

Lepakshi Knowledge Hub Pvt Ltd vs Global Emerging Markets India Ltd on 2 August, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

AT CHENNAI

APPELLATE JURISDICTION

Company Appeal (AT) (CH) (INS) No. 214 of 2022

In the matter of:

M/s. Lepakshi Knowledge Hub Pvt. Ltd.
(Shareholder of M/s. Lepakshi Heritage Wellness
Village Private Limited)
Represented by its Director, Mr. I. Karunakar Reddy
Having its registered office at S. No. 35/2, 35/1 Part,
1st Cross, Ananthapura,
Singanayakahalli Post,
Yelahanka, Bangalore,
Karnataka - 560064 Appellant

V

Global Emerging Markets India Ltd.
Registered Office at B-28,
Pushpanjali Farms Bijwasan,
New Delhi - 110061

..... Respondent No. 1

M/s. Lepakshi Heritage Wellness Village
Private Limited
Sy No. 35/2, 35/1 (Part)
1st Cross, Ananthapura,
Singanayakahalli Post,
Yelahanka, Bangalore,
Karnataka - 560064
Rep. by Interim Resolution Professional
Mr. Hemendra Paliwal
A-1901, Raheja Eternity, Thakur Village,
Kandivli East, Mumbai - 400101

..... Respondent No. 2

WITH

Company Appeal (AT) (CH) (INS) No. 214 of 2022 &
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Company Appeal (AT) (CH) (INS) No. 216 of 2022

In the matter of:

M/s. Lepakshi Knowledge Hub Pvt. Ltd.
(Shareholder of M/s. Lepakshi Science and

Technology Park Private Limited
Represented by its Director, Mr. I. Karunakar Reddy
Having its registered office at S. No. 35/2, 35/1 Part,
1st Cross, Ananthapura,
Singanayakahalli Post,
Yelahanka, Bangalore,
Karnataka - 560064 Appellant

V

Global Emerging Markets India Ltd.
Registered Office at B-28,
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M/s. Lepakshi Science and
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Sy No. 35/2, 35/1 (Part)
1st Cross, Ananthapura,
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Rep. by Interim Resolution Professional
Mr. Hemendra Paliwal
A-1901, Raheja Eternity, Thakur Village,
Kandivli East, Mumbai - 400101 Respondent No. 2

Present:

For Appellant :Mr. Y. Suryanarayana, Advocate

For Respondent No.1/ : Mr. Dhyan Chinnappa, Senior Advocate
Financial Creditor

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Respondent No.2 / :Mr. Dweep Joshi, Advocate
Resolution Professional

JUDGMENT

(Virtual Mode) Justice M. Venugopal, Member (Judicial) :

Preface (in Company Appeal (AT) (CH) (INS) No. 214 of 2022):

The Appellant / Shareholder of the 2nd Respondent / Corporate Debtor M/s.
Lepakshi Knowledge Hub Private Limited, Bangalore, Karnataka, through its
Director Mr. I. Karunakar Reddy has preferred the present Company Appeal (AT)

(CH) (INS) No. 214 of 2022 before this Appellate Tribunal, on being dissatisfied' with the 'impugned order', dated 03.06.2022, in CP(IB)/107/BB/2021, passed by the 'Adjudicating Authority', 'National Company Law Tribunal' ('NCLT'), Bengaluru Bench, in admitting the Company Petition.

2. The 'Adjudicating Authority', 'National Company Law Tribunal', Bengaluru Bench, while passing the 'impugned order' in CP(IB)/107/BB/2021 filed by the 1st Respondent/Petitioner/Financial Creditor against the 2nd Respondent/Corporate Debtor at paragraphs 9 to 12, had observed the following:

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9. ``It is not in dispute that the Respondent/Corporate Debtor executed a corporate guarantee in favour of the Financial Creditor/Petitioner guaranteeing repayment of the amount paid by the Financial Creditor/Petitioner to the Principal Borrower i.e., Lepakshi Science and Technology Park Private Limited. In C.P. (IB) No. 98/BB/2021 filed by the Financial Creditor/Petitioner against the Principal Borrower M/s. Lepakshi Science and Technology Park Private Limited, the Borrower has raised identical contentions and the said CP (IB) No. 98/BB/2021 is disposed of by this Adjudicating Authority by a separate order passed today, wherein identical contentions were answered as under:

``14. The Hon'ble Supreme Court of India in M/s. Innoventive Industries Ltd. vs. ICICI Bank & Anr. in Civil Appeal Nos.8337-8338 of 2017 observed as under: ``27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3 (12) in very wide terms as meaning non- payment of a debt once it becomes due and payable which includes non-payment of even part thereof or an instalment amount. For the meaning of ``debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a ``claim" and for the meaning of ``claim", we have to go back to Section 3(6) which defines ``claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7 (1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor.

Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4 (3), the applicant is to dispatch a copy of the application, filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

15. Section 7(5)(a) of the Code is as follows:-

"(5) Where the Adjudicating Authority is satisfied that-

(a) a default has occurred and the application under sub-

section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application."

16. As per the enunciation of law by the Hon'ble Apex Court, in an Application under Section 7 of the IBC, 2016, what is required to be seen by this Adjudicating Authority, is whether the application filed within the period of limitation and whether the Petitioner/Financial Creditor proved the debt and default thereon.

17. It is the settled principle of law that the amount given under an Inter Corporate Deposit is a financial debt. The Learned Counsel appearing for the Respondent/Corporate Debtor while not disputing the said principle, however, mainly contended that the subject Inter Corporate Deposit

was given by the Petitioner/Financial Creditor to the Respondent/Corporate Debtor as a part of the investment made and hence it cannot be treated as a financial debt and the C.P. should be dismissed. The Learned Counsel, in order to substantiate this submission drawn our attention to various Clauses of the Memorandum of Understanding dated 07.01.2012 executed between M/s. Lepakshi Knowledge Hub Private Limited and Global Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 Emerging Markets India Limited i.e., the Petitioner/Financial Creditor in the instant C.P. Accordingly, it is submitted that the true nature of the transaction was to invest in the Respondent/Corporate Debtor Company, and to purchase the shareholding. Advancing the money through the Inter Corporate Deposit was also part of the said investment scheme.

18. On the other hand, the Learned Senior Counsel appearing for the Petitioner submits that the Inter Corporate Deposit is an independent transaction and cannot be treated as part of any action or document in pursuance of the Memorandum of Understanding dated 07.01.2022 executed between the Petitioner and a third party.

19. We find force in the submissions made by the Learned Senior Counsel appearing for the Petitioner/Financial Creditor. The Memorandum of Understanding dated 07.01.2022, on which the Respondent placed reliance was admittedly executed between the Petitioner and a separate legal entity known as M/s. Lepakshi Knowledge Hub Private Limited. Further, the amount received by the Respondent/Corporate Debtor under the subject Inter Corporate Deposit dated 19.03.2022 was not for purchasing of any shares by the Petitioner in the Respondent Company. On the other hand, it was for meeting certain expenses by the Respondent/Corporate Debtor. Hence, the contention of the Petitioner in this regard is rejected. The other contention with regard to the pending Arbitration proceedings etc., have no relevance in the application u/s 7 of the IBC, 2016. The contention of the Respondent/Corporate Debtor that the Petitioner/Financial Creditor in the Balance Sheets shown the subject amount as 'other investments' but not shown as Inter Corporate Deposit and hence the C.P. is liable to be dismissed, is invalid and unsustainable, since the execution and transfer of money under the Inter Corporate Deposit was not in dispute.

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20. The Petitioner / Financial Creditor is able to prove the debt and default by placing reliance on various documents enclosed to the instant company petition.

21. The other issue for consideration is whether the present application is filed within limitation. The subject, Inter Corporate Deposit was dated 19.03.2012 and tenure of the same was for the period of 6 (six) months and was interest free during the said term. It was further provided that if the Inter Corporate Deposit is not repaid within the said term, the Corporate Debtor undertakes to repay Rs.5,00,00,000/- (Rupees Five Crores only) along with interest at the rate of 18% per annum to the Financial Creditor/Petitioner. As the Corporate Debtor admittedly not repaid the amount received under Inter Corporate Deposit within the specified period, the Financial Creditor/Petitioner recalled the Inter Corporate Deposit amount along with 18% interest from the

Corporate Debtor/Respondent vide recall letter dated 19.09.2020. The instant C.P. was filed on 13.10.2021. The Corporate Debtor/Respondent has acknowledged the receipt of Rs.5,00,00,000/- (Rupees Five Crores only) from the Financial Creditors/Petitioners in its Balance Sheets from the Financial Years 2011-2012 to 2018-2019. Hence, the C.P. is well within the period of limitation.

22. The various decisions, on which the Learned Counsel for the Respondent/Corporate Debtor placed reliance, have no relevance to the facts of the present case.

23. The application filed in the prescribed Form No.1 is found to be complete."

10. Since the debt and default against the Principal Borrower was already held to be proved and since the execution of the Corporate Guarantee by the Corporate Debtor and the invocation thereof was also proved, the instant C.P. is also liable to be admitted. Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

11. It is relevant to state here that the Hon'ble NCLAT in the case of State Bank of India vs. Athena Energy Ventures Private Limited, C.A. (AT) (Ins) No. 633 / 2020 considered its earlier judgement in Dr. Vishnu Kumar Agarwal vs. Piramal Enterprises Limited, C.A. (AT) (Ins.) No. 346/2018 and after interpreting the law, held that the Financial Creditor can simultaneously or one after another initiate CIRP against the Corporate Debtor as well as Corporate Guarantor. Hence, there is no impediment in initiating CIRP against the Respondent herein, who is the Corporate Guarantor, even after initiating the CIRP against the Principal Borrower.

12. The instant application filed in the prescribed Form No. 1 is found to be complete." and admitted the main Company Petition, by declaring 'Moratorium' and appointed an 'Interim Resolution Professional', Mr. Hemendra Paliwal, etc. Appellant's Submissions (in CA (AT)(CH)(INS) No. 214 of 2022):

3. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority', ('National Company Law Tribunal', Bengaluru Bench), while passing the 'impugned order' in CP(IB)/107/BB/2021 had failed to appreciate the real, correct ambit of its Jurisdiction in terms of Section 7 of the I & B Code, 2016 and brushed aside the aspect of 'Arbitration Proceedings' between the 'Parties', in the instant matter as an 'irrelevant one'.

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4. It is represented on behalf of the Appellant that the 'Adjudicating Authority' had failed to appreciate the rationale behind including even the disputed claim (s) in Section 7 'Application' filed under the I & B Code, 2016, has no application, in respect of the 'composite transactions', wherein the 'Adjudicating Authority' cannot single out one particular document, but is to consider the 'Bouquet of transactions in totality.

