 Crores, are collectively referred to as "the Amount".

2.11.2. The Promoters were principal obligors in terms of the consent award and the liability of the Promoters as well as Corporate Debtor, individually or jointly, was to arise upon default of the Promoters in making payment in accordance with the schedule of payment annexed to the consent award.

2.11.3. The Consent Terms provide that the Financial Creditors' rights and entitlements under the ARSSHA read with the Supplementary SSHA continue to be valid, subsisting and binding with full force and effect upon the parties until the payment of the said Amount.

2.11.4. The Consent Award has attained finality.

2.12. On 28th July, 2021, The Financial Creditors served notices upon the Corporate Debtor as a reminder for the payment of the first tranche amount on or before 25 August, 2021, i.e. due date.

2.13. On 25th August 2021, the payment of the first tranche amount was due, however, the Promoters and/or Corporate Debtor defaulted in making the payment. Consequently, the entire sum of Rs. 120,00,00,000/- became due and payable along with interest at 15% p.a. compounded annually.

2.14. The total amount payable as on 14 July 2022, is Rs. 135.88 Crores (approx.). On 27th August, 2021, in its response emails to the notices dated 28th July 2021, the Director of the Corporate Debtor admitted its liability, and requested an extension for a further period of 6 months.

2.15. The Financial Creditors served notices dated 27th August, 2021 upon the Corporate Debtor to pay the entire amount of Rs. 120 Crores due under the Consent Award along with interest thereon.

2.16. On 6th September 2021, in its response emails to the notices dated 27th August 2021, the Director of the Corporate Debtor admitted its liability and requested an extension for a further period of 6 months.

2.17. On 8th September, 2021, letters addressed by the Financial Creditor refusing the extension of time as requested by the Corporate Debtor and insisting upon payment.

3. The Corporate Debtor submits that the Petitioners are not "Financial Creditors", nor does a financial debt subsist. It is submitted that for a debt to become a "financial debt" for the purpose of Section 7 in particular and part II of the Code overall, it requires to meet the basic elements viz. that it must be a disbursal against the consideration for time value of money. The requirement of the existence of a debt disbursed against the consideration for the time value of money is an essential part even in transactions stated in Clause (a) to (i) of Section 5(8) of the Code, which contains the definition of "financial debt". The definition of "financial debt" is not so expansive that the key requirement of "disbursement" against "consideration for the time value of money" can be dispensed with, so as to enable any transaction to become a financial debt. While the debt may be of any nature, in order to be treated as financial debt it must carry, correspond to, or have some connection with disbursal against consideration for the time value of money. In support of this contention, the Corporate debtor has submitted that –

3.1. By the amended and restated share subscription and shareholders agreement dated 14th May 2008, the Petitioner agreed to subscribe to shares of the Respondent in accordance with the terms and conditions set out therein. The said agreement contains the following relevant clauses:

i. By Clause 2, it was *inter alia* agreed that the Applicant agreed that the Financial Creditor would pay a sum of Rs.72,86,65,720/- for shares of the Corporate Debtor.

ii. Under Clause 14, there were certain encumbrances and restrictions on the right to freely transfer the shares, as well as the Applicant had a pre-emption right in favour, in the event that any of the promoters of the Corporate Debtor desired to transfer his/her shares.

iii. Clause 15.2 also provided that the Applicant would have the discretion to sell, transfer, or dispose of some or all of their shares as well as rights under the Agreement, and the Corporate Debtor/its Promoters could not object to the same.

iv. Clause 16 of the Agreement contains an 'Exit Mechanism' by which the Corporate Debtor and its promoters undertook to provide an exit to the Petitioners by undertaking a public listing of the Corporate Debtor as more particularly set out therein. The shares held by the Applicant would then become freely marketable and transferable. Further, in the event the public listing did not take place, the Applicant had the right to sell, transfer or otherwise dispose of up to 100% of the issued and paid-up share capital of the Corporate Debtor by a strategic sale and to compel the promoters to sell some or all of their shares to the purchaser.

v. Clause 16.4 also contained a '*put option'* in favor of the Applicant, which granted them the option to require the promoters of the Corporate Debtor to buyout their shares as more particularly set out therein.

3.2. By the consent terms dated 25th November 2020, the Corporate Debtor was required to provide and exit to the Applicant, against which the shares of the Respondent held by the Petitioners were to be transferred to the promoters of the Respondent. Until the payments by the Corporate Debtor under the consent terms, the Applicant would continue to hold and retain all their rights under the aforesaid agreements. The consent terms were then taken on record by the Ld. Sole Arbitrator, vide consent award dated 19th January 2021, disposing of the arbitral reference between the parties.

