

SL.No.2

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

PHYSICAL HEARING

**CORAM: JUSTICE TELAPROLU RAJANI – HON’BLE MEMBER (J)
CORAM: SHRI CHARAN SINGH - HON’BLE MEMBER (T)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 14.03.2023 AT 02:30 PM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA (IBC)/1466/2022 IA (IBC)/1465/2022 in Company Petition IB/28/2022
NAME OF THE COMPANY	IVRCL Chegapalli Tollways Ltd
NAME OF THE PETITIONER(S)	Assets Care Reconstruction Enterprises Ltd
NAME OF THE RESPONDENT(S)	IVRCL Chegapalli Tollways Ltd
UNDER SECTION	7 of IBC

ORDER

IA(IBC)/1466/2022 and IA(IBC)/1465/2022

This Applications are dismissed, vide separate orders.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - II**

**IA No.1465 of 2022
In
CP(IB) No.28/07/HDB/2022**

**under section 60(5) of
of the I&B Code, 2016**

In the matter of:

M/s. IFCI Limited
Regional Office at:
Taramandal Complex,
8th Floor, 5-9-13,
Saifabad,
Hyderabad – 500 004.

Formerly known as
The Industrial Finance Corporate Ltd (IFCI)
Established under Industrial Finance Corporation Act, 1948
Having its registered office at:
IFCI Tower, 61
Nehru Place, New Delhi – 110019.

**.. Petitioner
Financial Creditor**

VERSUS

- 1. Sutanu Sinha**
Resolution Professional for IVRCL Chengapalli
Tollways Ltd. (ICTL), having office at:
4th Floor, Duckback House 41
Shakespeare Sarani
Kolkata – 700017
West Bengal.

- 2. Asset Care Reconstruction Enterprise Ltd (ACRE)**
Having its registered office at:
MIHIR, 8-2-350/5/A/24/1

B& 2, Panchavati Colony road No.2
Banjara Hills, Hyderabad – 500034.

.. .. Respondents/
**No.1: Resolution Professional of
Corporate Debtor / IVRCL
Chengapalli Tollways Ltd**
No.2: Sole Member of the CoC

Date of order: 14.03.2023

CORAM:
JUSTICE TELAPROLU RAJANI, MEMBER (JUDICIAL)
SHRI CHARAN SINGH, MEMBER (TECHNICAL)

Counsels present:

For Financial Creditor : Shri Avinash Desai, advocate.
For respondent no.1 : Shri Pasham Mohith Reddy, advocate.
For respondent no.2 : Shri Chandhiok and Mahajan, Advocate
Heard on : 20.02.2023.

[PER: BENCH]
ORDER

This is an application filed by M/s. IFCI Limited, a Government of India company and a financial institution within the meaning of section 4A of the Companies Act, 1956. It is a petition against the Resolution Professional of the Corporate Debtor / IVRCL Chengapalli Tollways

Ltd./ respondent no.1 herein; and Asset Care Reconstruction Enterprise

Ltd/ Sole CoC Member/ respondent no.2 herein.

This application is filed with the following prayers:

“(i) Declare the rejection of IFCI’s claim vide impugned order dated 09.08.2022 (ANNEXURE-15, page 199 of the IA) issued by the respondent no.1 as arbitrary and illegal.

(ii) Consequently, direct the respondent no.1 herein, to admit the claim FORM-C dated 09.05.2022 (page 155 of the IA) submitted by the applicant herein, thereby including the applicant in the Committee of Creditors of the Corporate Debtor.”

2. CP (IB) No.28/7/ HDB/2022 has been admitted and IVRCL Chengapalli Tollways Ltd is taken into CIRP vide order dated 20.04.2022 (ANNEXURE-10, page 141-152).

3. The applicant herein is aggrieved by the impugned communication dated 09.08.2022 (ANNEXURE-15, Page 199) issued by the Resolution Professional, rejecting the claim of the applicant.

4. Briefly, the facts as mentioned in the application are as under:

- I. National Highway Authority of India, in April 2009, had invited proposals for undertaking a Project for construction, operation and maintenance of Six-Laning from Km 102.035 to Km 144.680 on Chengapalli.
- II. After receiving several bids and after appropriate scrutiny, IVRCL Limited won the bid for undertaking the above Project.

- III. That, in furtherance of the above, a Concession Agreement dated 25.03.2010 was entered into between the NHAI and ICTL for execution of the Project, subject to and on the terms and conditions set forth therein.
- IV. Based on Concession Agreement dated 25.03.2010 entered into between NHAI and IVRCL Chengapalli Tollways Limited [ICTL] (ANNEXURE-2), the Applicant (IFCI) agreed for providing financial assistance to the Corporate Debtor through Compulsorily Convertible Debentures (CCDs). Consequently, Letter of Intent (LoI)/ Sanction Letter dated 28.09.2010 was issued. The terms and conditions of Compulsorily Convertible Debentures (CCDs) were modified vide letters dated 06.12.2010, 12.04.2011, 20.05.2011 and 29.08.2011.
- V. The applicant/ Financial Creditor agreed to subscribed to compulsorily Convertible Debentures (CCDs) numbering 12,50,00,000 with face value of Rs.10/- each amounting to Rs. 125,00,00,000/- (Rupees one hundred and twenty five crores only) vide Debenture Subscription Agreement (DSA) dated 14.10.2011 (ANNEXURE-3).
- VI. The above Debentures were secured by the following:
- a. An unconditional and Irrevocable Corporate Guarantee of IVRCL Assets & Holding Limited, i.e., Sponsor Company.
 - b. Pledge of shares in Demat form of ICTL held by the Sponsor Company amounting to not less than 49% of the paid up equity capital of the SPV Company, to be maintained throughout the tenure of the funding.