5. The Learned Counsel for the Appellant comes out with a plea that the 'Adjudicating Authority' came to the wrong conclusion that the 'Application' filed by the 1st Respondent/Financial Creditor in C.P. (IB)/ 98/BB/2021 (under Section 7 of the Code) was not barred by limitation.

6. The Learned Counsel for the Appellant strenuously contends that the 'Adjudicating Authority' had committed a factual and legal error in considering the 'ICD Agreement' dated 19.03.2012 as an independent material and not part of the larger transaction between 'Lepakshi' and the '1st Respondent'. In this connection, it is submitted on behalf of the 'Appellant' that the 'Inter-Corporate Deposit' Agreement dated 19.03.2012 was only one part of a bouquet of documents executed in furtherance of a larger transaction.

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7. According to the Learned Counsel for the Appellant the 'Memorandum of Understanding' and 'other agreements' including the 'ICD' are part of the same 'composite transaction' with the 'Memorandum of Understanding', being the Principal Agreement that it was only pursuant to the 'Memorandum of Understanding' that the subject land was transferred from the 'Appellant' to the 'Corporate Debtor' and 'LHW', that the amount of Rs.5 Crores advanced was part of the series of reciprocal promises that were to be performed between the parties and the amount was not advanced by the 1st Respondent in its capacity as a 'Bank' or 'Financial Institution' and that it was the 1st Respondent who abandoned all its obligations after complying firstly with the payment of Rs.5 Crores, that the 1st Respondent had not paid a single rupee of the promised Rs.238.5 Crores after the land was transferred to the Corporate Debtor and LHW and deliberately backed out from the transaction and that it was the 1st Respondent's own stand was that the Rs.5 Crores was a short term arrangement to be adjusted in the sum, to be paid by it, all of these were placed before the 'Adjudicating Authority' and substantiated with documentary record by the Corporate Debtor. However, these facts were not taken into account by the 'Adjudicating Authority' at the time of passing the 'impugned order'. Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

8. The Learned Counsel for the Appellant points out that the 'Adjudicating Authority' had failed to apply the decision of the Hon'ble Supreme Court of India in Indus Biotech (P) Ltd. V Kotak India Venture (Offshore) Fund, reported in [2021] 6 SCC at page 436.

9. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' had wrongly held that the 1st Respondent's Application was within limitation, by incorrectly placing reliance on the Balance Sheets for the Financial Years 2011-2012 to 2018-2019. In this regard, the stand of the Appellant is that the Corporate Debtor had cogently explained as to how Rs.5 Crores continued as a mere balancing entry to balance the asset side entry towards Stamp Duty amounting to Rs.5 Crores which is an irreversible one. In fact, after the Financial Year 2016-2017, the note at the end of the liability was specifically modified, removing any reference to the 'Inter-Corporate Deposit' or 'Interest'.

10. The categorical plea of the Appellant is that there is nothing in the Balance Sheet 3 years before the Petition which constitute a Written Acknowledgement of Debt satisfying the requirements of Section 18 of the Limitation Act, 1963.

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11. The Learned Counsel for the Appellant points out that the 'Adjudicating Authority' had failed to take into account and appreciate that in the eight years, since the 'Memorandum of Understanding' and till the belated filing of malicious litigation, the 1st Respondent/Financial Creditor had not addressed a single communication qua the 'Inter- Corporate Deposit' and further, that the 1st Respondent deserved to be saddled with astringent penalty as per Section 65 and 75 of the I & B Code, 2016.

12. The Learned Counsel for the Appellant proceeds to point out that if an earlier Entry / Head is changed and the 'new entry' does not retain the character of old entry and the note in the old entry is removed, it constitutes a 'denial of any liability'.

13. The Learned Counsel for the Appellant submits that 1st Respondent/Financial Creditor/Petitioner, tried to hoodwink 'IPL's Resolution Professional', whereby the 1st Respondent claimed that it is 100% Shareholder of the 2nd Respondent. After the IPL's Resolution Professional cogently responded to the false claims made by the Petitioner/the 1st Respondent filed an urgent interim relief Petition before the Hon'ble High Court of Delhi which was later transferred to the 'Arbitration Tribunal' and thereafter, the Arbitration began. Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

14. The Learned Counsel for the Appellant projects a plea that even the purported document of the 'Information Utility' exhibiting the debt was registered by the 1st Respondent on 08.07.2021 after filing of the Section 7 Application under the I & B, Code, 2016 in July 2021, while litigious correspondence and the litigation was proceeding from December 2019.

15. The Learned Counsel for the Appellant submits that the 1st Respondent/Financial Creditor deliberately had not pleaded the material facts or filed any material relating to the true scope of the transaction and the penalty under Section 75 of the I & B Code, 2016, should have been imposed and further, prayed for an imposition of stringent penalty under Section 65 of the Code, to maintain the sanctity of the 'Insolvency Jurisdiction'.

16. The other contention advanced on behalf of the Appellant is that the 1st Respondent/Financial Creditor's claim before the 'Arbitration Tribunal' was not only terminated but positively dismissed and an 'Appeal' was filed by the 1st Respondent as per Section 34 of the Arbitration and Conciliation Act, 1996, and therefore, unless the Hon'ble High Court set aside the 'Award', the 1st Respondent is legally precluded from claiming the amounts.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 1st Respondent's/Financial Creditor's/Petitioner's Contentions(in CA (AT)(CH) (INS) Nos. 214 and 216 of 2022:

17. The Learned Counsel for the 1st Respondent/Financial Creditor submits that the 1st Respondent had executed an 'Inter-Corporate Deposit' Agreement dated 19.03.2012 with the 2nd Respondent (M/s. Lepakshi Science and Technology Park Private Limited), in and by which a sum of Rs.5 Crores only was advanced to the 2nd Respondent (M/s. Lepakshi Science and Technology Park Private Limited) has a 'Short Term Loan' and that the term of this 'Inter-Corporate Deposit' was 6 months, which was repayable on demand thereafter with an interest at 18% per annum.

18. Also, it is brought to the notice of this 'Tribunal' that the 1st Respondent/Financial Creditor 'as security' towards the grant of the aforesaid 'Short Term Loan' had secured a 'Corporate Guarantee' being executed by the 2nd Respondent (M/s. Lepakshi Heritage Wellness Village Private Limited) in CA (AT) (CH) (INS) No. 214 of 2022.

19. It is represented on behalf of the 1st Respondent that the 2nd Respondent (M/s. Lepakshi Science and Technology Park Private Limited) in spite of the issuance of Notice dated 19.09.2020 through which the Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 aforesaid 'Inter-Corporate Deposit' was recalled had failed to pay the said amount, together with interest, aggregating in all, Rs.25,84,94,300/-, as on the date of filing of an 'Application'/'Petition' under Section 7 of the I & B Code, 2016, in CP(IB)/107/BB/2021, on the file of the 'Adjudicating Authority' ('National Company Law Tribunal', Bengaluru Bench).

20. The Learned Counsel for the 1st Respondent submits that the 2nd Respondent (M/s. Lepakshi Science and Technology Park Private Limited) and the Appellant (M/s. Lepakshi Knowledge Hub Private Limited - Project Proponent) (i) had not disputed or denied the execution of the Inter-Corporate Deposit and the Corporate Guarantee (ii) the receipt of a sum of Rs.5 Crores of the Inter-Corporate Deposit (iii) the receipt of Recall Notice dated 19.09.2020 and (iv) non-payment of Inter-Corporate Deposit sum together with interest.

21. It is the categorical stand of the 1st Respondent/Financial Creditor that the 'Inter-Corporate Deposit' sum was recorded as a 'liability' in all the 2nd Respondent's Financial Statements from the Year 2012 till its recent filings in the Year 2019 and further that the 'Default' on the 'Inter-Corporate Deposit Amount' and accrued interest was reflected in the record of the Information Utility relating to R2/M/s. Lepakshi Science and Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 Technology Park Private Limited) - L1 in CA (AT) (CH) (INS) No. 216 of 2022 and R2 / M/s. Lepakshi Heritage Wellness Village Private Limited) - L2 in CA (AT) (CH) (INS) No. 214 of 2022.

22. The Learned Counsel for the 1st Respondent/ Financial Creditor points out that the 'Borrower' in its Balance Sheet filed with the 'Ministry of Corporate Affairs' for the Financial year 2011-2012 to 2018-2019 had admitted the 'liability' in respect of the Financial Creditor and further that the 'Outstanding Interest' payable on the 'unpaid debt' sum, as on 26.06.2021, by the 'Corporate

Debtor' amounts to Rs.20,84,94,000/- and added further the Compound Interest at the rate of 18% was payable from 21.09.2012.

23. The specific plea of the 1st Respondent/Financial Creditor is that 'Inter-Corporate Deposit' is a 'contract' executed with a 'Party' (M/s. Lepakshi Science and Technology Park Private Limited - L1), which is legally distinct from the 'Appellant/Parent Company' and the same applies to the execution of the 'Corporate Guarantee' as well (M/s. Lepakshi Heritage Wellness Village Private Limited - L2). Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

24. The Learned Counsel for the 1st Respondent/Financial Creditor points out that nothing in the 'Memorandum of Understanding' or in any 'document' produced by the Appellant states the foundation of the fact that the 'Inter-Corporate Deposit' was a Short Term Loan executed with M/s. Lepakshi Science and Technology Park Private Limited (L1) and guaranteed by M/s. Lepakshi Heritage Wellness Village Private Limited (L2) that was meant to be repaid with interest. In short, the 1st Respondent/Financial Creditor's plea is that the success or failure of the transaction contemplated with the Appellant as per the 'Memorandum of Understanding' signed with M/s. Lepakshi Knowledge Hub Private Limited (Appellant) and L1 and L2 are not 'Parties' to the said 'Memorandum of Understanding', therefore, the 'Memorandum of Understanding' can have no bearing on M/s. Lepakshi Science and Technology Park Private Limited (L1's) 'liability' to repay the 'Inter- Corporate Deposit' sum with interest.

25. The submission of the 1st Respondent/Financial Creditor is that the 'Inter-Corporate Deposit' sum together with 'Interest' constitute a 'Financial Debt', as per Section 5 (8) of the Code and its non-payment by M/s. Lepakshi Science and Technology Park Private Limited (L1) constitutes an 'event of default', in terms of Section 3 (12) of the Code. Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

26. The Learned Counsel for the 1st Respondent/Financial Creditor contends that all the shares of the 2nd Respondent/Company had pledged as 'security' and continued to remain in the custody of the 'Escrow Agent' (IndusInd Bank) and further subjected to protective orders passed by the Hon'ble High Court of Delhi. In reality, the 'Escrow Account' held with 'IndusInd Bank' is still 'active' and 'operational', thereby, making it evident that the Appellant's position that it considered the 'Memorandum of Understanding' had lapsed or terminated is a false one.