3.3. The Corporate Debtor has also filed an affidavit in reply dated 06.07.2022 stating that the consent terms executed upon by the Applicant and the Corporate Debtor is in violation of FEMA regulations specifically, Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017. It is submitted that fixation of Exit Price under Consent terms is in violation of Regulation 10(7) and 11(3) of the said Regulations, which prohibits any person resident outside India any guaranteed assured fixed price at the time of making investment and that they shall exit at market price prevailing at the time of exit. The Corporate Debtor was made to agree to an assured exit price and the same was forced upon the Corporate Debtor in violation of FEMA regulations. It is pertinent to mention here that one Mr. Arun Digambar Kulkarni has filed a complaint to the Enforcement Directorate against violation of the FEMA regulations by Applicant and

Corporate Debtor as also Kakade Construction Company Pvt. Ltd.

3.3.1. It is further pertinent to mention here that pursuant to the filing of the complaint to the Enforcement Directorate ('ED'), since the ED did not take action on the said complaints, the said Mr. Arun Digambar Kulkarni had also filed a Writ Petition before the Hon'ble Bombay High Court which was disposed off by the Hon'ble Court vide order dated 30th June 2022 whereby liberty was granted to adopt appropriate proceedings in the nature of Public Interest Litigation.

3.4. The Hon'ble Court vide the said order has directed the Receiver to take possession of the land on or before 20th December 2021 and held that the appointment of Court Receiver will not in any manner derail the ongoing negotiations for availing of credit facilities or other investment that the proposed lender/investor may have entered into with the Corporate Debtor.

3.5. The Commercial Execution Application filed by the Petitioners is still pending before the Hon'ble High Court at Bombay. Pending the High Court proceedings, Petitioners have approached this Court for execution of the same consent terms and money Award, which clearly shows the malafide intentions of the Applicants and the same amounts to indulging in forum shopping by the Petitioners.

4. We have heard both the counsel(s) and perused the material available on record.

4.1. There is no dispute that the applicant had invested a sum of Rs. 87,86,65,720/- in the Compulsorily Convertible Preference Shares (CCPS) of the Corporate Debtor in terms of the ARSSHA & Supplementary SSHA, which stipulated that an Exit route shall be provided to the Applicants by the Promoters by listing these instruments or through strategic sale or buy out from the Applicants; the Applicants also have a put option whereby they can require the Promoters of the Corporate Debtor to buy CCPS held by them for a consideration to be determined in accordance with formula defined in ARSSHA; CCPS didn't carry any specified coupon rate of dividend, however, ARSSHA provided for the formula for determination of the amount payable to the Applicant on transfer of such CCPS, and the Term Sheet entered into thereafter also stipulated a fixed IRR; the Corporate Debtor became party to these agreements thereby taking upon itself to facilitate the aforesaid Exit route to the Applicants; the Applicants had a right of nominating two out of six persons as Director on the Board of the Corporate Debtor and were further entitled to voting rights in the General Meeting on resolutions in relation to specified business/transactions; the Promoters and/or the Corporate Debtor failed to provide the stipulated Exit to the Applicants on or before 31.03.2014 and thereafter executed a Consent term sheet in the Arbitral proceedings ensuing from the aforesaid default; under the consent terms, the Promoters and the Corporate Debtor agreed to pay a sum of Rs. 120.00

crores in consideration of transfer of CCPS held by the Applicant; the Promoters consented to pay the aforesaid sum either jointly or severally; CCPS were to be transferred by the Applicant in proportion to the sums paid as stipulated in the schedule annexed to Consent terms to the promoters; the Corporate debtor as well as Promoters were guarantors to the obligation of the Promoters to pay the said sum, failing which the applicant had a right to call upon any of party i.e. either Corporate Debtor or Any of Promoters jointly or severally to pay the amount specified under Consent terms; and a default has occurred in payment of sum specified in Consent terms to the Applicant, which is more than Rs. 1.00 crore.

4.2. The Corporate Debtor has contested the present application primarily on the ground that the sum payable under Consent award is not in nature of Financial Debt, accordingly, the Applicant is not a financial creditor and it could not have filed the present application u/s 7 of the Code. It has also raised a plea that the Corporate debtor cannot said to be in default as the applicant had subscribed to CCPS, under which the Corporate Debtor has no obligation to pay back the money to the holder of such CCPS.

4.3. We notice that the Applicant has filed this application on the ground of failure of the Corporate Debtor to pay the sums due under the Consent Award, when it was asked to pay upon failure of its Promoters to pay the decretal amount. It is not in dispute that the Consent award is a decree and a decree holder

is included in the definition of "Creditor" as provided in Section 3(10) of the Code, which reads as "*creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder".* A Financial Creditor is defined as a Person to whom Financial Debt is owed. Accordingly, whether such decree gives rise to Financial Debt or Other Debt needs to be determined prior to proceeding further.