- c. In case of enforcement of security by senior lenders of the project, IFCI would have a charge on the residuals available with the Sponsor Company.
- VII. IFCI, IVRCL and ICTL also entered into a Share Buyback Agreement dated 14.10.2011, wherein terms and conditions of buyback of CCDs subscribed by the Applicant were enshrined. That, in accordance with the above Agreement, the Applicant herein shall be entitled to but not obligated to exercise a put option on ICTL to agree to buy back of 12.5 Cr CCDs any time between the end of 3rd year and 6th year from the date of issue of CCDs and in the event of default on the of ICTL, the Applicant would be at liberty to sell the CCDs to third party. Furthermore, ICTL was also obligated to deliver to the Applicant herein an amount equal to the Buy Back price, in accordance with the instructions of IFCI.
- VIII. The applicant herein also entered into a Share Pledge Agreement dated 21.10.2011 (ANNEXURE-5) with IVRCL. As per the terms of the said Share Pledge Agreement, IVRCL confirmed the repayment obligations of ICTL herein.
- IX. In pursuance thereof the applicant herein subscribed to the proposed CCDS of ICTL and sanctioned the amount of Rs.125 crores on 09.11.2011.
- X. ICTL sought restructuring of the terms of repayment of CCDs vide its letter dated 21.11.2014 (Page 123 of the petition) and the applicant has approved restructuring of the CCD facility vide letter dated 05.12.2014 (Page 124 of the petition).

- XI. ICTL's Project has achieved Provisional Commercial Operations (PCOD) in October 2015. Since then it has been generating revenue. Still it has sought extension of time from NHAI beyond the period mentioned in the Concession Agreement. NHAI, on receipt of revised premium of Rs.59.10 crores, granted extension as sought for.
- XII. On 22.02.2017, ICTL addressed a letter dated 22.02.2017 to the applicant suggesting One Time Settlement (OTS). The applicant has agreed to the same vide its letter dated 22.03.2017, on condition that the amount of Rs.135 crores shall be paid by 31.03.2017.
- XIII. In view of default to honour the terms of OTS, the applicant addressed a letter dated 19.12.2017 to the ICTL, revoking the relief and concession granted under restructuring of CCDs. Consequently, the OTS stood withdrawn. Copies of above letters dated 22.02.2017, 22.03.2017 and 19.12.2017 are at ANNEXURE-8 (COLLY).
- XIV. Subsequent to the above revocation and in accordance with the DSA, the Corporate Guarantee of IVRCL was invoked by the Applicant. Subsequently, CIRP proceedings were initiated by SBI against IVRCL and CIRP commenced on 23.02.2018. However, as no resolution was attained, Liquidation proceedings were initiated vide NCLT order dated 26.07.2019. The applicant herein filed its claim for Rs. 663.08Cr., i.e., in relation to IVRCL's Corporate Guarantee obligations against IFCI's facilities provided to ICTL

and IVRCL Indore Gujarat Tollways Limited (IIGTL), which was admitted.

- XV. The applicant addressed a letter dated 12.10.2021 (ANNEXURE-9) to NHAI apprising the state of affairs of IVRCL and further informing about its decision to initiate recovery proceedings against ICTL. It was learnt that Lenders Consortium assigned their debt in ICTL, amounting to Rs.1001.47 crores (principal + interest), to Asset Care Reconstruction Enterprise Limited (ACRE) for a total consideration of Rs.624 crores on 10.11.2021.
- XVI. The applicant herein has filed CP (IB) No.20 of 2022 on 31.12.2021, whereas Asset Care Reconstruction Enterprise Limited (ACRE) has filed CP (IB) No.28 of 2022 to initiate insolvency proceedings against ICTL. This Tribunal vide order dated 20.04.2022 (ANNEXURE-10, Page 141) has admitted CP (IB) No.28 of 2022.
- XVII. In furtherance of the Public Announcement dated 25.04.2022 (ANNEXURE-11). The applicant herein had submitted its claims in Form-C dated 09.05.2022 (ANNEXURE-12). Respondent no.1/ Resolution Professional has sought clarifications/ additional documents vide his e-mails dated 16.05.2022, 19.05.2022 and 26.05.2022 (ANNEXURE-13). The applicant has furnished additional documents vide e-mail dated 17.05.2022, 19.05.2022 and 26.05.2022 (ANNEXURE-13).
- XVIII. Before admitting the claim of the applicant herein the Resolution Professional has issued Expression of Interest in Form-G on

08.07.2022 (ANNEXURE-14, page 173) for prospective Resolution Applicants, to submit Resolution Plan.