27. Expatiating his submission, the Learned Counsel for the 1st Respondent/Financial Creditor projects an argument that the 'Nominee Director' of the 1st Respondent, as per the terms of the 'Memorandum of Understanding' Mr. Gulshan Jhurani, remained Director of the 2nd Respondent/Company till the passing of the 'impugned order' and he had filed an 'Affidavit' in January 2022, wherein at paragraphs 2 to 5, he had averred as under:

2. 'That on 19.03.2012, Global Emerging Markets Ltd and Lepakshi Science and Technology Pvt Ltd had executed an Inter Corporate Deposit (ICC) by which a loan amount to the tune of Rs.5 Crore was forwarded to M/s. Lepakshi Science and

Technology Park Pvt Ltd. The term of ICD was set as 06 months with an interest of 18% per annum till repayment date.

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3. Further on 29.03.2012, Lepakshi Heritage Wellness Village Pvt Ltd had executed a corporate guarantee in favour of Global Emerging Markets Ltd guarantying repayment of amount transferred to M/s. Lepakshi Science and Technology Park Pvt Ltd.

4. I state that the amount received through ICD was used for payment of stamp duty for transfer of 2000 acres of Land to Lepakshi Science and Technology Park Pvt Ltd and 650 acres of Land to Lepakshi Heritage Wellness Village Pvt Ltd.

5. I confirm that the transfer of Rs.5 Crore was a short-term Loan disbursed to Lepakshi Science and Technology Park Pvt Ltd for which M/s. Lepakshi Heritage Wellness Village Pvt Ltd had guaranteed repayment and therefore it also reflects as ``Other Financial Liabilities" in the books of accounts of both the companies."

28. The Learned Counsel for the 1st Respondent submits that neither the `Memorandum of Understanding' nor the `Inter-Corporate Deposit' document or the `Corporate Guarantee' refer to any `forfeiture Clause' or `any adjustment of the Inter-Corporate Deposit Sum' in final payment to be made to the 2nd Respondent. That apart, there is no written (or) verbal communication (or) any legal document executed between the `Parties' on such `Adjustments' / `Forfeiture'.

29. The Learned Counsel for the 1st Respondent/Financial Creditor submits that the proceedings in `Indus Biotech' case arose in the context Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 of the Respondent seeking to initiate `Insolvency' on account of the `Petitioner' failing to effect payment of a sum on redemption of `Optional Convertible Redeemable Preference Shares', Viz. an `Equity Instrument'. However, in the instant case on hand, no such or similar facts exists. Furthermore, in the instant case, there is enough material to exhibit that a `Default' had in fact took place.

30. The Learned Counsel for the 1st Respondent/Financial Creditor comes out with a stance that the `Existence of any Suit' or `Proceeding' between the `Parties' is no fetter to the admission of an `Application' under Section 7 of the I & B Code, 2016, and in fact, an `Adjudicating Authority' is only to examine whether there exists a `Financial Debt' which was defaulted upon.

31. It is the version of the 1st Respondent/Financial Creditor that the `Appellant', M/s. Lepakshi Science and Technology Park Private Limited (L1) and M/s. Lepakshi Heritage Wellness Village Private Limited (L2) had neither `repaid the 1st Respondent/Financial Creditor' when demanded nor sought for `Termination' of the `Memorandum of Understanding' by making `requisite payments' and seeking `Release of Shares'.

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32. The other plea taken on behalf of the 1st Respondent/Financial Creditor is that it is the 1st Respondent/Financial Creditor who had showed restraint by not taking immediate coercive steps for recovery of its dues, despite the fact that the 'Enforcement Directorate' had launched criminal investigations into the 'Appellant / Company's Affairs' and its 'Associated Entities'.

Evaluation (in CA (AT)(CH) (INS) No. 214 of 2022:

33. It is pertinent to point out by this 'Tribunal' in the 'Application' in C.P.(IB)/107/BB/2021 filed by the 1st Respondent/Financial Creditor before the 'Adjudicating Authority' ('National Company Law Tribunal', Bengaluru Bench), under Section 7 of the I & B Code read with Rule 4 of the Insolvency, Rules, 2016, under 'Column Part IV', 'Particulars of Financial Debt', it is mentioned as under:

1. Total amount of debt granted date(s) • On 29.03.2012 Lepakshi Heritage of Disbursement Wellness Village Pvt Ltd ('Corporate Debtor') had executed a corporate guarantee ('Guarantee') in favour of the Financial Creditor guarantying repayment of the amount transferred by the Financial Creditor to Lepakshi Science and Technology Park Private Limited ('Borrower').

• On 19.03.2012 the Financial Creditor and the Borrower had executed an Inter Corporate Deposit ('ICD') agreement by which an amount of Rs.5,00,00,000/- (Rupees Five Crores) was forwarded by the Financial Creditor to the Borrower.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 • The ICD was executed in furtherance of Memorandum of Understanding dated 07.01.2012 ('MoU') that the Financial Creditor had entered into with Lepakshi Knowledge Hub Pvt Ltd ('Project Proponent'). • Under the MoU the Financial Creditor was investing in the project undertaken by the Project Proponent.

• The Project Proponent had entered into a Memorandum of Agreement with the Government of Andhra Pradesh on 22.12.2008 ('MoA') for the purpose of setting up global knowledge hub ('Project'). By way of this MoA the government of Andhra Pradesh agreed to allot and transfer required land to the Project Proponent. Further the Project Proponent incorporated two entities i.e. the Borrower and Corporate Debtor.

• It was the understanding between the Financial Creditor and the Project Proponent in terms of the MoU that the Project Proponent was in the process of transferring 2000 acres and 650 acres of land to the Borrower and the Corporate Debtor respectively.

• Under the MoU with the Project Proponent the Financial Creditor agreed to purchase 100% equity shareholding in the Corporate Debtor and the Borrower for a total consideration of

Rs.2,38,50,00,000/-. It was agreed that within 5 days from the date of MoU the Financial Creditor shall forward an amount of Rs.5,00,00,000/- (Rupees Five Crores) to the Borrower through an inter corporate deposit or a similar instrument. Consequent to this the ICD was entered into.

- The purpose of the ICD was solely for payment of agreed amount of stamp duty for transfer of 2,650 acres of land from the Project Proponent to the Corporate Debtor and the Borrower.

The term of the ICD was set as 6 months with an interest of 18% per annum after the term of the ICD.

- Further on 16.04.2012 the Financial Creditor, Project Proponent and IndusInd Bank Ltd (``escrow agent") Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 entered into an escrow agreement by which the entire shares of the Corporate Debtor was deposited with the escrow agent for the benefit of the Financial Creditor as security for the ICD.

- Thereafter the Financial Creditor and Project Proponent were in discussion for entering into definitive agreements/share purchase agreement in terms of the MoU when the Project Proponent informed the Financial Creditor that the Andhra Pradesh Government had proposed to cancel the MoA given to the Project Proponent.

Consequently no definitive agreement was entered into. The Project Proponent continuously assured the Financial Creditor that all disputes will be resolved and obligations under the MoU will be honoured. At the request of the Project Proponent, the Corporate Debtor and the Borrower the Financial Creditor refrained from recalling the ICD.

- Finally the Financial Creditor was constrained to recall the ICD on 19.09.2020 when a notice was issued to the Project Proponent, Corporate Debtor and Borrower calling upon return of Rs.5,00,00,000/- along with compound interest amounting to Rs.17,97,00,000/-.

- On 07.10.2020 a joint response was received by the Financial Creditor from the Project Proponent, Corporate Debtor and Borrower denying liability on unsustainable grounds.

- It is to be noted that the Borrower has in its Balance Sheet filed with the Ministry of Corporate Affairs from the financial year 2011-12 to 2018-19 admitted to the liability towards the Financial Creditor.

2. Amount claimed to be in default and the date • The total outstanding principal amount due on which the default occurred (Attach the and payable by the Corporate Debtor stands workings for computation of amount and dates at Rs.5,00,00,000/- (hereinafter referred to of default in tabular form) as the `` Outstanding Principal Amount Due"). The Outstanding Principal Amount fell due and payable on 21.09.2012 at the end of the term of the ICD. Thereafter the ICD continued to subsist and was recalled on 19.09.2020. The liability has been acknowledged by the Borrower in its Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 Balance Sheet between the financial years 2011-12 to 2018-19.

- The outstanding interest pay unpaid amount of debts as on 26.06.2021 by the Corporate amounts to Rs.20,84,94,000/- Twenty Crores Eighty Four La Ninety Four Thousand (hereinafter referred to as ``Outstanding Interest Amount Compound Interest at the rat was payable from 21.09.2012.
- The calculation of the Outst Principal Amount and the Out Interest is provided and fil tabular format in this prese Application.
- The total amount due and pay the Corporate Debtor includi Outstanding Principal Amount Outstanding Interest Amount Rs.25,84,94,000/- (Rupees Tw Crores Eight Four Lakhs Nine Thousand Only) (also referre ``Total Amount Due and Payab The detailed tabular working provided below:

S. No.	Particulars	Amount
1	Outstanding Principal Amount Due	Rs.5,00,0
2	Compound Interest of 18% per annum on Principle Amount from 21.09.2012 till date	Rs.20,84,
	Total Amount Due and Payable	Rs.25,84,

34. Under Part V at Serial No. 8 of the `Application' in CP/(IB)/ 107/BB/2021 filed by the 1st Respondent/Financial Creditor before the Company Appeal (AT) (CH) (INS) No. 214 of 2022 &

Company Appeal (AT) (CH) (INS) No. 216 of 2022 `Adjudicating Authority', (`National Company Law Tribunal', Bengaluru Bench), it is mentioned as under:

LIST OF OTHER DOCUMENTS • Memorandum of Agreement dated ATTACHED TO THIS APPLICATION 22.12.2008 between the Government of Andhra Pradesh and Lepakshi IN ORDER TO PROVE THE Knowledge Hub Pvt Ltd the Project EXISTENCE OF FINANCIAL DEBT. Proponent THE AMOUNT AND DATE OF DETAULT: • Memorandum of Understanding dated 07.01.2012 between Financial Creditor and Lepakshi Knowledge Hub Pvt Ltd the Project Proponent.

- Inter Corporate Deposit dated 19.03.2012 executed by the Financial Creditor and Lepakshi Science and Technology Park Private Limited the Borrower.
- Guarantee dated 29.03.2012 issued by the Corporate Debtor in favour of the Financial Creditor.
- Escrow Agreement dated 16.04.2012 between the Financial Creditor.

Lepakshi Knowledge Hub Pvt Ltd the Project Proponent and IndusInd Bank Ltd.