4.4. The Ld. Counsel for the Applicant submitted that a decree, per se, is a financial debt, whereas Ld. Counsel for the Corporate Debtor pleaded that the nature of the debt due under decree would depend on the nature of transaction from which the decretal debt has arisen.

4.5. Ld. Counsel(s) for the parties relied on various decision(s) in this regard. Both have placed reliance on the judgment of ***Kotak Mahindra Bank Limited v. A. Balakrishnan & Anr. Civil Appeal No. 689 of 2021***, wherein the following issue was under consideration -

> *42. In this background we will have to consider, as to whether a person, who holds a Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 of the IBC.*
>
> *43. A person to be entitled to be "financial creditor" has to be owed a financial debt and would also include a person to whom such debt has been legally assigned or transferred to. Therefore, the only question that would be required to be considered is, as*

to whether a liability in respect of a claim arising out of a Recovery Certificate would be included within the meaning of the term "financial debt" as defined under clause 8 of section 5 of the IBC.

4.6. Further the counsel for the Applicant has relied on the following paras of the decision in case of ***Kotak Mahindra Bank Limited*** (Supra) -

52. In any case, we have already discussed hereinabove that the trigger point for initiation of CIRP is default of claim. "Default" is non-payment of debt by the debtor or the Corporate Debtor, which has become due and payable, as the case may be, a "debt" is a liability or obligation in respect of a claim which is due from any person and a "claim" means a right to payment, whether such a right is reduced to judgment or not. It could this be seen that unless there is a "claim", which may or may not be reduced to any judgment, there would be no "debt". When the "claim" itself means a right to payment, whether such a right is reduced to a judgment or not, we find that if the contention of the respondents, that merely on a "claim" being fructified in a decree, the same would be outside the ambit of clause 9 of section 5 of the IBC, is accepted then it would be inconsistent with the plain language used in the IBC. As already discussed hereinabove, the definition is inclusive and not exhaustive. Taking into consideration the object and purpose of the IBC, the legislature could never have

intended to keep a debt, which is crystallized in the form of a decree, outside the ambit of clause 8 of section 5 of the IBC.

53. Having held that a liability in respect of a claim arising out of a Recover Certificate would be "financial debt" within the ambit of its definition under clause 8 of section 5 of the IBC, as a natural corollary thereof, the holder of such Recovery Certificate would be financial creditor within the meaning of clause 7 of section 5 of the IBC. As such, such a "person" would be "person" as provided under section 6 of the IBC who would be entitled to initiate the CIRP.

68. A perusal of the judgment of this court in the case of Dena Bank (supra) would reveal that this court considered all the relevant provisions of the IBC and the earlier judgments of this court. A already discussed hereinabove, we do not find any inconsistency in the judgment of this court in the case of Dena Bank (supra) with the earlier judgments of this Court on which reliance is placed by Shri Vishwananthan, We find that the contention that the judgment of this Court in the case of Dena Bank (supra) being per incuriam to the statutory provisions and earlier judgments of this Court, is wholly unsustainable.

69. We have already hereinabove, done the exercise of considering the relevant provisions of the IBC afresh and come to a conclusion that a liability in respect of a claim arising out of a Recovery Certificate would be a "financial debt" within the meaning of clause 8 of section 5 of the IBC

and holder of the Recovery Certificate would be "financial Creditor" within the meaning of clause 7 of section 5 of the IBC. We have also held that a person would be entitled to initiate CIRP within a period of three years from the date bon which the Recovery Certificate is issued. We are of the considered view that the view taken by the two-judge Bench of this Court in the case of Dena Bank supra) is correct in law and we affirm the same."

4.6.1. The applicant has further relied upon decision of Hon'ble NCLAT, Chennai Bench in case of ***White Stock Limited v. Prajay Holdings Private Limited (Company Appeal (AT) (CH) (Ins) no. 271 of 2022***

"29. The `Financial Creditor' had subscribed to and purchased around 2,82,151 `Equity Shares' and 12,44,265 `Compulsorily Convertible Debentures' ("CCDs") of the `Corporate Debtor', through the `Investment Agreement' dated 03.08.2011 ("Investment Agreement") and the `Sale and Purchase Agreement' dated 15.06.2011 ("Sale and Purchase Agreement"). Financial Creditor holds 22% equity shareholding in Corporate Debtor. Financial Creditor was entitled to receive Coupons (interest) at the rate of 10% and 11% per annum on the CCDs held in the Respondent company. The Financial Creditor alleged that no payment was made by the Corporate Debtor and therefore the Financial Creditor filed CP (IB) No. 17/7/HDB/2021 under Section 7 of the I & B Code, 2016 and Rule 4 of the I

& B Code, 2016 (Application to Adjudicating Authority Rules, 2016). In the said application, total outstanding default amount on the date of filing the application was shown as Rs. 274,26,60,573.71/- and documents evidencing `financial debts' were annexed in the said application and relevant date of default was also indicated. The Financial Creditor further mentioned that audited financial statements of the Corporate Debtor including FY ending 31.03.2019 consistently acknowledge liability of amount payable.