- XIX. Ultimately, the Resolution Professional has rejected the claim of the applicant vide e-mail dated 09.08.2022 (ANNEXURE-15, page 199).
- XX. The applicant herein sent e-mail communications dated 24.08.2022 and 30.08.2022 (ANNEXURE-16). However, respondent no.1, vide e-mail dated 26.09.2022 (ANNEXURE-17) has once again refused to consider the claims of the applicant.
- XXI. Respondent no.1 has uploaded the list of creditors of ICTL (ANNRCITR-18) on its website and the claims received upto 20.09.2022. As per the same, claim of Asset Care Reconstruction Enterprise Limited (ACRE), respondent no.2 herein is admitted at Rs.1058,49,99,727/-. Respondent no.2/ ACRE holds 99% of voting rights of the CoC of ICTL.

The applicant, to lay emphasis on the plea that Compulsorily Convertible Debt (CCD) is a 'financial debt' and not 'equity', has relied on order dated 18.01.2022 of the Hon'ble NCLAT, Delhi in SREI Multiple Asset Investment Trust Vs. IDBI Bank and others, Company Appeal No.593 of 2020.

5.Counter dated 20.01.2023 filed by respondent no.1/ Resolution Professional submits that:

- (i) The Applicant has also filed another connected application being IA No. 1466 of 2022, for interim reliefs, and the grounds raised by the Applicant in IA No. 1466 of 2022 are the same as the grounds raised in

the captioned Application, except the reliefs sought. Respondent No.1 submits that its reply in IA No. 1466 of 2022 be read as a part and parcel of the present reply, the contents/grounds of both IAs (IA. No. 1466 of 2022 and IA. No. 1465 of 2022) being the same, and Respondent No. 1 craves leave to refer to and rely upon Reply to IA. No. 1466, as and when required.

(ii) It is submitted that despite its claim being not admitted on 9 August 2022 and thereafter once again being not admitted on 26 September 2022, the Applicant has, as an afterthought, filed the captioned Application dated 30 November 2022, served upon Respondent No.1, only on 6 December 2022.

(iii) CIRP is a time bound process. Resolution of the Corporate Debtor is a complicated matter. To consider the requests received from various Prospective Resolution Applicants (PRAs), extension of time of 90 days for submission of Resolution Plan was sought, and thereafter further extension of 60 days was sought so as to complete the CIRP within 330 days from the insolvency commencement date. Respondent no.1 submits that for successful resolution of the Corporate Debtor and for maximisation of assets of the Corporate Debtor, such a belated application cannot be entertained.

(iv) There is no debt due from the Corporate Debtor as per the Agreement between the parties. Under section 3(11) of the I&B Code, 2016, ‘debt’ is defined as:

“3(11) ‘debt’ means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.”

Whereas, in the present case, as per Debenture Subscription Agreement (DSA) dated 14.10.2011 (ANNEXURE-3), obligor for repayment of amounts under Compulsorily Convertible Debentures (CCDs) was IVRCL and not ICTL. A distinction is drawn between ‘**IVRCL**’ and ‘**ICTL**’. It is contended that IVRCL is an obligor, not Corporate Debtor. ICTL is the Corporate Debtor. It is further contended that notes to the financial statements,, as elaborated below state that IVRCL was liable to meet obligations of coupon payment. Thus, when amounts as per the prevalent contract are NOT due from the Corporate Debtor, the claim of the applicant does not fall into the very definition of ‘debt. In view of the above, the amount cannot be admitted as a financial debt. Thus, ICTL/ the Corporate Debtor had no liability or obligation qua IFCI, the applicant herein.

(v) Even in para 59 of the Counter same distinction is reiterated. It is reproduced hereunder:

“59. The payment obligation in respect of the CCDs was of IVRCL, can further be seen from the proposal for the OTS made by ICTL to the applicant by its letter dated 22 February 2017 (Refer Annexure 8 to the IA at page no.129 to 131). The amounts payable under the OTS were to be raised by IVRCL through sale

of various assets owned by IVRCL, to an entity called TRIL Roads Private Limited (TRPL). The letter stated that the payment is proposed to be made at one go “on receipt of TRPL sale proceeds”. Therefore, the intent of the parties was clear that monies that IVRCL recovered from the sale of TRPL would service the OTS. This is again consistent with the terms of the Concession Agreement which does not allow ICTL to make any payment except as specifically provided in the waterfall arrangement set forth under Article 31 of the Concession Agreement.”

(vi) It is submitted that as provided under section 71(8) of the Companies Act, 2013, ICTL is bound to adhere to the terms of issuance of the CCDs provided under the DSA.

(vii) It is contended that IVRCL was the primary obligor. Clause 2.1 read with Clause 2.4 of Debenture Subscription Agreement (DSA) provides that interest of 11% p.a. was payable by the IVRCL; not by ICTL on quarterly basis till buy-back of all CCDs/ conversion of CCDs into equity in ICTL.

Under Clause 2.8 of Debenture Subscription Agreement (DSA), IVRCL is the ‘buy-back guarantor’ and was to enter into a buy-back agreement with IFCI to buy-back the CCDs as per the terms of the DSA.

(viii) IVRCL was undergoing liquidation proceedings, in which the applicant has filed Form-D, viz. Proof of claim by Financial Creditors (Exhibit-E, page 198 of the Counter) for an amount of Rs.319,40,30,054, under the Corporate Guarantee executed by IVRCL in respect of CCDs issued by ICTL. Said claim of the applicant has been admitted in full by the Liquidator of IVRCL, respondent no.1 herein, who is also the Resolution Professional of ICTL. The applicant is categorised as an unsecured Financial Creditor. Vide order dated 15.06.2022 (Exhibit-F,

page 211 of this Counter) this Tribunal has approved the sale of IVRCL as a going concern.