- Balance Sheet of Lepakshi Science and Technology Park Private Limited the Borrower - from the Financial Years 2011-12 to 2018-19.
- Recall letter issued by Financial Creditor to the Corporate Debtor, Project Proponent and Borrower dated 19.09.2020.

35. Before the `Adjudicating Authority', the 2nd Respondent / Lepakshi Heritage Wellness Village Private Limited in its `Reply' had averred that it is a fully owned Subsidiary of the Appellant/ M/s. Lepakshi Knowledge Hub Pvt. Ltd.(`LKH') and it was incorporated on 26.03.2008. The Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 Lepakshi Knowledge Hub Pvt. Ltd. (`LKH') in turn, is a wholly owned Subsidiary of `M/s. Indu Projects Limited' (`IPL'), incorporated with an object to develop a World Class Project in the Backward District of Anantapur, Andhra Pradesh.

36. It is the stand of the 2nd Respondent / Lepakshi Heritage Wellness Village Private Limited that towards such an objective, the `Appellant' / `Lepakshi Knowledge Hub Pvt Ltd' (`LKH/Appellant') made an `Application' to the Andhra Pradesh Industrial Infrastructure Corporation (`APIIC'), being a `Nodal Agency', in Andhra Pradesh to provide lands for the Industrial and Infrastructural Development.

37. Indeed, the `Government of Andhra Pradesh' and the `Andhra Pradesh Industrial Infrastructure Corporation' (`APIIC') had provided around 8,848 Acres of land to the Appellant / M/s. Lepakshi Knowledge Hub Private Limited (`LKH') at Chilamattur and Gorantla in Anantapur District, Andhra Pradesh. Later, the Appellant / LKH had paid the necessary sale consideration after which the `Andhra Pradesh Industrial Infrastructure Corporation' had executed numerous Sale Deeds

conveying the total land to the Appellant.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

38. According to the 2nd Respondent/M/s. Lepakshi Heritage Wellness Village Pvt. Ltd., during the Year 2011 negotiations took place between the 1st Respondent/Petitioner/Financial Creditor and the Appellant/LKH to enable the Petitioner to participate in a part of the 'Project' and it was agreed that 2650 Acres out of total land proposed to be developed by the Claimant ('subject land') would be transferred to R2 / M/s. Lepakshi Science and Technology Park Private Limited in CA (AT) (CH) (INS) No. 216 of 2022 and to R2 / M/s. Lepakshi Heritage Wellness Village Pvt Ltd in CA (AT) (CH) (INS) No. 214 of 2022, after which, the 1st Respondent/Petitioner will fully acquire the 'Equity' of the 'LST' and 'LHW' for a total consideration of Rs.238,50,00,000/- and in this regard, the Appellant / LKH and the 1st Respondent/Petitioner/Global Emerging Markets India Limited had executed a 'Memorandum of Understanding' dated 07.01.2012 ('MOU'). 'LKH', 'LST' and 'LHW' are jointly referred to as 'M/s. Lepakshi' in 'Reply'.

39. According to the 2nd Respondent / M/s.Lepakshi Heritage Wellness Village Pvt Ltd a conjoint reading of Clause 4, specifically Clause 4.1 to 4.3 will point out the 'Order of Performance', as under:

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 ``Within a period of 5 days from the execution of the MoU, Petitioner should transfer an amount of Rs. 5 crores to LST towards the cost of land transfer from LKH to LST and LHW. After the transfer of Rs.5 Crores, LKH was to transfer the subject land to LST and LHW through registered sale deeds. After the transfer of land from LKH to LST and LHW, the Petitioner was required to pay the first tranche of the sale consideration (Rs. 25 crores) along with definitive agreements towards first tranche of share purchase (26% of the paid-up shareholding of LST and LHW)."

40. Moreover, it is represented on behalf of the 2nd Respondent ('LHW') that during the Year 2012, after the execution of the 'Memorandum of Understanding', the 1st Respondent/Petitioner/Financial Creditor had transferred Rs.5 Crores to the 2nd Respondent ('LST') in CA AT (CH) (INS) No. 216 of 2022 and later the Appellant / LKH had transferred the subject land to M/s. Lepakshi Science and Technology Park Private Limited and Appellant / LHW.

41. Besides this, the next obligation on the part of the '1st Respondent/Petitioner', as per 'MOU's Order of Performance' was to transfer the initial payment towards the initial closing along with the definitive agreements. However, in spite of negotiations etc., the 1 st Respondent/Petitioner had not taken their transaction forward by performing its part of the promise and after the transfer of land from the Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 Appellant/LKH to LST and LHW, there was no further obligation to be

performed by the Lepakshi Companies before the initial closing and continuing further, it is incumbent on the part of the 1st Respondent/Petitioner to perform further steps, so that the Appellant/LKH was paid the initial payment consideration towards the transfer of the 1st tranche of shares.

42. It is projected on the side of the 2nd Respondent/LHW that the 1st Respondent/Petitioner had not come forward to pay the 1st tranche of the sale consideration and intentionally backed out from the transaction without paying the initial payment along with the definitive agreements, the parties considered the 'Transaction' as failed. Apart from this, the 1st Respondent/Petitioner and M/s. Lepakshi had entered into several ancillary agreements being 'Inter-Corporate Deposit Agreement' dated 19.03.2012, 'Corporate Guarantee' dated 29.03.2012 and an 'Escrow Agreement' dated 16.04.2012 and none of these 'Agreements' had any independent existence apart from the terms and performance of the 'Memorandum of Understanding'.

43. The 2nd Respondent/LHW in its 'Reply' had averred that Rs.5 Crores was transferred from the 1st Respondent/Petitioner/Financial Creditor to Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 the 2nd Respondent/LST in CA (AT) (CH) (INS) No. 216 of 2022 was, admittedly not towards the Share Transfer, but only towards the Cost of Land Transfer from LKH to LST and LHW. In fact, the terms of the Agreement make it very clear that the amount of Rs.5 Crores was transferred to 'LST' as cost of 'Land Transfer'. Further, it is apparent that the parties had considered Rs.5 Crores to be part of the expenses to be incurred towards the transaction, obviously subject to the payment of 'MOU' consideration by the 1st Respondent/Petitioner to the Appellant/LKH.

44. In the 'Reply' of the 2nd Respondent/LHW to the CP(IB)/ 107/BB/2021, it was averred that after the failure of 'Memorandum of Understanding', none of the parties gave any significance to the 'Memorandum of Understanding' or its 'Terms'. Further, as originally envisaged in the 'MOU' all the Directors in '2nd Respondent / LST' in CA (AT) (CH) (INS) No. 216 of 2022 were to resign and only Mr. Balaji and Mr. Gulshan Jhurani were to be on the Board of LST / LHW. But the Board of LST / LHW consistently had another Directors which demonstrate that the Parties gave no credence to the 'Memorandum of Understanding' as it had not fructified into any definitive Agreements because of '1st Respondent/Financial Creditor's non-performance.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

45. As a matter of fact, the Central Bureau of Investigation had filed a Charge Sheet dated 17.09.2013 in respect of the subject 'Project' and was followed by the 'Enforcement Directorate'

issuing a 'Provisional Attachment Order' dated 25.03.2015, attaching the total land, including the subject land in the Year 2015. Before the 'Adjudicating Authority', the 'Provisional Attachment Order' was contested followed by an 'Appeal' before the 'Appellate Authority', which is presently pending.

46. The stand of the 2nd Respondent/LHW is that the 1st Respondent/Petitioner had not addressed a single correspondence to the 'Central Bureau of Investigation' or 'Enforcement Directorate' claiming any proprietary rights of the shareholding or managerial rights in 'LST' or 'LHW'.

47. According to the 2nd Respondent / LHW, the 1st Respondent/Petitioner's own 'Balance Sheets' do not depict Rs.5 Crore as a 'Debt', but as 'other investments' (Group Companies) and further the 1st Respondent/Petitioner/Financial Creditor had not depicted any accrual of interest for the past eight years and hence, this belated 'litigation' of it, is a 'malafide one'. Apart from that, the 1st Respondent/Financial Creditor had Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 also failed to demonstrate any written acknowledgement in debt before 3 years before the instant 'Application' (filed under Section 7 of the Code), making any reference to the purported 'Inter-Corporate Deposit' in the manner that extends the time as mentioned in the 'Limitation Act'. Furthermore, the 'claim' is barred by 'Limitation'. Financial Debt:

48. To be noted, that with a view to fulfil the requirement of Section 5 (8) of the I & B Code, 2016, the financial transaction ought to be in the nature of 'Debt'. An existing obligation to pay a sum of money is the sine qua non of a 'Financial Debt'. A sum of money which is certainly and in all eventualities payable is a 'Debt' without regard to the fact whether it is payable now or at a future date.

Debt :

49. The term 'Debt' (as per Section 3 (11) of the Code) means a 'liability' or 'obligation' in respect of a 'claim' which is due from any person and includes a 'financial debt' and 'operational debt'.

50. Indeed, the term 'Debt' as defined under Section 3 (11) of the I & B Code, refers to a sum i.e., due from any person, including the 'Corporate Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 Debtor'. Also that, the words 'Employed' in the definition of 'Default' in Section 3 (12) of the Code, Viz. 'Due and Payable' means that the 'Default' must be a 'subsisting debt'. Moreover, as per Section 4 of the I & B Code, 2016, a 'Tribunal' is not required to determine the 'Default Amount'.

51. It must be borne in mind that under the I & B Code, 2016, the shift is from 'Inability to Pay' to an 'existence of default'. Undoubtedly, a 'Loan Acceptance Letter' is an evidence of 'Financial Debt'. The reason for an 'inability' of the Corporate Debtor is not to be seen by an 'Adjudicating Authority'. Admittedly, an 'Adjudicating Authority' is not a 'Civil Court' to decide the 'Violation of Contract' between the 'Parties'. Default:

52. Section 3 (11) of the I & B Code, 2016, defines 'Default' meaning non payment of 'Debt' when whole or any part or instalment of the amount of 'Debt' has become due and payable and is not (paid) by the 'Debtor' or the 'Corporate Debtor', as the case may be.

53. It cannot be forgotten that the 'gist' of any 'Debt' to be described as 'Financial Debt' is the time value of money, as borrowing is a money for 'money transaction'. In this regard, this 'Tribunal' pertinently points out Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 that the term 'Time Value' is defined to mean the 'Price' associated with the length of time that an 'Investor' must wait until an 'Investment' matures or related income is earned (vide Black's Law Dictionary - 9th Edition).