30. Therefore, it is clear to us that financial arrangement made between the Financial Creditor and the Corporate Debtor clearly falls in definition of 'Debt', "Financial Debt' and 'Default'. Therefore, the Financial Creditor had right to move an 'Application' under Section 7 of the I & B Code'."

4.6.2. The Applicant has also relied upon the following para of decision of Hon'ble NCLAT in case of ***Pushpa Shah and Another v. IL&FS Financial Services Limited and Anr (Company Appeal (AT) (Insolvency) No. 521 of 2018 -***

"18. On careful reading of the agreement such as 'SPA' and 'La-Fin LoU', we find that the 'IL&FS Financial Services Limited'- ('Financial Creditor') has disbursed the amount and the 'Corporate Debtor' has raised the amount with an object of having economic gain or commercial effect of borrowing. The clauses of 'SPA' if read along with the 'LoU', we find that the terms of transaction involved not only the purchase of shares but it shows the date by which the amount

of transaction was to be repaid by the 'Corporate Debtor' which had fallen due on 19th August, 2012. There was an element of 'time value of money', particularly, when one of the conditions related to 'internal rate of return of 15%' on the transaction, therefore, the time value of money having already shown, we hold that the amount disbursed by 'IL&FS Financial Services Limited'- ('Financial Creditor') and the 'Corporate Debtor' had agreed to reverse the transaction by purchasing the shares within a specified time along with the payment of 15% accrual on 20th August, 2009. We hold that the amount if disbursed by 'IL&FS Financial Services Limited'- ('Financial Creditor') comes within the meaning of 'financial debt', therefore, the 'IL&FS Financial Services Limited'- ('Financial Creditor') has been rightly claimed to be a 'Financial Creditor' and filed Form-1 under Section 7 of the 'I&B Code'."

4.7. The counsel for the Corporate Debtor has relied on the following paras of the decision in the case of ***Kotak Mahindra Bank Limited*** (Supra) to support its contention that the nature of decree shall be determined basis nature of underlying claim -

"51. Applying these principles to clause 8 of Section 5 of the IBC, it could clearly be seen that the words "means a debt along with interest, if any, which is disbursed against the consideration for the time value of money" are followed by the

words "and includes". Thereafter various categories (a) to (i) have been mentioned. It is clear that by employing the words "and includes, the Legislature has only given instances, which could be included in the term "financial debt". However, the list is not exhaustive but inclusive. The Legislative intent could not have been to exclude a liability in respect of a "claim" arising out of Recovery Certificate from the definition of the term "financial debt", when such a liability in respect of a "claim" simpliciter would be included in the definition of the term "financial debt'."

4.7.1. The counsel for the Corporate Debtor has further relied on the judgments of ***Digamber Bhondwe v. JM Fiancial Asset Reconstruction (2020 SCC OnLine NCLAT 399) wherein it was pointed out at Para 22 that "……****.Part II of I & B Code deals with "Insolvency Resolution And Liquidation For Corporate Person"' & has its own set of definitions in Section 5. Section 3(10) definition of "Creditor" includes "financial Creditor", "Operational Creditor", "Decree Holder" etc. But Section 7 or Section 9 dealing with "financial Creditor" and "Operational Creditor" do not include "Decree Holder" to initiate CIRP in part II……".*

4.7.2. The Corporate Debtor further relied upon the decision of Hon'ble Tripura High Court in case of ***Shubhakar Bhowmik v. Union of India & Anr (2022 SCC OnLine Tri 208),***

however, we feel that this is no longer a good law in view of decision in case of ***Dena Bank Vs. C. Shivakumar Reddy and Anr. (2021) ibclaw.in 69 SC*** wherein it was held that default in payment of decree gives fresh cause of action**.**

4.8. We note that the Hon'ble Madras High Court in the case of ***Cholamandalam Investment and Finance Company Ltd. V. Navrang Roadlines Private Limited (O.S.A (CAD) no. 115 of 2022, following the decision of Hon'ble Supreme Court in case of Kotak Mahindra Bank (Supra)*** held at para 12 that – ***"*** *A mere perusal of the above observations of the Hon'ble Supreme Court in the decisions cited supra, shows that the liability in respect of a claim arising out of a recovery certificate issued by the DRT would be considered as "financial debt" within the ambit of Section 59(8) of Insolvency and Bankruptcy Code, 2016. It has also held that the underlying claim of the Bank/Claimant under the lending documents would have to be categorised as a "financial debt" under Insolvency and Bankruptcy Code, 2016. Therefore, a recovery certificate issued in respect of the same claim, which is essentially a crystallization of the claim through the process of adjudication, had also be classified as a "financial debt" under Insolvency and Bankruptcy Code, 2016. Consequently, the nature of the underlying claim of the creditor, would determine the categorisation of the amount payable under the final decree passed adjudication of the same claim. The liability arising out of an arbitral award or a court decree would be categorised as either financial or operational debt depending on the nature of the underlying claim which stands crystallised through the arbitral or court*

proceedings".