(ix) The applicant had taken the following enforcement actions:

- Invoked Corporate Guarantee vide its Letter of Invocation of Corporate Guarantee dated 30.01.2018 (Exhibit-G of the Counter), calling upon IVRCL to pay an amount of Rs.233,47,48,335, due as on 25.01.2018, together with interest thereon from 26.01.2018.
- Issued five notices, all dated 02.03.2018 (Exhibit-H), under section 138 of the Negotiable Instruments Act, 1881, alleging that ICTL had failed to honour the terms of One Time Settlement (OTS), calling upon ICTL to make payment of the amounts due under the Post-dated Cheques. Respondent no.1 raised certain queries vide email dated 08.06.2022 (Exhibit-I). Representative of the Corporate Debtor has replied, inter alia, vide his email dated 14.06.2022 (Exhibit-J).

However, no further actions were taken by the applicant in pursuance of the said notices under section 138 of the NI Act.

- Issued Demand Notice dated 28.05.2021 (Exhibit-K) under 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) to ICTL, IVRCL and Absorption Aircon Engineers Private Ltd. calling upon to make payment of Rs.233,47,48,335/-.

It is reiterated by respondent no.1 that the above enforcement actions undertaken by the applicant were against IVRCL.

(x) Respondent no.1 has submitted that the reasons for not admitting the claim of the applicant by respondent no.1 were furnished in the impugned communication dated 09.08.2022 (ANNEXURE-15, page 199 of the IA). Said reasons are reiterated in para 40 of the Counter, which are reproduced hereunder:

“(a) As per Debenture Subscription Agreement (DSA) dated 14.10.2011 entered between ICTL/ Corporate Debtor, IVRCL Limited (erstwhile IVRCL Assets & Holdings Limited) and IFCI, Compulsorily Convertible Debentures (CCDs) were to be treated as equity under Schedule-III of DSA. The CCDs are also approved as equity under the financial package for the Concession Agreement dated 25.03.2010 executed between ICTL/ Corporate Debtor and NHAI.

(b) The CCDs were part of equity in the project cost approved by NHAI and debt equity ratio is required to be maintained by IVRCL Limited. There was no recategorization of the CCDs from equity to debt and as stated in your email of 19 May 2022, no approval was sought from NHAI in this respect. The DSA recognises that any act in contravention of the Concession Agreement is void.

(c) Lenders consortium had approved the treatment of CCDs as equity and no approval for conversion to debt was sought from NHAI.

(d) All repayment obligations under the DSA are that of IVRCL Limited and not of ICTL/ Corporate Debtor.

(e) The notes to the balance sheets of ICTL/ Corporate Debtor also clarify that the repayment obligations are that of IVRCL Limited and not ICTL/ Corporate Debtor.

(f) The CCDs were mandatorily convertible to equity in December 2017, and only corporate actions for the conversion was pending.”

6. Reply dated 02.02.2023 filed by respondent no.2/ Asset Care Reconstruction Enterprises Limited.

(i) The application suffers from delay and laches. E-mail dated 09.08.2022 rejecting the claim of the applicant as a Financial Creditor is challenged on 30.11.2022 by way of this application, viz. three and half months after the decision.

(ii) CIRP is a time bound process. The applicant has very conveniently, after three and half months of impugned decision has approached this Tribunal without explaining the delay. Thus, the intent of the applicant is to sabotage the CIRP of the Corporate Debtor.

(iii) The CCDs, in the present case, do not constitute 'financial debt' under the IBC. It is submitted by respondent no.2 that the Resolution Professional has rejected the claim of the applicant after a thorough analysis of the documents and the case law.

(iv) As per the Debenture Subscription Agreement (DSA) dated 14th October 2011 entered between Corporate Debtor (ICTL), the Sponsor (IVRCL) and the Applicant (IFCI), CCDs were admittedly to be treated as 'Equity'. This has been specifically admitted by the counsel for the Applicant during oral arguments on IA 1466 of 2022 (**"Stay**

Application”). It is the case of the Applicant that although the CCDs were initially treated as ‘equity’ they subsequently acquired the nature of ‘financial debt’ since the conditions under the DSA were not fulfilled. It is submitted that this argument is completely untenable as this interpretation is not in accordance with the definition of ‘financial debt’ under Section 5(8) of the IBC. Section 5(8) defines ‘financial debt’ as debt along with interest which is ‘disbursed’ against consideration for time value of money. Admittedly, the CCDs were not disbursed against consideration for time value of money. This is also evident from the fact that no interest (which is the consideration for time value of money) was payable to the Applicant by the Corporate Debtor.

(v) Respondent no.2 submits that treatment of CCDs as a financial debt is not only against the definition of financial debt under section 5(8) of the Code, but also is detrimental to the secured creditor of the Corporate Debtor that was assigned loans by the Lenders Consortium. In support of its contention, respondent no.2 enclosed relevant extracts of CLA and Concession Agreement dated 25.03.2010 are at ANNEXURE R/2/2 (COLLY.) to this Reply.