Financial Creditor:

54. A 'Financial Creditor' (as per Section 5 (7) of the Code) is any person to whom the 'Financial Debt' is owed and includes a person to whom such a 'Debt' has been legally 'assigned' or 'transferred' to. In fact, a 'Financial Creditor' is an 'individual' whose relationship with the 'entity' is a 'pure financial contract', such as a 'loan' or 'debt security'. That apart, a 'Financial Creditor' is a person who has a right to 'Financial Debt'. A 'Financial Creditor' can be either a 'Secured Creditor' or an 'Unsecured Creditor'.

Deposit:

55. Section 2 (31) of the Companies Act, 2013, defines 'Deposit' which includes any receipt of money by way of deposit or loan or in any other form by a company, but that does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India'. Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 Subsidiary Company:

56. Section 2 (87) of the Companies Act, 2013, defines 'Subsidiary Company' or 'Subsidiary' in relation to any other company (i.e., to say the 'Holding Company') means a 'Company' in which the 'Holding Company' (i) Controls the composition of the Board of Directors (or) (ii) Exercises or Controls more than one half of the (total voting power) either at its own or together with one or more of its Subsidiary Companies, etc. Inter-Corporate Deposit:

57. An 'Inter-Corporate Deposit' basically bare interest obligation by the accepting 'Organisation / Entity'. An 'Inter-Corporate Deposit' is an 'Unsecured Borrowing' by the Companies and the Financial Institutions for other 'Corporate Entities', registered under the Companies Act, 2013, dependent upon 'Personal Contracts'. A 'Corporate' having a surplus fund will lend to another 'Corporate', which is in requirement of 'Funds'. Loan & Investment by Company:

58. The term 'Loan' means a 'Lending', delivery by 'One Party' to and receipt of a 'Sum' by 'another Company' upon 'Agreement', 'express' or 'implied' to 'Repay' it with or without 'Interest'. The core feature of a Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 'Loan' is the 'Advance of Money' / any 'Article', upon an 'Undertaking'

that it shall be 'Returned' and it may or may not carry any 'Interest'.

59. Section 186 of the Companies Act, 2013, pertains to a 'Loan Investment', a 'Guarantee Security' will cover the 'Inter-Corporate Loan', 'Investment Guarantee' or 'Security'. It is to be remembered that the word 'Loan' is not defined under the Companies Act, 2013. However, Section 179 of the Companies Act, 2013 deals with the rest of the loans, 'Instrument Guarantee' or 'Security'.

Financial Statement:

60. It is clear from the definition of 'Financial Statement' read with sub-section (4) of Section 186 of the Companies Act, 2013, that the 'Disclosure of details of Loan', 'Guarantee', 'Security' and 'Investment' ought to be in 'Financial Statement' which is made at the year end.

61. In fact, the Financial Statements must reveal in Balance Sheet or Profit & Loss Account and the Cash Flow Statement, all relevant information in such manner that the financial position and the working Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 results are shown as they are existing. There should neither be an 'Overstatement' nor an 'Understatement'.

Hon'ble Supreme Court Decision:

62. At this stage, this 'Tribunal' worth recollects and recalls the Judgment of the Hon'ble Supreme Court of India in J K Industries and Another V Union of India & Others (vide Civil Appeal No. 3761 of 2007 dated 19.11.2007), wherein it is observed that "the annual financial statements should convey an overall fair view and should not give any misleading information or impression and further, the information to be disclosed should be in consonance with the fundamental accounting assumptions and commonly accepted accounting policies." Dispute:

63. As per Section 5 (6) of the Code, the word 'Dispute' includes a 'Suit' or 'Arbitration' proceedings relating to-

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty; Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

64. It is to be remembered that an 'Adjudicating Authority' under the Code only is to see whether the 'Dispute' raised is a 'plausible one'. In so far as the present case is concerned, this 'Tribunal' relevantly points out that the 2nd Respondent/M/s. Lepakshi Heritage Wellness Village Private Limited (LHW) on 29.03.2012 as 'Guarantor' had executed a 'Corporate Guarantee' to and in favour of the 1st Respondent/Petitioner/Financial Creditor ('GEM'), in and by which, in consideration of the 'Beneficiary' granting an 'Inter-Corporate Deposit' of Rs.5 Crore to the

Principal, pursuant to the 'ICD Agreement' the 'Guarantor' irrevocably and unconditionally guarantees to the 'Beneficiary' ('GEM') that due and punctual observance and performance by the Principal of all his obligations under or pursuant to the 'ICD Agreement' and agrees to pay to the 'Beneficiary' from time to time on demand all sums of money which the Principal is at any time liable to pay the 'Beneficiary' under or pursuant to the 'ICD Agreement' and which have become 'due and payable' but have not been paid such demand is made (vide Clause 3 of the 'Corporate Guarantee' dated 29.03.2012).

65. A mere perusal of the Clause 4.1 of the 'Corporate Guarantee' dated 29.03.2012 indicates that the obligation of the 2nd Respondent/Guarantor (LHW) proceeds to the effect that the obligation of the 'Guarantor' Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 contained in this Guarantee shall be in addition to and independent of every other security which the Beneficiary may any time hold in respect of any of the principles obligations under 'ICD Agreement'.

66. In fact, Clause 4.2 of the 'Corporate Guarantee' executed by the Guarantor / 2nd Respondent (LHW) to and in favour of the 1st Respondent/Financial Creditor (GEM / Beneficiary) shows that the obligations of the 'Guarantor' shall be a continuing one, etc.

67. Earlier, a 'Memorandum of Agreement' dated 22.12.2008 was executed between the 'Government of Andhra Pradesh' and the 'Appellant/Lepakshi Knowledge Hub Pvt. Ltd.' ('Project Proponent').

68. It is to be pointed out that a 'Memorandum of Understanding' dated 07.01.2012 was executed between the 'Appellant / Lepakshi Knowledge Hub Pvt. Ltd.' and the '1st Respondent / Financial Creditor / Petitioner', wherein the 'Parties' had acknowledged the terms and conditions of the transactions arrived at between them. In fact, the definitive agreement (s) shall mean the Shareholders and Share Purchase Agreement to be executed between the 'Parties' to the 'MoU', as set out in Clause 4.3. Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

69. On going through the 'Memorandum of Understanding' dated 07.01.2012 executed between the Appellant / Lepakshi and the 1st Respondent / Financial Creditor / Petitioner (GEM), it is crystalline and clear that the Appellant/Lepakshi had approached the 1st Respondent/Financial Creditor/GEM to purchase 100% of the 'Equity Shareholding of both new CO1 and new CO2 and the Appellant / GEM had agreed to purchase 100% of the entire 'Equity Shareholding' of each of new CO1 and new CO2 for a total aggregate consideration of Rs.238,50,00,000/- to be paid in tranches on the terms and conditions, mentioned therein.

70. At this juncture, this 'Tribunal' relevantly points out that on 19.03.2012, the 'Inter-Corporate Deposit' was executed by the 1st Respondent/Financial Creditor and the Borrower (Lepakshi Science and Technology Park Private Limited), wherein among other things mentioned that the 1st Respondent/GEM had agreed to forward a sum of Rs.5 Crore only through a Secured Inter-Corporate Deposit ('ICD') to Lepakshi Science and Technology Park Private Limited

(Borrower) and the said deposit shall only be used for the purpose of paying the agreed amount of stamp duty for the transfer of 2650 Acres of land from Lepakshi to LST and Lepakshi Heritage Wellness Village Pvt. Ltd. Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

71. Admittedly, the tenure of 'Inter-Corporate Deposit' dated 19.03.2012 shall be for a period of six months and the said deposit shall be 'InterestFree' during the 'Term', but if the said deposit was not repaid within the term, LST had undertaken to pay Rs.5 Crores only along with interest @ 18% per annum to the 1st Respondent/GEM, as seen from the 'ICD' dated 19.03.2012 executed between the 'Financial Creditor' and the 'Corporate Debtor'.

72. It is the well settled proposition of law that (i) the existence of 'Debt' and (ii) 'Default' are to be there for an 'admission' of an 'Application', filed under Section 7 of the I & B Code, 2016.

73. An 'interest' amounted to 'consideration' for the 'time value of money', when an amount is raised by a 'Borrower' through a 'Promissory Note' or 'Issue of Bond(s)' or 'Debenture(s)', 'Loan Stock' or 'any similar kind of instrument(s)', certainly it is a 'Financial Debt', as per definition Section 5 (8) of the I & B Code, 2016.

74. In the instant case, the reference made pertaining to the Arbitration Proceedings, etc, are not germane for deciding the 'Application' filed under Section 7 of the Code. There is no provision which bars referring to the Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 Code, if already relief was sought for or pending in another Forum. In fact, Section 238 of the I & B Code, 2016, shall have effect notwithstanding anything inconsistent therein contained in any other 'Law' for the time being in force or any instrument having effect by virtue of any such 'Law'. Besides this, to put it pinpointedly, the 'Execution and Transfer of Money' in terms of 'Inter-Corporate Deposit' cannot be disputed. Viewed in that perspective, the emphatic plea taken on behalf of the Corporate Debtor is not acceded to by this 'Tribunal'. Likewise, the stand of the Corporate Debtor that the 1st Respondent/Petitioner/Financial Creditor in its Balance Sheets from 2011-12 to 2018-19 had described the 'sum' in issue as 'other investments' but had not mentioned specifically as 'ICD', is a 'futile one', besides, the same being 'unworthy of acceptance'.

75. It is not out of place to this Tribunal to point out that the Recall Letter dated 19.09.2020 was issued by the 1st Respondent/Petitioner/Financial Creditor to the Project Proponent (M/s. Lepakshi Knowledge Hub Private Limited) and the Corporate Debtor (M/s. Lepakshi Heritage Wellness Village Private Limited).

76. It is to be pointed out that an 'Acknowledgement' is to be made before the expiry of prescribed period of limitation, in terms of Section 18 Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 of the Limitation Act, 1963. In this regard, this 'Tribunal' pertinently points out the decision of the Hon'ble Supreme Court of India in A.V. Murthy V Nagabasavanna, reported in AIR 2002 SC Page 985, wherein it is observed that if the sum borrowed by the Respondent is shown in the Balance Sheet, it may amount to an 'Acknowledgment' and the Creditor might have a fresh period of limitation, from the date of which an

`Acknowledgment' was made.