From the perusal of the decisions, as discussed in aforesaid para(s), we find that the nature of the debt due under decree would depend on the nature of transaction from which the decretal debt has arisen. Accordingly, before proceeding any further, we consider it imperative to first examine the nature of principal transaction i.e. subscription to CCPS by the Applicant.

4.9. Section 5(8) of the Code contains the definition of Financial Debt, which reads as under –

(8) "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 dematerialised equivalent;

(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;

Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(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;

4.10. From the above, we note that definition of Financial debt is inclusive and a debt to fall under the definition of Financial debt should have been disbursed against the consideration for time value of money. The debt is defined u/s 3(11) of the Code

to mean "*a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt*". The Corporate debtor has pleaded that Applicant was allotted CCPS in consideration of the amounts paid by it to the Corporate Debtor; such CCPS carry no coupon rate; ARSSHA & SSHA does not contemplate payment of any return on such CCPS by the Corporate Debtor; and the subscribed instrument, being a convertible instrument, there was no obligation or liability of the Corporate Debtor to make any payment against such CCPS at the time of Exit by the Applicant.

4.10.1. At this juncture, we find that the Hon'ble Supreme Court has considered "*whether interest free term loan are financial debt*?" in the case of **M/s. Orator Marketing Pvt. Ltd. Vs. M/s. Samtex Desinz Pvt. Ltd. (2021) ibclaw.in 68 SC**, It was held that –

"21. The definition of 'financial debt' in Section 5(8) of the IBC has been quoted above. Section 5(8) defines 'financial debt' to mean "a debt along with interest if any which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest, as per Section 5(8) (a) of the IBC. The definition of 'financial debt' in Section 5(8) includes the components of sub-clauses (a) to (i) of the said Section.

22. The NCLT and NCLAT have overlooked the words "if any" which could not have been intended to be otiose. 'Financial debt' means outstanding principal due in respect of a loan and would

also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLAT and NCLT have failed to notice clause(f) of Section 5(8), in terms whereof 'financial debt' includes any amount raised under any other transaction, having the commercial effect of borrowing.

……"

4.10.2. In the present case, the Corporate Debtor drew our attention to the fact that the CCPS does not stipulate any coupon rate. The Applicant drew our attention to the contents of the Term Sheet entered into amongst the parties to ARSSHA and submitted that this clearly stipulates IRR @ 17%. The Ld. Counsel for the Corporate Debtor has not denied the existence of this term sheet, however, she contended that this document came into existence subsequently and cannot be taken into consideration to decide whether the amount in question was disbursed for time value of money or not.

4.10.3. Nonetheless, in view of the Hon'ble Supreme Court decision in case of Ornate Marketing Pvt Ltd. (Supra), we feel that absence of stipulation of regular payment of interest can not exclude a debt from the ambit of Financial Debt.

4.11. We note that debt is defined u/s 3(11) of the Code to mean "*a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt*". It is not in

dispute that the applicant must have a claim against the Corporate Debtor in terms of Section 3(10) of the Code. A claim to be considered as debt must be in nature of a liability or obligation on the part of the person against whom such claim exists.

4.11.1. On perusal of "*Exit Route*" terms contained in ARSHAA, we find that only the Promoters had the obligation to pay under all the Exit Route; the Corporate Debtor had no obligation as to repayment of the sums disbursed to it towards subscription of its CCPS and was merely a facilitator to enable the Promoters to provide an exit route to the applicant under one of option i.e. through listing of its shares; and the terms of ARSSHA does not obligate the Corporate Debtor even on default of the Promoters to pay in terms of ARSSHA. Accordingly, we feel it can not be said that the amount disbursed to the Corporate Debtor can said to be in nature of a debt in the hands of the Corporate Debtor. In case of **Hubtown Limited v. GVFL Trustee Company Private Limited (2021 SCC OnLine NCLT 31 03)**, this Tribunal held that the amount in question is not a financial debt qua Corporate Debtor in view of Put Option and we are in agreement for the reasons that Put Option does not obligates a corporate debtor to pay, accordingly, subscription to convertible instrument cannot be held to be debt qua Corporate Debtor, unless any interest or dividend thereon is claimed to be due.