(vi) In support of contention that the precedents relied on by the applicant in the following cases are not applicable to the present case, respondent no.2 refuted such parallel drawn by the applicant as under:

- SREI Multiple Asset Investment Trust Vs. IDBI Bank Ltd and others, Company Appeal (AT) (Ins) No.593 of 2020 (SREI), Hon'ble NCLAT -- The facts being materially different, this judgment does not apply to the facts of the present case.
- Narendra Kumar Maheshwari Vs. Union of India and others, 1990 (Supp) SCC 440 – No parallel can be drawn to the facts of the present case.
- Maif Investments India Pte Ltd Vs. Ind Barath Energy (Utkal) Limited, 2019 SCC Online NCLAT 825. -- Reference to this case is unfounded and does not in any way compliment the case of the applicant. In Maif Investments, the issue was whether optionally convertible debentures constituted 'financial debt. If the debenture-holder chooses not to convert the OCDs, they continue to remain debentures on which interest is payable. Hon'ble NCLAT, in para 28, holds that:

“ these were independent transactions and therefore the conversion of CCDs held in the holding

company did not result in repayment of the OCDs held in the Corporate Debtor which remained due and payable.”

Hence this judgment does not apply to the case of the applicant.

- Case before the Authority for Advance Rulings (AAT) – Income Tax 769 of 2007, 2008 SCC On Line AAR – IT – 23 -- The facts of the said ruling are different. The same cannot be relied on by the applicant. Determination, whether a CCD can be termed as a financial debt under section 5(8) of the Code can only be made by scrutinizing the nature of transaction, including the terms and conditions of the CCD, intention of the parties and the circumstances surrounding issuance of the CCD. It lacks essential ingredients of a financial debt under section 5(8) of the Code, which requires disbursal of ‘debt’ against ‘time value of money’.
- SGM Webtech Pvt Ltd. Vs. Boulevard Projects Pvt Ltd., IB 967/PB/ 2018, NCLT, Principal Bench. In this case Corporate Debtor was obligated to pay interest. In the present case sponsor was supposed to pay the interest due. Besides, CCDs in the cited case are not converted. Whereas, in the present case it stood matured for conversion on 09.11.2017, viz. prior to commencement of CIRP. Moreover from the beginning CCDS were to be treated as equity as can be witnessed from CLAs and financing agreement entered

into between the parties. Hence the cited case does not apply to the facts of the present case.

7. WRITTEN SUBMISSIONS dated 09.02.2023 filed by respondent no.1/ Resolution Professional are mostly reiteration and repetition of the contentions raised in his Counter dated 20.01.2023. The same are taken note of. Nevertheless some of the new contention are discussed hereunder:

(i) The event of default under DSA does not give any right to the applicant to recover monies from the Corporate Debtor / ICTL. Relying on Clauses 8.1 and 8.2 of Debenture Subscription Agreement, respondent no.1 submits that:

“The applicant has argued that since under Clause 8.1 of the DSA, notice could be addressed to IVRCL or ICTL, ICTL is liable to pay outstanding dues to IFCI. However, the applicant cannot skirt away from the fact that upon default, the security created becomes enforceable, which security was provided by IVRCL only.”

(ii) No security was created by ICTL in favour of IFCI, as is also seen from the filings of ICTL with the ROC, Ministry of Corporate Affairs.

(iii) The Applicant has admitted that it did not exercise its put option available to it under the DSA and has provided no reason for non-exercise of the put option.

(iv) The Applicant has admitted that the Applicant did not take any actions in furtherance to the put option available to it and has failed to produce any documents in support of its submission that such non action was at the instance of IVRCL.

(v) Applicant has already claimed its dues in the liquidation of IVRCL which are admitted

(vi) Applicant filed Form D (proof of claim form) (Refer Exhibit to the Counter Affidavit of Respondent No.1) in IVRCL's liquidation proceedings to claim an amount of INR 319,40,30,054 (under the Corporate Guarantee executed by IVRCL in respect of CCDs issued by ICTL).

8. WRITTEN SUBMISSIONS dated 09.02.2023 filed by respondent no.2/ ACR Enterprises Limited are reiteration of what has been stated in Reply dated 02.02.2023 filed by respondent no.2. However, certain additional points are discussed hereunder:

(i) In support of its contention that jural relationship between the Corporate Debtor and the applicant is not that of a debtor-creditor, respondent no.2 submits that

- Interest on CCDs is to be paid by the ‘sponsor, viz. the holding company of the CD (IVRCL) and the Corporate Debtor was not under any obligation to pay interest on the borrowing signifying absence of time value of money to the Corporate Debtor.
- On the contrary the financing plan states that the amount infused by the applicant is to be treated as equity, manifesting a relationship of an investor of the Corporate Debtor. The applicant’s relationship as an investor of the Corporate Debtor has been reinforced in Schedule-III of DSA, whereunder, in the Financial Plan, amounts infused by the applicant are treated as ‘equity’ and not debt.
- Reliance is placed on decision of the Hon’ble NCLAT in Pramod Sharma Vs. Karanaya Heartcare Pvt Ltd., Company Appeal (AT) (Ins.) No.426 of 2022, wherein it was held that share application money paid to a company where shares are not allotted does not constitute financial debt. By similar logic, simply because the CCDs in the present case were not converted into shares, this does not make the CCD amount financial debt.
- Reliance is also placed on this Tribunal,s order in IFCI Limited Vs. IVRCL Indore Gujarat Tollways Limited, CP IB

No.19/7/HDB/2022, wherein on identical facts, this Tribunal has dismissed the application, as the applicant had failed to take steps to give notice to the Corporate Debtor in that case in terms of DSA. Thus, the amount was not due and payable. Even in the present case, the applicant has failed to issue notice under Clause 8.1 of DSA. Thus, no amount is due and payable in absence of such notice.