77. When the main CP (IB)/107/BB/2021 dated 05.07.2021 (vide Vol. I - Page 78, Form I - Annexure A2) was filed before the `Adjudicating Authority' (`National Company Law Tribunal', Bengaluru Bench) and when the `2nd Respondent/Corporate Debtor' had acknowledged the receipt of Rs.5 Crores, from the `1st Respondent/Petitioner/Financial Creditor' in its Balance Sheets beginning from the Financial years 2011- 12 to 2018-19 (significantly, Section 7 `Application' being filed before the `Adjudicating Authority' in the Year 2021), the `Application' in main CP (IB)/107/BB/2021 is well within the time of limitation, as held by this `Tribunal'. Therefore, the contra stand taken on behalf of the Appellant fails.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

78. In the upshot of foregoing elaborate discussions and in the light of the candid fact that the twin aspects of `Debt' and `Default' as against the `Principal Borrower'/'M/s. Lepakshi Science and Technology Park Private Limited' was established clinchingly on the side of the `1st Respondent/Petitioner/Financial Creditor' and further in the teeth of the `Corporate Guarantee' being executed by the `2nd Respondent/Corporate Debtor' (M/s. Lepakshi Heritage Wellness Village Pvt. Ltd.) to and in favour of the `1st Respondent/Petitioner/Financial Creditor' guaranteeing the repayment of the `sum' transferred by the `1st Respondent/Petitioner/Financial Creditor' to the `2nd Respondent/Borrower' (M/s. Lepakshi Science and Technology Park Pvt. Ltd.) in CP(IB)/98/BB/2021 and the factum of same being invoked was established (on the side of the 1st Respondent/Petitioner/Financial Creditor), in the present case, the view arrived at by the `Adjudicating Authority' in admitting the main CP(IB)/107/BB/2021, declaring `Moratorium' and appointing the `Interim Resolution Professional' are free from legal flaws. Resultantly, the instant `Appeal' is devoid of merits and it fails.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 Background(in Company Appeal (AT) (CH) (INS) No. 216 of 2022):

79. The Appellant / Shareholder of the 2nd Respondent / Corporate Debtor (M/s. Lepakshi Knowledge Hub Private Limited, Bangalore, Karnataka, through its Director, Mr. I. Karunakar Reddy) has preferred the present Company Appeal (AT) (CH) (INS) No. 216 of 2022, before this Appellate Tribunal, on being dissatisfied' with the `impugned order', dated 03.06.2022, in CP(IB)/98/BB/2021, passed by the `Adjudicating Authority', (`National Company Law Tribunal', Bengaluru Bench), in admitting the Company Petition.

80. The `Adjudicating Authority', (`National Company Law Tribunal', Bengaluru Bench), while passing the impugned order in CP(IB)/ 98/BB/2021 (filed by the 1st Respondent/Petitioner/Financial Creditor) against the 2nd Respondent/Corporate Debtor at paragraphs 14 to 23, had observed the following:

14. ``The Hon'ble Supreme Court of India in M/s. Innoventive Industries Ltd. vs. IICI Bank & Anr. in Civil Appeal Nos.8337- 8338 of 2017 observed as under:

27. `` The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3 (12) in very wide terms as meaning non-

payment of a debt once it becomes due and payable which Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 includes non-payment of even part thereof or an instalment amount. For the meaning of ``debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a ``claim" and for the meaning of ``claim", we have to go back to Section 3(6) which defines ``claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7 (1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub- section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4 (3), the applicant is to dispatch a copy of the application, filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the ``debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and

corporate debtor within 7 days of admission or rejection of such application, as the case may be."

15. Section 7 (5)(a) of the Code is as follows:-

``5) Where the Adjudicating Authority is satisfied that-

(a) a default has occurred and the application under sub-

section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application".

16. As per the enunciation of law by the Hon'ble Apex Court, in an Application under Section 7 of the IBC, 2016, what is required to be seen by this Adjudicating Authority, is whether the application Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 filed within the period of limitation and whether the Petitioner/Financial Creditor proved the debt and default thereon.

17. It is the settled principle of law that the amount given under an Inter Corporate Deposit is a financial debt. The Learned Counsel appearing for the Respondent/Corporate Debtor while not disputing the said principle, however, mainly contended that the subject Inter Corporate Deposit was given by the Petitioner/Financial Creditor to the Respondent/Corporate Debtor as a part of the investment made and hence it cannot be treated as a financial debt and the C.P. should be dismissed. The Learned Counsel, in order to substantiate this submission drawn our attention to various Clauses of the Memorandum of Understanding dated 07.01.2012 executed between M/s. Lepakshi Knowledge Hub Private Limited and Global Emerging Markets India Limited i.e., the Petitioner/Financial Creditor in the instant C.P. Accordingly, it is submitted that the true nature of the transaction was to invest in the Respondent/Corporate Debtor Company, and to purchase the shareholding. Advancing the money through the Inter Corporate Deposit was also part of the said investment scheme.

18. On the other hand, the Learned Senior Counsel appearing for the Petitioner submits that the Inter Corporate Deposit is an independent transaction and cannot be treated as part of any action or document in pursuance of the Memorandum of Understanding dated 07.01.2022 executed between the Petitioner and a third party.

19. We find force in the submissions made by the Learned Senior Counsel appearing for the Petitioner/Financial Creditor. The Memorandum of Understanding dated 07.01.2022, on which the Respondent placed reliance was admittedly executed between the Petitioner and a separate legal entity known as M/s. Lepakshi Knowledge Hub Private Limited. Further, the amount received by the Respondent/Corporate Debtor under the subject Inter Corporate Deposit dated 19.03.2022 was not for purchasing of any Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 shares by the Petitioner in the Respondent Company. On the other hand, it was for meeting certain expenses by the Respondent/Corporate Debtor. Hence, the contention of the Petitioner in this regard is rejected. The other contention with regard to the

pending Arbitration proceedings etc., have no relevance in the application u/s 7 of the IBC, 2016. The contention of the Respondent/Corporate Debtor that the Petitioner/Financial Creditor in the Balance Sheets shown the subject amount as 'other investments' but not shown as Inter Corporate Deposit and hence the C.P. is liable to be dismissed, is invalid and unsustainable, since the execution and transfer of money under the Inter Corporate Deposit was not in dispute.

20. The Petitioner / Financial Creditor is able to prove the debt and default by placing reliance on various documents enclosed to the instant company petition.

21. The other issue for consideration is whether the present application is filed within limitation. The subject, Inter Corporate Deposit was dated 19.03.2012 and tenure of the same was for the period of 6 (six) months and was interest free during the said term. It was further provided that if the Inter Corporate Deposit is not repaid within the said term, the Corporate Debtor undertakes to repay Rs.5,00,00,000/- (Rupees Five Crores only) along with interest at the rate of 18% per annum to the Financial Creditor/Petitioner. As the Corporate Debtor admittedly not repaid the amount received under Inter Corporate Deposit within the specified period, the Financial Creditor/Petitioner recalled the Inter Corporate Deposit amount along with 18% interest from the Corporate Debtor/Respondent vide recall letter dated 19.09.2020. The instant C.P. was filed on 13.10.2021. The Corporate Debtor/Respondent has acknowledged the receipt of Rs.5,00,00,000/- (Rupees Five Crores only) from the Financial Creditors/Petitioners in its Balance Sheets from the Financial Years 2011-2012 to 2018-2019. Hence, the C.P. is well within the period of limitation.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

22. The various decisions, on which the Learned Counsel for the Respondent/Corporate Debtor placed reliance, have no relevance to the facts of the present case.

23. The application filed in the prescribed Form No.1 is found to be complete." and finally admitted the main Company Petition, by declaring 'Moratorium' and appointed the 'Interim Resolution Professional', Mr. Hemendra Paliwal, etc. Appellant's Contentions (in CA (AT)(CH) (INS) No. 216 of 2022:

81. The Learned Counsel for the Appellant (M/s. Lepakshi Knowledge Hub Private Limited) submits that the 'Adjudicating Authority' ('National Company Law Tribunal', Bengaluru Bench) had committed an error at the time of passing the 'impugned order' on 03.06.2022 in CP(IB)/98/BB/2021 in not adverting to all the relevant materials available before it, which has resulted in serious miscarriage of justice.

82. According to the Learned Counsel for the Appellant the 'Adjudicating Authority' had failed to appreciate that the rationale behind including even 'disputed claims' in Section 7 of the I & B Code, 2016, has no applicability to the composite commercial transactions, wherein it is Company Appeal (AT) (CH) (INS) No. 214 of 2022 &

Company Appeal (AT) (CH) (INS) No. 216 of 2022 quite common that one of the terms of reciprocal promises may include a momentary advancement of money for interest.

83. The Learned Counsel for the Appellant projects an argument that the 'Adjudicating Authority' had failed to take into consideration and appreciate that in eight years, since the 'Memorandum of Understanding' and until the malicious litigation in a belated manner by the 1st Respondent/Financial Creditor/Petitioner and ought to have saddled it with the stringent penalty as per Section 65 and 75 of the I & B Code, for its malafide conduct in resurrecting a 'stale claim' by indulging in oral shopping and bench chanting, all of which had resulting in filing the 'Application' under Section 7 of the I & B Code, 2016.

84. The Learned Counsel for the Appellant takes a stand that an inclusion of a 'Disputed Claim' does not render 'disputes'/'arbitration' between the 'Parties' completely as an irrelevant one.

85. The Learned Counsel for the Appellant comes out with a plea that the 'Adjudicating Authority' came to a wrong conclusion by incorrectly placing reliance on the Balance Sheets for the Financial Year 2011-12 to 2018-2019 and completely had ignored the modification to the note at the Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 end of liability removing reference to 'Inter-Corporate Deposit' and 'Interest' from the Financial Year 2016-17.

86. The Learned Counsel for the Appellant urges before this 'Tribunal' that the 'Adjudicating Authority' should not have considered only one of the transactions, from and out of the web of documents, but examine the whole gamut of agreements/documents to come to the conclusion whether there was a 'Default' and the 'Debt' was 'due and payable'.

87. The Learned Counsel for the Appellant expatiating his submission points out that Rs.5 Crores was the cost of the 'Land Transfer' in respect of 'stamp duty and registration charges' from the 'Appellant / Lepakshi Knowledge Hub Private Limited' to the '2nd Respondent / M/s. Lepakshi Science and Technology Park Private Limited and M/s. Lepakshi Heritage Wellness Village Private Limited.

88. The clear cut stand of the Appellant is that but for the transaction and promise of the 1st Respondent/Financial Creditor/Petitioner to pay Rs.238.5 Crores there would have been no necessity to transfer the subject land from LKH to LST and LSW (requiring Rs.5 Crores) and further that after such transfer, there was no further obligation on M/s. Lepakshi and it was the 1st Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 Respondent/Financial Creditor, who was obligated to pay Rs.238.5 Crores in

tranches.

89. The other contention advanced on behalf of the Appellant is that the 1st Respondent/Financial Creditor had not paid the 'considerations' first tranche, being Rs.25 Crores and in fact, the 1st Respondent/Financial Creditor had not paid a single rupee out of the promised Rs.238.5 Crores till date. Moreover, the 1st Respondent/Financial Creditor had backed out from the transaction, possibly to disassociate from the criminal allegations. Apart from this, the 'transaction' was considered as failed and abandoned and no one considered the 'transaction' as a subsisting one.