4.11.2. However, as observed in preceding para, the Promoters are obligated to pay to the Applicant and take back CCPS from the Applicant against such payment. Accordingly, these sums can be held to be in nature of debt qua Promoters. This amount was disbursed to the Corporate Debtor against time value of money upon execution of ARSSHA, as the Promoters were obligated to pay the principal amount paid towards subscription to CCPS alongwith the additional amount to be determined in accordance with the formula provided in ARSSHA. The time of such payment is also clearly stipulated in ARSSHA. Merely right of representation on the Board of Corporate Debtor and the right to vote in the general meeting vested in a creditor can not convert the transaction into an investment as such right(s) are insisted upon and taken by lender(s) now a days to securitize their money. Further, the arrangement between the Applicant and the Promoters had the commercial effect of borrowing as the Promoters had raised funds, repayable upon specified tenure along with stipulated return, to fund the business of Corporate Debtor, which it were obligated to do so in capacity of Promoters and their having agreed to provide Exit Route to the Applicant caused the applicant to disburse the money to the Corporate Debtor. The promoter's obligation under Exit Route is in nature of debt having been disbursed against time value of money under Promoter's obligation to

provide Exit route and has Commercial effect of borrowing. It squarely falls under the definition of Financial Debt in terms of clause (f) of section 5(8) as it is in nature of *any amount raised by the Promoters for Corporate Debtor under a transaction having the commercial effect of a borrowing.*

4.11.3. The Ld. Counsel for the Corporate Debtor drew our attention to the FEMA Regulations, which does not allow investment in instruments, carrying promised rate of return and not convertible into the Share capital of the issuer of such instruments, except with the prior approval of Reserve Bank of India; and has also filed a letter inviting attention of Enforcement Directorate to the alleged contravention having taken place in view of fact that the Consent Award came to be passed by Arbitrator asking the Promoters and the Corporate Debtor to pay a sum of Rs. 120.00 crores determined on basis of stipulated IRR in the term sheet. We feel that the nature of a transaction is to be decided in the context of relevant statute and alleged contravention, if any taken place, or bar under FEMA can not be a ground to characterize a transaction to hold it not be in nature of a debt, if it otherwise qualifies to be so under the definition(s) of Financial Debt contained in the Code.

4.11.4. The decision in case of Pushpa Shah and Another (Supra) was reversed by Hon'ble Supreme Court though on ground of limitation, which was fairly conceded by Ld. Counsel for Applicant. We feel that it cannot be considered as a

precedent in view of it having been set-aside in whole. The decision of Hon'ble NCLAT, Chennai Bench in case of ***White Stock Limited v. Prajay Holdings Private Limited (Company Appeal (AT) (CH) (Ins) no. 271 of 2022*** is distinguishable on the facts as in that case, the Hon'ble NCLAT found that the 'Corporate Debtor' has not brought anything on record refuting that 'Debt' was not due or was paid and no 'Default' took place. In the present case, the Corporate Debtor has pleaded specifically that it had no obligation to pay in terms of ARSSHA and we agree with such assertion of the Corporate Debtor, hence it can not be said that it is in default.

4.11.5. The decision in case of ***State Bank of India v. Alstom Power Boilers Limited (Appeal no. 1116 of 2002 with Appeal (L) no. 953 of 2002)*** relied upon by the Corporate Debtor is not applicable to the case in hand as that decision was rendered on a question whether preference shareholders have a right to vote in meeting of creditors held u/s 397 of the Companies Act, 1956. We find that the Code provides its own definition of "claim", "debt" and "financial debt", hence a transaction is to be tested in accordance with such definitions only.

4.11.6. The Corporate Debtor further relied upon the NCLAT's decision in case of ***Raj Singh Gehlot Director, Ambience Priavte Limited v. Vistra (ITCL) India Limited (2022 SCC OnLine NCLAT 1431).*** We feel that this decision was

rendered relying upon decision in case of Shubankar Bhowmik (Supra) and Sushil Ansal (Supra) holding that decree is not included in the term 'Financial Debt" under the Code. However, this proposition has been settled by Hon'ble Supreme Court in Dena Bank (Supra).

4.11.7. In view of foregoing discussion, we feel that the amount paid by the Applicant to the Corporate Debtor towards subscription of Corporate debtor's CCPS are in nature of financial debt qua Promoters only.

4.12. As held in earlier Para that the amount paid for subscription of CCPS is in nature of Financial Debt qua Promoters, the question, which arises for consideration in this application, is '*Whether the Corporate Debtor can be held to be in default for an obligation of its promoters in payment of financial debt under Consent Award, wherein the Corporate Debtor has become one of obligor to pay the Award Amount in case the promoters defaults in payment thereof*?" This contention was raised specifically by the Corporate Debtor during course of hearing.