(ii) The contention of delay and laches as was raised by respondent no.2 in its Reply dated 02.02.2023, is again pressed into service as following:

- Decision of Resolution Professional rejecting the applicant's claim was conveyed to the applicant through e-mail dated 09.08.2022. The decision was not challenged. Until this application was filed on 30.11.2022 challenging the said communication dated 09.08.2022.
- CIRP ought to have been completed by 22.10.2022, but for extension of 90 days granted by this Tribunal until 20.01.2023. Neither challenge to the impugned decision was made nor was stay sought for before 22.10.2022.

- This application was filed on 30.11.2022, viz. after completion of CIRP completion dated, viz. 22.10.2022 (before extension granted). Thus, this application is an afterthought.

9. WRITTEN SUBMISSIONS dated 20.02.2023 filed by the applicant/ Financial Creditor:

- (i) On the question whether the Financial Creditor has issued any written notice to the Corporate Debtor under Clause 8.1 of DSA articulating that the amount was due and payable, the Financial Creditor submits that the Financial Creditor has exercised its right and issued Demand Notice dated 28.05.2021 to IVRCL and ICTL, under section 13(2) of SARFAESI Act. A copy of the same is at Exhibit-K of Counter filed by respondent no.1 (page 252). In spite of that, CIRP was initiated against the Corporate Debtor. When CIRP is initiated, all the creditors claim their respective amounts against the Corporate Debtor, which phenomenon is called '*erga omnes affect*'. In this regard the Financial Creditor relies on the following decisions:

- Vidya Drolia and others Vs. Durga Trading Corporation, (2021) 2 SCC 1, wherein such phenomenon '*erga omnes affect*' was discussed.

- Indus Biotech Pvt Ltd Vs. Kotak India Venture (Offshore) Fund, 2021 SCC Online SC 268, wherein it was observed that after admission of CIRP, proceedings become in rem to which the entire body of creditors become a party. It is submitted by the Financial Creditor that even in the present case, the event of default is deemed to have arisen on the date of admission of CIRP against ICTL. Therefore, there is no need to issue written notice in order to declare the amount outstanding and payable as provided under DSA.

(ii) In support of its contention that there was no delay and laches on its part, the Financial Creditor has offered the following chronology:

20.04.2022	..	Order placing the Corporate Debtor under CIRP passed.
24.08.2022 30.08.2022	..	Applicant has issued e-mails (Annexure-16, page 201 of the IA), objecting the impugned order and furnishing additional documents substantiating its claim.
26.09.2022	..	Respondent no.1 sent e-mail (Annexure-17, Page 206 of the IA) refused to accept the Reasoning given by the applicant.
30.11.2022	..	Aggrieved by such refusal the applicant has filed the present application.

Thus, the allegation of delay is misplaced. Even otherwise, the I&B Code, 2016 does not provide any limitation period within which an

application has to be preferred before the Adjudicating Authority after refusal/ non-admission of claims by the Resolution Professional. Regulation 14(2) of CIRP Regulations allows Resolution Professional to revise the amount of claim even after it was admitted. The Financial Creditor relied on *Ghanshyam Mishra and Sons Pvt Ltd Vs. Edelweiss Asset Reconstruction Company Ltd*, (2021) 9 SCC 657.

(iii) It is submitted that CCDs were treated as equity as per DSA under Schedule-III. It is also treated as equity under the Concession Agreement with NHAI and no approval was sought from or granted by NHAI to recategorize the equity into debt. Respondents no.1 and 2 also relied on Common Loan Agreement to illustrate that the applicant herein has accepted to treat the CCDs as equity. In this regard the applicant relied on *Narender Kumar Maheshwari Vs. Union of India and others*, 1990 (Supp) SCC 440.

(iv) The applicant submits that on occurrence of default, the applicant has exercised its right and issued Demand Notice (Exhibit-K, page 252 of Counter), which crystallises its intention to recover the amount rather than converting the same into equity. Respondent no.1 in the impugned order itself accepts that corporate action was pending towards conversion of CCDs into equity. To emphasise that there is

no estoppel against law, the Financial Creditor relied on the following decisions:

- Nazir Ahmad Vs. The King Emperor, 1936 SCC Online PC 41,
- Municipal Corpn of Greater Mumbai Vs. Abhilash Lal, (2020) 13 SCC 234, and
- Krishna Rai (dead) through Legal Representative Vs. Banaras Hindu University and others, (2022) 8 SCC 713.

(v) As regards its contention that the compulsory convertible debenture is debt and not equity in the event the same has not been converted at the time of initiation of CIRP, the application submitted that Narendra Kumar Maheshwari Vs. Union of India and others, 1990 (Supp) SCC 440 does not apply to the facts of the present case. The applicant further relied on DGIR Vs. Gramophone Co. of India Ltd., 1994 SCC Online MRTPC 5, wherein it is held that:

“the question is whether convertible debentures are to be treated as equity straightway, that is, ipso facto on the issue of debentures and even before allotment. The answer must, in our humble view, be in the negative. Indisputably, in the even of the company being wound up before the allotment, the debenture holder shall be entitled to the payment of principal together with interest thereon.