90. The Learned Counsel for the Appellant proceeds to point out that the 'impugned order' passed by the 'Adjudicating Authority' in admitting the 'Application' filed by the 1st Respondent/Financial Creditor/Petitioner (under Section 7 of the I & B Code) is quite contra to the decision of the Hon'ble Supreme Court of India in Indus Biotech (P) Ltd V Kotak India Venture ('Offshore') Fund (2021) 6 SCC 436.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

91. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' must examine the totality of transaction to see whether 'Default' can be the only 'Irresistible Conclusion'.

92. The Learned Counsel for the Appellant brings it to the notice of this 'Tribunal' that the 2nd Respondent / M/s. Lepakshi Science and Technology Park Private Limited in its 'Reply' to CP(IB)/98/BB/2021 (filed by the 1st Respondent/Financial Creditor/Petitioner) at paragraph 16, had mentioned that 'as LST's business has been in a stand still all along without any regular operations, an entry made contemporaneous to the MoU in 2012, subsisted in the books. Any reference to the ICD qua the Rs.5 Cr. was also removed after FY 2016-17 and the Rs.5 Cr. subsisted as an 'other liability' as a balancing entry towards the cost of land transfer which was incurred as capital expenditure (occurring on the asset's side of the Respondent No. 2's Balance Sheets). It is pertinent to note that the Asset's side entry is not reversible as the Stamp Duty and Registration Charges once paid will not be returned if the transaction is cancelled. As LST incurred this expenditure purely on account of Claimant's promise to pay the initial tranche, which was, admittedly, not honoured, the entries remained as they were due to accounting compulsion'.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

93. The Learned Counsel for the Appellant advances an argument that if an earlier 'Entry / Caption' is changed and the 'New Entry' does not retained the character of an 'Old Entry' and a note in the 'Old Entry' is removed, it constitutes an 'Emphatic Denial of any Liability'.

94. The Learned Counsel for the Appellant contends that the 1st Respondent/Financial Creditor's claim before the 'Arbitral Tribunal' was not only 'terminated', but an 'Appeal' was preferred by the 1st Respondent/Financial Creditor/Petitioner under Section 34 of the Arbitration and Conciliation Act, 1996, unless the 'Hon'ble High Court' set aside the 'award', the 1st Respondent/Petitioner's claim was dismissed, the 1st Respondent/Financial Creditor is precluded from claiming the 'Sum'.

95. The Learned Counsel for the Appellant submits that the 1st Respondent/Financial Creditor had not pleaded the material facts or filed any material relating to the true ambit of transaction and that penalty as per Section 65 and 75 should have been imposed, to maintain the sanctity of the 'Insolvency Jurisdiction' from such malicious cases, aimed at arm twisting tactics.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 2nd Respondent's Contentions:

96. According to the Learned Counsel for 2nd Respondent / M/s. Lepakshi Science and Technology Park Private Limited is a fully owned subsidiary of the Appellant (LKH) and the Appellant in turn is a wholly owned subsidiary of M/s. Indu Projects Limited ('IPL') which was incorporated to develop a world class project in the backward district of Ananthapur, Andhra Pradesh. In fact, the Project was conceived as an integrated project to provide integrated infrastructural support to University Clusters, Science and Technology Parks, etc.

97. It is represented on behalf of the 2nd Respondent that the Appellant/LKH submitted an 'Application to the Andhra Pradesh Industrial Infrastructure Corporation ('APIIC') which was the Nodal Agency in Andhra Pradesh to provide lands for industrial and infrastructure development. The Government of Andhra Pradesh and Andhra Pradesh Industrial Infrastructure Corporation had provided 884 Acres of land to the Appellant at Chilamattur and Gorantla in Ananthapur District, Andhra Pradesh and later, the Appellant / LKH paid the necessary sale consideration and subsequently the Andhra Pradesh Industrial Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 Infrastructure Corporation had executed numerous Registered Sale Deeds conveying the total land to the Appellant.

98. The Learned Counsel for the 2nd Respondent points out that in the year 2011, the negotiations took place between the 1st Respondent/Financial Creditor and the Appellant to enable the 1st Respondent/Financial Creditor/Petitioner to take part in a part of the Project. It was agreed upon that 2650 Acres out of total land proposed to be developed by the Claimant (subject land) would be transferred to the 2nd Respondent/LST and M/s. LHW, after which, the 1st Respondent will acquire the Equity of LST and LHW for a total consideration of Rs.238,50,00,000/- and in this regard a 'Memorandum of Understanding' dated 07.01.2012 was executed between the Appellant and the 1st Respondent/Financial Creditor (LKH, LST and LSW).

99. The Learned Counsel for the 2nd Respondent / LST points out that the 'Memorandum of Understanding' contained an 'Order of Performance' to take forward the transaction. A cumulative reading of Clause 4.1, 4.2 and 4.3 clearly envisage :-

(i) Within a period of 5 days from the execution of the MoU, Petitioner should transfer an amount of Rs.5 Crores to LST towards the cost of land transfer from LKH to LST and LHW.

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(ii) After the transfer of Rs. 5 Crores, LKH was to transfer the subject land to LST and LHW through registered sale deeds.

(iii) After the transfer of land from LKH to LST and LHW, the Petitioner was required to pay the first tranche of the sale consideration (Rs. 25 Crores) along with definitive agreements towards first tranche of share purchase (26% of the paid-up shareholding of LST and LHW)."

100. It is the version of the 2nd Respondent/LST that in 2012, subsequent to the execution of the 'Memorandum of Understanding', the 1st Respondent/Financial Creditor/Petitioner had transferred Rs.5 Crore to the 2nd Respondent/LST. Later, the Appellant had transferred the subject land to the 2nd Respondent/LST and the Appellant.

101. Furthermore, it is the stand of the 2nd Respondent/LST that the 1st Respondent/Financial Creditor's obligation was to transfer the initial payment in respect of initial closing along with the definitive agreements and that the 1st Respondent/Financial Creditor/Petitioner had not taken the transaction forward by fulfilling its part of the promise. There was no further obligation to be performed by the Lepakshi Companies before the initial closing. Besides these, it was for the 1st Respondent/Financial Creditor to fulfil further steps, so that the Appellant was paid the initial consideration payment, in respect of the transfer of the 'First Tranche' of Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 shares and that the 1st Respondent/Financial Creditor had not chosen to pay the first tranche of sale consideration.

102. The Learned Counsel for 2nd Respondent / LST adverts to the fact that the 1st Respondent/Petitioner and M/s. Lepakshi had entered into several ancillary agreements being 'Inter-Corporate Deposit Agreement' dated 19.03.2012, 'Corporate Guarantee' dated 29.03.2012 and an 'Escrow Agreement' dated 16.04.2012. Because of the expiry of 'Memorandum of Understanding' and owing to the non performance of the 1st Respondent/Financial Creditor/Petitioner, the parties had considered that the old transaction failed and all the agreements paled into insignificance without any legal effect.

103. According to the 2nd Respondent / LST, the sum of Rs.5 Crores transferred from the 1st Respondent/Financial Creditor/Petitioner to the 2nd Respondent/LST was only in respect of the cost of land transfer from the Appellant to the 2nd Respondent/LST and the LHW. As per the stand of the 1st Respondent/Petitioner, the aforesaid Rs. 5 Crore was to be adjusted in the 'sale consideration' to be paid by the 1st Respondent/Financial Creditor/Petitioner to the 'Lepakshi' Group. Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

104. The Learned Counsel for the 2nd Respondent contends that the 1st Respondent/Petitioner had not chosen to implement the 'Memorandum of Understanding' and that the whole Project got mired in legal controversy on account of certain criminal allegations levelled against the 'Promoters of Indu Projects Limited', which culminated in filing of Charge Sheet by the Central Bureau of Investigation dated 17.09.2013 in respect of the subject Project and that a 'Provisional Attachment Order' dated 25.03.2015 was issued by the 'Enforcement Directorate' and an 'Appeal' filed before the 'Appellate Authority' is pending.

105. The Learned Counsel for 2nd Respondent / LST submits that the 1st Respondent/Petitioner had never addressed a single correspondence to the Central Bureau of Investigation or the Enforcement Directorate claiming any proprietary rights or shareholding or managerial rights in 2nd Respondent/LST or the Appellant / LKH.

106. The Learned Counsel for 2nd Respondent / LST adverts to the fact that because of the LST's business was in standstill all along, without any regular operations, an entry made contemporaneous to the 'Memorandum of Understanding' in the Year 2012 remained in the books and indeed, any reference to the 'Inter-Corporate Deposit' qua, Rs. 5 Crore was removed Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 after the Financial Year 2016-17 and that Rs.5 Crore subsisted as an 'other liability', as a 'balancing entry' in respect of the cost of land transfer which was incurred as 'capital expenditure'. Further, as the 2nd Respondent/LST had incurred this expense because of the Claimant's promise to pay the initial tranche, which was not honoured, the entries, because of the Accounting compulsion remained as they were.

107. The Learned Counsel for 2nd Respondent / LST brings it to the notice of this 'Tribunal' that no 'sale consideration' was paid till date to the Appellant from the 2nd Respondent/LST or LHW, which was to be paid from the consideration promised to be paid by the Petitioner. In reality, the sale between the Appellant, 2nd Respondent/LST and LHW itself is void and M/s. Lepakshi, because of the 'Attachment' was unable to cancel the transaction.

108. According to the 2nd Respondent / LST, the 1st Respondent/Financial Creditor/Petitioner had not depicted any interest on the 'Inter-Corporate Deposit' in its income and Rs.5 Crore was not classified as an 'ICD' in 1st Respondent/Financial Creditor's Balance Sheets having a separate caption for 'Advances' and 'Inter-Corporate Deposit's.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

109. The Learned Counsel for the 2nd Respondent / LST points out that the 1st Respondent/Financial Creditor/Petitioner never asserted any rights in regard to the validity of the 'Memorandum of Understanding' and for the first time the 1st Respondent/Petitioner wrote emails and letters to the Indu Project Limited's Resolution Professional claiming that it is 100% 'Equity Shareholders' of 'LST' and 'LHW'. In fact, the 1st Respondent/Petitioner through a Letter dated 19.09.2020, addressed to M/s. Lepakshi claimed that it is 100% Shareholder of 'LST' and 'LHW'

and that the 'Memorandum' was binding after 8 years and claimed the sum of Rs.5 Crores with 18% interest per annum, etc. As a matter of fact, the series of events and pleadings in litigation were not detailed and only some facts for the purpose of these proceedings were mentioned.