4.13. Clause 9 of the Consent Terms forming basis of the Award ("Consent Terms") uses term(s) "Promoter Respondents", "Respondent No. 2 to 5", and "Respondent No. 1", and "Respondents" while defining the obligations of each Respondent Party in clause 9 as regard payment of Exit Consideration to the "Claimants" (Applicant and 'Hirer Investors'). Respondent No. 1 is the Corporate Debtor, Respondent No. 2 to 5 are referred as "Promoters" and the

Applicant is referred as 'Claimant No. 1". The terms "Promoter Respondents" is not defined in the Consent Terms, however, we feel that it refers to Respondent No. 2 to 5 collectively.

4.13.1. We note that clause 9(ii) obliges Promoter Respondents, jointly, to pay the amount specified in Award in two tranche(s) i.e. first tranche within 9 months from date of award and second tranche within 15 months of Award. The Second Schedule to the Consent Terms specifies amount to be paid to each claimant and number of shares to be transferred by each claimant to the payer thereupon. Clause 9(ix) of the Consent Terms provides for recourse available to the claimants in case of default by Promoter Respondents. It provides that *"In the event the promoter Respondents fail to pay the remaining 50% of the First Tranche Amount along with First Tranche Default Interest to the Claimants and the HIREF Investors on before expiry of the First Tranche Grace Period or there is an Other Breach, then upon expiry of the First Tranche Grace Period or upon occurrence of any Other Breach, as the case may be, the remainder of the Decretal amount ("Balance Decretal Amount") shall become immediately due and payable and an event of default shall be deemed to have occurred, and the Claimants and HIREF Investors shall in such case be entitled to exercise all rights and remedies available to them under law or in contract to enforce their rights under these Consent Terms and Respondent Nos. 1 to 5 and/or their*

affiliates/nominees, shall be jointly and/or severally liable to pay the Balance Decretal Amount along with an interest of 15% per annum, calculated from the date on which Grace Period expires or the date on which any other Breach occurs (as applicable) till the date of payment thereof ("Balance Decretal Amount Default Interest") to the claimants and HIREF Investors shall be entitled to exercise all rights and remedies available to them under law or in contract to enforce their rights under these Consent Terms, including but not limited to execution of the Present Consent Terms/ award against the Respondent Nos 1 to 5, jointly and/or severally, against any of their assets".

4.13.2. From the perusal of the aforesaid clause, the Corporate Debtor together with Promoter Respondents was under obligation to pay the amount in default when called upon to do so by the Applicant. It is undisputed fact that neither the Promoter Respondents nor the Corporate Debtor paid any amount fallen due under the Award. We find that clause (i) of Section 5(8) of the Code includes '*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'.* As we held in preceding para, the payment of money by the Applicant to the Corporate Debtor towards subscription of CCPS in terms of 'Exit Route' is a Financial Debt in terms of section 5(8)(f) of the Code, the liability in respect of such debt arising from the guarantee/indemnity also squarely falls under 'Financial Debt'.

4.14. Having said that the corporate debtor owes a financial debt to the applicant, we shall now proceed to examine the contention of Ld. Counsel for Corporate Debtor 'whether the corporate debtor can be said to be in default for a debt, which it cannot pay without following the provisions of Companies Act, 2013 which regulates certain aspects of its affairs'. It is undisputed fact that the Corporate Debtor was called upon to pay the amounts due under the Consent award and it didn't pay; and if such payment had been made, the financial creditors were under obligation to transfer CCPS in the manner stated in Schedule to Consent Terms. In effect, the payer of the amount due under the Consent Terms was entitled to CCPS shares in the manner stated in schedule. In case of Corporate Debtor, it has the effect of Buy-back of own shares by the Corporate Debtor or in case, such CCPS vests with the Promoters, it tantamount to loan by Corporate for buying its own shares.

4.14.1. Section 67 of Companies Act, 2013 contains restriction on giving of loans by a Company for purchase of its shares and Section 68 & 70 thereof contains the provisions in relation to buy-back of own shares by a Company.

4.14.2. In the present case, if the Corporate Debtor pays the amounts due, the CCPS held by the Applicant(s) shall stands transferred to either Company or its Promoters. The effect of such transaction shall be that it would result into either (a) buy back of its own shares in first situation; or (b)

giving loans to a person for buying own shares in second situation.

4.14.3. From the bare reading of the provisions of Section 67 of Companies Act, 2013, it follows that a Company can not extend loan to any person for buying its own shares and the word "shall" employed in this section bars a Company do to so. Accordingly, the Corporate debtor could not have paid the amount stated to be due under Consent Terms and allowed the transfer of CCPS in name of its Promoters due to specific prohibition in Section 67 of the Companies Act, 2013.