.. ..”

The applicant also relied on the order of NCLT, Principal Bench in SGM Webtech Pvt Ltd Vs. Boulevard Projects Pvt Ltd., and quoted observations made therein as under:

“ when a company is in the process of winding up or company has become insolvent, as on the date of

admission, whatever is shown as debt in the books of the corporate debtor, such debt shall continue as debt.”

The applicant further relied on LMN India Ltd., 2008 SCC Online AAR-IT and quoted the following observations:

“28. There is yet another aspect. Suppose at the end of the stipulated period, the company which has issued debentures is not in a position to convert the bonds into equity shares as per the agreement or the company is wound up. The bondholders right to claim or recover the debt still survives.”

On the same issue of categorisation of compulsory convertible debentures as debt under I&B Code, 2016, the application further relied on:

- Neelkanth Township and construction pvt ltd Vs. Urban Infrastructure Trustees Limited, Company Appeal (AT) (Ins.) No.44 of 2017, Hon’ble NCLAT, Delhi Bench.
- MAIF Investments India Pvt Ltd. Vs. Ind Barath Energy (Utkal) Limited, 20119 SCC Online NCLAT 825.

(vi) Rebutting the argument of the respondent that even if ICTL was liable to repay the principal amount, it is not obliged to pay interest and thus, it is a financial debt, the applicant relied on Orator Marketing Pvt Ltd. Vs. Samtex Desinz Pvt Ltd. 2021 SCC Online SC 513.

(vii) On the point of dual claim, one before IVRCL and other before ICTL, it is submitted by the applicant that CCDs were issued by ICTL and security was provided by IVRCL by way of Corporate Guarantee.

The claim admitted in full by the Resolution Professional of IVRCL has been derived by the role of IVRCL as Corporate Debtor. Both the principal borrower and guarantor are jointly liable for payment of debt. On this point the applicant relied on Edelweiss Asset Reconstruction Company Ltd Vs. Gwalior Bypass Projects Ltd., Company Appeal (AT) (Ins.) No.1186 of 2019; and SBI Stressed Asset Management Branch Vs. Animesh Mukhopadhyay, 2021 SCC Online NCLAT 30.

10. Besides, vide MEMO dated 30.01.2023, the Financial Creditor has filed Form 26AS dated 18.01.2023, in support of the averments made in the application. The said Form evidences that the coupon payments were being paid by the Corporate Debtor towards discharge of its liability against the CCDs and the Corporate Debtor has also deducted TGDS against the said payments reflected in Form 26AS.

11. We heard Ld counsels for the applicant and respondents, perused the written statements submitted by the parties and have gone through the Case Laws and other documents presented to us for our consideration. We observe that the issue for our consideration in this case is:

“Whether Compulsory Convertible Debentures subscribed by the applicant is to be treated as Equity or Debt?”

12. To decide on this issue we have firstly taken into account the guidelines of financial regulator of the country i.e., Reserve Bank of India in this regard. CCD under question being a financial product and Applicant being a financial institution, the treatment as advised by RBI in regard to CCD carry a lot of relevance. We have gone through para 4 and sub para 4.6 of RBI Master Direction on Foreign Investment in India: (Updated up to March 17, 2022), RBI/FED/2017-18, FED Master Direction No. 11/2017-18/60 which is reproduced below :

- **4.6 Debentures: Debentures which are fully, compulsorily and mandatorily convertible are treated as equity instruments.**
- 4.6.1 Amendment of the tenor of compulsorily and mandatorily convertible debentures shall be in compliance with the Companies Act, 2013.
- 4.6.2 **Debentures which are not fully, compulsorily and mandatorily convertible are debt instruments** in terms of the notification no. S.O.3722(E) dated October 16, 2019, issued under sub-section (7) of Section 6 of FEMA. Therefore, issuance of the same are not governed under the NDI Rules.
- 4.6.3 Optionally convertible/ partially convertible debentures issued up to June 7, 2007 or for which funds were received for such issue prior to June 7, 2007 are deemed to have been issued in accordance with the NDI Rules till their original maturity. Any extension of maturity prior to June 7, 2007, by the company in accordance with the provisions of the Companies Act, 2013, will be considered as original maturity for the purpose of these rules.
- 4.6.4 **non-convertible/ optionally convertible/ partially convertible debentures, funds for which have been received after June 07, 2007, shall be treated as debt** and shall conform to External Commercial Borrowing (ECB) guidelines framed

under Foreign Exchange Management (Borrowing and Lending in Foreign Exchange) Regulations, 2018, as amended from time to time.

13. CCDs, as issued in the present case, as the name suggests, are debentures which are to be compulsorily converted into equity after a certain time period. Being of such nature, the guidelines on Foreign Direct Investment ('**FDI**') issued by Reserve Bank Of India (para 4.6) treat such CCDs as equity for the purposes of reporting to the Reserve Bank of India ('**RBI**'). The other type of debentures like Optionally Convertible Debenture, Non-Convertible Debentures etc are to be treated as Debt as per RBI guidelines. Some of the case laws produced in this case also do not deal with CCD but they pertain to the second type of debentures which are treated as Debt as per RBI guidelines also.