110. The Learned Counsel for 2nd Respondent / LST submits that the 1st Respondent/Petitioner had invoked the 'Arbitration' on 02.12.2020 and ultimately the 'Arbitration Tribunal' was formed and the said 'Tribunal' granted interim relief qua limited to the shares held in 'Escrow'.

111. The Learned Counsel for 2nd Respondent / LST contends that the 1st Respondent/Petitioner is not a Financial Creditor and a sum of Rs.5 Crore is neither a 'Financial Debt' nor the 1st Respondent/Petitioner is a Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 'Financial Creditor' as defined under the I & B Code, 2016. Further, the 1st Respondent/Petitioner had failed to exhibit any 'acknowledgement', in writing in respect of the 'Debt' in 3 years before the filing of Section 7 'Application' and the 'Claim' itself is without any basis and barred by limitation.

112. According to the Learned Counsel for 2nd Respondent / LST, the penalty to be imposed on the 1st Respondent/Petitioner as per Section 65 of the Code.

Assessment(in CA (AT)(CH) (INS) No. 216 of 2022:

113. This 'Tribunal' points out that in respect of the 'Application' in CP (IB)/98/BB/2021 filed by the 1st Respondent/Financial Creditor before the 'Adjudicating Authority ('National Company Law Tribunal', Bengaluru Bench), under Section 7 of the I & B Code read with Rule 4 of the Insolvency, Rules, 2016) seeking to initiate 'Corporate Insolvency Resolution Process' against the 2nd Respondent / M/s. Lepakshi Science and Technology Park Private Limited under Part IV ('Particulars of Financial Debt'), it is mentioned as under:

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

1. Total amount of debt granted date(s) • On 19.03.2012 the Financial Creditor of Disbursement and Lepakshi Science and Technology Park Private Limited ('Corporate Debtor') executed an Inter Corporate Deposit ('ICD') agreement by which an amount of Rs.5,00,00,000/- (Rupees Five Crores) was forwarded by the Financial Creditor to the Corporate Debtor • The ICD was executed in furtherance of Memorandum of Understanding dated 07.01.2012 ('MoU') that the Financial Creditor had entered into with Lepakshi Knowledge Hub Pvt Ltd ('Project Proponent') • Under the MoU the Financial Creditor was investing in the project undertaken by the Project Proponent.

• The Project Proponent had entered into a Memorandum of Agreement with the Government of Andhra Pradesh on 22.12.2008 ('MoA') for the purpose of setting up global knowledge hub ('Project'). By way of this MoA the government of Andhra Pradesh agreed to allot and transfer

required land to the Project Proponent. Further the Project Proponent incorporated two entities i.e. the Corporate Debtor herein and Lepakshi Heritage Wellness Village Pvt Ltd ("Guarantor").

- It was the understanding between the Financial Creditor and the Project Proponent in terms of the MoU that the Project Proponent was in the process of transferring 2000 acres and 650 acres of land to the Corporate Debtor and the Guarantor.

- Under the MoU with the Project Proponent the Financial Creditor agreed to purchase 100% equity shareholding in the Corporate Debtor and the Guarantor for a total consideration of Rs.2,38,50,00,000/-. It was agreed that within 5 days from the date of MoU the Financial Creditor shall forward an amount of Rs.5,00,00,000/- (Rupees Five Crores) to the Corporate Debtor through an inter corporate deposit or a similar instrument. Consequent to this the ICD was entered into.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 • The purpose of the ICD was solely for payment of agreed amount of stamp duty for transfer of 2,650 acres of land from the Project Proponent to the Corporate Debtor and the Guarantor.

The term of the ICD was set as 6 months with an interest of 18% per annum after the term of the ICD.

Further consequent to the ICD on 29.03.2012 the Guarantor had executed a corporate guarantee ("Guarantee") in favour of the Financial Creditor guarantying repayment of the amount transferred by the Financial Creditor to the Corporate Debtor.

- On 16.04.2012 the Financial Creditor, Project Proponent and IndusInd Bank Ltd ("escrow agent") entered into an escrow agreement by which the entire shares of the Corporate Debtor was deposited with the escrow agent for the benefit of the Financial Creditor as security for the ICD.

- Thereafter the Financial Creditor and Project Proponent were in discussion for entering into definitive agreements/share purchase agreement in terms of the MoU when the Project Proponent informed the Financial Creditor that the Andhra Pradesh Government had proposed to cancel the MoA given to the Project Proponent.

Consequently no definitive agreement was entered into. The Project Proponent continuously assured the Financial Creditor that all disputes will be resolved and obligations under the MoU will be honoured. At the request of the Project Proponent, the Corporate Debtor and the Guarantor the Financial Creditor refrained from recalling the ICD.

- The Financial Creditor was constrained to recall the ICD on 19.09.2020 when a notice was issued to the Project Proponent, Corporate Debtor and Guarantor calling upon return of Rs.5,00,00,000/- along with compound interest amounting to Rs.17,97,00,000/-

- On 07.10.2020 a joint response was received by the Financial Creditor from the Project Proponent, Corporate Debtor and Guarantor denying liability on unsustainable grounds.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 • It is to be noted that the Corporate Debtor has in its Balance Sheet filed with the Ministry of Corporate Affairs from the financial year 2011-12 to 2018-19 admitted to the liability towards the Financial Creditor.

2. Amount claimed to be in default and • The total outstanding principal amount the date on which the default occurred due and payable by the Corporate Debtor stands at Rs.5,00,00,000/-

(Attach the workings for computation of (hereinafter referred to as the amount and dates of default in tabular ``Outstanding Principal Amount Due"). form) The Outstanding Principal Amount first fell due and payable on 21.09.2012 at the end of the term of the ICD.

Thereafter the ICD continued to subsist and was recalled on 19.09.2020.

• The outstanding interest payable on the unpaid amount of debts as on 26.06.2021 by the Corporate Debtor amounts to Rs.20,84,94,000/- (Rupees Twenty Crores Eighty Four Lakhs Ninety Four Thousand Only) (hereinafter referred to as the ``Outstanding Interest Amount Due").

Compound Interest at the rate of 18% was payable from 21.09.2012.

• The calculation of the Outstanding Principal Amount and the Outstanding Interest is provided and filed in a tabular format in this present Application.

• The total amount due and payable by the Corporate Debtor including the Outstanding Principal Amount and the Outstanding Interest Amount stands at Rs.25,84,94,000/- (Rupees Twenty Five Crores Eight Four Lakhs Ninety Four Thousand Only) (also referred to as the ``Total Amount Due and Payable").

The detailed tabular working is provided below:

S. No. Particulars Amount 1 Outstanding Principal Rs.5,00,00,000/-

Amount Due Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 2 Compound Rs.20,84,94,000/-

Interest of 18% per annum on Principle Amount from 21.09.2012 till date Total Amount Rs.25,84,94,000/-

Due and Payable

114. In the instant case, it is pertinently pointed out by this `Tribunal' that the `Memorandum of Understanding' dated 07.01.2012 was entered into between the 1st Respondent/Financial Creditor/Petitioner and the Appellant/Lepakshi Knowledge Hub Private Limited. It is latently and patently quite clear that the money received in terms of the `Inter- Corporate Deposit' dated

19.03.2012, was to deal with the expenses of the 2nd Respondent/Corporate Debtor/LST. Because of the fact that the transfer of money as per 'Inter-Corporate Deposit' was not in controversy/disputed, the stance of the 2nd Respondent/LST that in the Balance Sheets the money in question was not described as 'Inter-Corporate Deposit', but only mentioned under the caption 'other investments' has no legs to stand, in the considered opinion of this 'Tribunal'.

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115. In so far as the pleas of the 2nd Respondent/LST pertaining to the 'Arbitration Lis', they have no bearing in deciding the Section 7 'Application' filed under the I & B Code, 2016. Since the 2nd Respondent/Corporate Debtor had not repaid the amount received as per 'Inter-Corporate Deposit' dated 19.03.2012 with interest at 18% per annum (for six months period, interest free), through a Letter dated 19.09.2020, the 1st Respondent/Financial Creditor had recalled the amount received from the 2nd Respondent/LST.

116. In the instant case, considering the fact that the receipt of Rs. 5 Crores was tacitly admitted by the 2nd Respondent/LST by way of an acknowledgement as per the Balance Sheets of the 1st Respondent/Financial Creditor for the period from 2011-12 to 2018-19, the main CP(IB)/98/BB/2021 filed by the 1st Respondent/Financial Creditor/Petitioner, before the 'Adjudicating Authority' ('National Company Law Tribunal', Bengaluru Bench), is maintainable in 'Law', based on the filing of the Petition on 06.07.2021 (vide Vol. I - Page 100; Form I in CP(IB)/98/BB/2021) and signed by the Counsel for the 1st Respondent/Financial Creditor/Petitioner dated 07.07.2021 (vide Page No.98 of Vol. I in CA (AT) (CH) (INS) No. 216 of 2022) and looking at from that angle, the main CP (IB)/98/BB/2021 is not barred by limitation. Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022

117. Be that as it may, in view of the aforementioned detailed discussions and for foregoing reasons, this 'Tribunal' comes to an inescapable and inevitable conclusion that the 1st Respondent/Petitioner/Financial Creditor had established the aspect of subsisting 'Debt' and 'Default' which are the pre-requisites for an 'admission' of an 'Application' filed under Section 7 of the I & B Code, 2016. Moreover, the 'Adjudicating Authority', in the considered opinion of this 'Tribunal' cannot traverse the finer aspects of violation of contract between the 'Parties' in the light of the fact that it is an 'Adjudicating Authority' in a 'summary proceeding' and not a 'Civil Code' where an evidence can be let in by the 'Parties' in an elaborate manner.

118. The proceedings under the I & B Code, 2016, are not adversarial in character and in the instant case, the 'Adjudicating Authority' cannot determine the 'default sum' as per Section 4 of the I & B Code, 2016. Looking at from any point of view, the instant 'Appeal' sans merits. Result (in Comp. App (AT) (CH) (INS) No. 214 of 2022):

In fine, the Comp. App (AT) (CH) (INS) No. 214 of 2022 is dismissed. No costs. The connected pending I.A. Nos. 467 to 469 of 2022 are Closed.

Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022 Conclusion (in Comp. App (AT) (CH) (INS) No. 216 of 2022):

In fine, the Comp. App (AT) (CH) (INS) No.216 of 2022 is dismissed. No costs. The connected pending I.A. Nos. 472 to 474 of 2022 are Closed.

[Justice M. Venugopal] Member (Judicial) [Kanthi Narahari] Member (Technical)
02/08/2022 SR/TM Company Appeal (AT) (CH) (INS) No. 214 of 2022 & Company Appeal (AT) (CH) (INS) No. 216 of 2022