4.14.4. Section 70 of the Companies Act, 2013 contains express prohibition on company to buy back its own shares and this is not relevant in the present case, as none of clause specified in Section 70(1) or violations specified in section 70(2) are attracted in this case.

4.14.5. Section 68(1) of the Companies Act, 2013 allows a Company to buy back of own shares subject to conditions specified in Sub-section (2) and (6). The buy-back is allowed out of *(a) its free reserves; (b) the securities premium account; or (c) the proceeds of the issue of any shares or other specified securities.* On perusal of the Financial Statements for the year ended immediately preceding the date of default i.e. 31.03.2021 (first tranche was payable within 9 months of date of award), it is noted from the financial statements for the year ended on 31.03.2020 & 31.03.2021

(www.mca.gov.in) that the Free reserves and Security Premium amounted to Rs.210.52 crores as on that date; it had no operating revenue since inception; it is engaged in development of one real estate project for which the funds were brought in by the applicant as subscription to CCPS; this project forms substratum of its business; it has incurred Rs. 1.92 crores only from 1.4.2018 to 31.03.21; and it has advanced a sum of Rs. 85.94 crores to its related party. It follows that the Corporate Debtor had sufficient balance in securities premium account so as to enable it to buy back its own shares i.e. CCPS. Further, the aggregate of secured and unsecured debts owed by the company as on 31.03.2021 is shown as Rs. 6.90 crores only. Accordingly, the Corporate Debtor was not disabled from buying its own shares to pay the amount due under Award even if it had the effect of buying its own shares.

4.14.6. We note that the Corporate Debtor could have bought back its own shares subject to compliance with the procedure under the Companies Act.

4.14.7. Accordingly, we feel that default has arisen in payment of financial debt qua corporate debtor.

4.15. However, it was also pleaded by the Corporate Debtor that the applicant has already filed for execution of Consent Award before Hon'ble Bombay High Court, whereunder the Bombay High Court has allowed the Applicant to take possession of Project land of the Corporate Debtor till pendency of execution

of proceedings. We find from the financial statement of the Corporate Debtor for the year ended on 31.03.2021 as available at www.mca.gov.in that the Corporate Debtor has no business other than the development of project, the Hon'ble High Court has allowed possession of Project land in favour of the applicant in the execution proceedings as interim relief. However, we also note that the Corporate Debtor has advanced to its related party and have been carrying out minimal activities for development of the project which leads to the conclusion that the Corporate Debtor requires Resolution to carry out development of its project so as to keep on going. We feel considering this fact in mind that the filing of present application u/s 7 of Code is for a resolution of the Corporate Debtor, which is intent and purport of the Code.

4.16. In the case of **Arun Kumar Jagatramka Vs. Jindal Steel & Power Limited & Anr. {Civil Appeal No.9664/2019}**, the Hon'ble Supreme Court at para 40 let down that "*These objectives can be achieved only through a purporsive interpretation which requires courts, while infusing meaning and content to its provision, to ensure that the problem which beset the earlier regime do not enter though the back door through disingenuous strategems*".

5. In view of the foregoing discussion, we feel that though the Corporate Debtor is a Financial Creditor of the Applicant and is in default, the present proceedings are for resolution of the Corporate Debtor. In view of this, this Bench is of considered view that the Petition under section

7 filed by the Financial Creditor to initiate the CIRP against the Corporate Debtor deserve to be admitted.

6. The Applicant has proposed the name of Mr. Jayesh Natvarlal Sanghrajka, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P00216/2017-2018/10416] as Interim Resolution Professional, to carry out the functions as mentioned under I&B Code and has also given his declaration that no disciplinary proceedings are pending against him.

ORDER

This Application being C.P. (IB) No. **CP (IB) No.747MB-IV/2022** filed under Section 7 of I&B Code, 2016, filed by **HDFC Ventures Trustee Company Limited**, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against **Kakade Estate Developers Private Limited**, Corporate Debtor is **Admitted**. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

I. That this Bench as a result of this prohibits:

a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.

II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to

a. such transactions as may be notified by the Central Government in consultation with any financial sector regulator;

b. a surety in a contract of guarantee to a Corporate Debtor.

IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.

V. The Financial Creditor shall deposit a sum of Rs.5,00,000/- (Rupees Five Lakh only) with the IRP to meet the expenses arising

out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

VI. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.

VII. That this Bench appoints Mr. Jayesh Natvarlal Sanghrajka, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P00216/2017-2018/10416] as an Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

VIII. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor.

IX. The Registry is directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. Compliance report of the order by Designated Registrar is to be submitted within 7 days**.**

Sd/-
Prabhat Kumar
Member (Technical)
29.03.2023

Sd/-
Kishore Vemulapalli
Member (Judicial)