14. In compliance with RBI guidelines, all the important contracts / documents namely (I) **Concession Agreement** dated 25.03.2010 entered into between NHAI IFCI, IVRCL and ICTL- annexure 2 (II) **Debenture subscription agreement** dated 14.10.2011-annexure 3 (III) **Share Pledge Agreement** dated 21.10.2011 and **Share buyback agreement** dated 14.10.2011- annexure 5 executed between the parties in this case have treated CCDs as Equity. Respondents have quoted different paras of these documents to prove that CCDs were subscribed as Equity and not as Debt and the applicant's case is that, although the CCDs were initially treated as 'equity' but they subsequently acquired the nature of 'financial debt' since the conditions under the DSA were not fulfilled.

We are of the view that occurrence of default or any other happening, unless it is a part of the conditions of the contract/ agreement or later on agreed between the parties to the contract / agreement, **cannot** change its very nature from equity to debt. No such term/ condition or such agreement between the parties to change the nature of CCDs was brought to our notice. Therefore, this argument of the applicant is not sustainable.

Furthermore, these CCDs cannot acquire the status of debt on default also because interest on CCDs is to be paid by the ‘sponsor’, viz. the holding company of the CD (IVRCL) and the Corporate Debtor was not under any obligation to pay interest on the borrowing, signifying absence of time value of money to the Corporate Debtor. Respondent no 1 in para (59) of its counter has also elaborated that even after default in the OTS proposal, the payment obligation was on holding company. The relevant para is reproduced as under:

“59. The payment obligation in respect of the CCDs was of IVRCL, can further be seen from the proposal for the OTS made by ICTL to the applicant by its letter dated 22 February 2017 (Refer Annexure 8 to the IA at page no.129 to 131). The amounts payable under the OTS were to be raised by IVRCL through sale of various assets owned by IVRCL, to an entity called TRIL Roads Private Limited (TRPL). The letter stated that the payment is proposed to be made at one go “on receipt of TRPL sale proceeds”. Therefore, the intent of the parties was clear that monies that IVRCL recovered from the sale of TRPL would service the OTS. This

is again consistent with the terms of the Concession Agreement which does not allow ICTL to make any payment except as specifically provided in the waterfall arrangement set forth under Article 31 of the Concession Agreement.”

The applicant has not put forward any evidence to counter this statement.

15. The applicant has already claimed its dues in the liquidation of IVRCL on account of guarantee of IVRCL in the instant case which has already been admitted. Applicant has put its reliance on Case Law, CA (AT) 1186 of 2019 at NCLAT Delhi in EARC Ltd vs Gwalior Bypass Projects Ltd in which it is decided that FC can proceed against the principal borrower as well as Corporate Guarantor at the same time, either in CIRPs or file claims in both CIRPs. But, in this case, the basic point before deciding on multiplicity of claim is to decide whether being a CCD holder it can be treated as Corporate Debtor or not.

16. To put emphasis that CCD can be treated as Debt and in turn CCD holder can be treated as Financial Creditor, the applicant has placed its reliance on case laws ,SREI Multiple Asset Investment Trust Vs. IDBI Bank Ltd and others, Company Appeal (AT) (Ins) No.593 of 2020 (SREI), Hon’ble NCLAT and SGM Webtech Pvt Ltd vs Boulevard Projects Pvt Limited.

In SGM webtech , Hon’ble NCLAT has held that if at the time of winding up or admission of a case under IBC , if the debentures are not matured and not convertible for the period of redemption is not complete , they shall be treated as debentures and the consequence is , it will remain as debt . The conditions of this case are not applicable here as the CCDs in this case got matured before admission into CIRP. The applicant has also submitted some other case laws but most of them pertain to OCD or debentures and not to CCD which are entirely different in nature from these financial instruments.

17. Respondents have mainly relied on Hon’ble Supreme Court judgement “(1990 9supp) Supreme Court Cases 440” in Narendera Kumar Maheshwari vs Union of India and others. The relevant portion of the said judgement is reproduced below:

“A compulsory Convertible Debenture does not postulate any repayment of the principle. The question of security becomes relevant for the purpose of payment of interest on these debentures and the payment of principle only in the unlikely event of winding up. Therefore, it does not constitute a ‘debenture’ in its classic sense. Even a debenture, which is only convertible at option has been regarded as a ‘hybrid’ debenture. Any instrument which is

compulsorily convertible into shares, is regarded as an “equity” and not a loan or debt.”

This judgement of Hon’ble Supreme Court and RBI guidelines as referred above are almost on the same lines and give ample clarification that CCDs are to be treated as Equity because there is no option of repayment here and the only option is to convert them into equity. In the present case also put option was available to applicant to convert these CCDs into equity which they did not prefer to exercise.

18.Considering all the above points, Case Laws and RBI guidelines we are of the view that Compulsory Convertible Debentures subscribed by the applicant are to be treated as Equity and not as Debt. Having settled this question, the petition deserves to be dismissed, hence dismissed and the application is disposed of accordingly.

SD/-

**(CHARAN SINGH)
MEMBER (TECHNICAL)**

SD/-

**(JUSTICE TELAPROLU RAJANI)
MEMBER (JUDICIAL)**

Apoorva