

Raj Singh Gehlot vs Vistra Itcl (India) Limited on 2 August, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Ins) No. 06 of 2021

IN THE MATTER OF:

1. Raj Singh Gehlot
Director, Ambience Pvt. Ltd.
R/o A-4-5, Mayfair Garden,
New Delhi - 110016 ...Appellant

Versus

1. Vistra (ITCL) India Ltd.
(Formerly Known as IL & FS Trust
Company Ltd.) (Trustee to India REIT
Fund Scheme IV), Piramal Tower,
Ground Floor, A- Wing, Peninsula
Corporate Park, GK Marg, Lower
Parel, Mumbai- 400013

2. Sandeep Chandana
Reg. No. IBBI/IPA- 0021P-N00447/2017-
2018/11237
23-Ground Floor, A Block, South City -2,
Sector- 49, Sohna Road
Gurugram - 122018 ...Respondents

Present:

For Appellant: Mr. Krishnan Venugopal, Sr. Advocate with Mr. Anush
Raajan, Advocate.

For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Mr. Manoranjan
Sharma, Mr. Vijay Nair and Ms. Sakshi Kapoor,
Advocates for R-1.
Mr. Sandeep Chandana, for IRP, R-2, (in-person)
Mr. Nikhil Verma, Advocate for IRP, R-2.
Ms. Anjali Anchayil, Mr. SumeshDhawan, Mr. Raghav
Dembla (Intervention for Indiabulls Housing Finance
Ltd.)

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JUDGMENT

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER This Appeal has been filed by Mr. Raj Singh Gehlot Director Ambience Pvt. Ltd. under Section 61 of IBC, 2016 challenging the legality of the order dated 21.12.2020 passed by Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench -III) in the case of CP (IB) -1600/ND/2018 under Section 7 of the Code, initiating

CIRP of the Ambience Pvt. Ltd.-CD.

2. The Adjudicating Authority has admitted the case on the basis of following observations:

"6. We have perused the submissions made by the parties. The corporate debtor has raised several objections; however, such objections are untenable on the ground that corporate debtor did not file any objection/appeal against the award passed by the conciliator; hence, it has attained the finality in terms of Section 74 of the Arbitration and Conciliation Act, 1996. Furthermore, there is a payment by the corporate debtor of Rs. 65 crore, so it has dully admitted the financial debt. Apart from it, as per the settlement agreement there is an interest to be paid by the corporate debtor on the amount disbursed by the financial agreement, which also proves that the money is of the nature of financial debt. Moreover, instalments have also been agreed for return of securities by way of shares and debentures, which comes within the ambit of the 'Financial Debt' in following manner:-

"5(8) 'Financial Debt' means a debt along with interest, if any, which is disbursed against the Company Appeal (AT) (Ins) No. 06 of 2021 consideration for the time value of money and includes-

.....

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument"

7. Therefore, the plea taken by the Corporate Debtor is devoid of merits and stands rejected for the reasons recorded herein above. The evidence placed by the financial creditor is sufficient to ascertain the existence of a default on the part of the corporate debtor. The Financial Creditor has fulfilled all the requirements of law and proposed the name of the Resolution Professional for appointment of IRP. Hence, the Application stands Admitted and the commencement of the Corporate Insolvency Resolution Process is initiated".

3. This is the Case of Share subscription cum Shareholders agreement by and between IL & FS Trust Company Ltd. (as Trustee to the India REIT fund Scheme -IV) (the Investor) and Mr. Raj Singh Gehlot (the Promoter & Ambience Pvt. Ltd. (Developer & Ambience Projects and Infrastructure Pvt. Ltd.) the SPV executed on 28.05.2011.

4. The relevant Agreement appearing at pg.109 of the APB are as under:

(a) SPV, Investor, Promoter and the Developer are hereinafter, where the context so permits, referred to individually as a 'Party' and jointly as 'Parties'.

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(b) The SPV is a company already incorporated and promoted by the Promoter, and is engaged in the business of real estate construction and development.

(c) Developer is an existing private limited company promoted by the Promoter and incorporated under the provisions of the Act, and is engaged inter alia in the business of construction and development of real estate projects and has represented to the Investor that it has the requisite expertise and resources for execution of real estate construction and development projects, including the Project;

(d) Based on the above representations of the Developer and the Promoter and subject to the terms of this Agreement, the Investor has agreed to invest Investor Contribution, either directly or through its Affiliates, for funding the SPV, which would in turn be utilized for acquisition of Project Land and for other purposes as mentioned in this Agreement including for the development of the Project, which would be developed by the SPV on the understanding that the Investor and the Promoter/Developer would be entitled to the distributions of revenue/cashflows by the SPV in accordance with clause 1A.4 hereunder and the Developer/Promoter will control, manage, supervise, monitor and Company Appeal (AT) (Ins) No. 06 of 2021 provide the necessary expertise and technical support for the construction and development of the Project.

(e) The Investor, SPV, Promoter and the Developer propose to jointly enter into this Agreement for the construction and development of the Project by the Developer, and investment into the SPV by the Investor and the Developer/Promoter in the manner stipulated herein.

(f) "Additional Investor Contribution" shall mean any amount infused by the Investor in the SPV in excess of the Investor Contribution not exceeding Rs. 65,04,38,570 (Rupees Sixty Five Crores Four Lakh Thirty Eight Thousand Five Hundred Seventy only).

(g) "Investor Contribution" shall mean a sum of Rs. 134,95,61,430 (Rupees One Hundred Thirty Four Crores Ninety Five Lakh Sixty One Thousand Four Hundred and Thirty only) invested by the Investor as of Closing Date and/or any further amount to be invested (excluding Additional Investor Contribution) as of any other date into the SPV towards subscription of the Investor Securities.

(h) "Investor debentures" shall mean the optionally convertible debentures of Rs. 10 each issued as per the terms and conditions specified in Schedule 4 hereto by the SPV to the Investor against Company Appeal (AT) (Ins) No. 06 of 2021 the whole or part of Investor Contribution or any further contribution by the Investor in the SPV (excluding Additional Investor Contribution).

(i) "Project" shall mean the development of residential apartments and commercial spaces on 3 parcels of land of 14.82 acres, 0.05 acres and 2.76 acres, aggregating to a total land area of 17.63 acres, situated at Sector 22, Old Delhi - Gurgaon Road, Gurgaon so as to achieve Saleable Area (excluding car parks), with a total FSI of 13,43,935 (Thirteen Lakh forty Three Thousand Nine Hundred and thirty Five) square feet at 1.75 times of area of all three parcels of land. A minimum of 14.82 acres of land out of the total 17.63 acres of land is to be used for residential group housing development.

(j) "Project Land" shall mean the land required for the development of the Project as per the Business Plan, aggregating to a total land area of 17.63 acres situated at sector 22, Old Delhi - Gurgaon Road, Gurgaon and more appropriately described in Schedule 1A.

(k) "Saleable Area" shall mean super built up area of 20,00,000 square feet including both for residential and commercial purposes but excluding car park area to be arrived at by marking-up the total permissible built up area of 13,43,935 square feet on the Company Appeal (AT) (Ins) No. 06 of 2021 Project Land by 48.82%, or any other percentage of marking arrived at with the unanimous approval of the board and in case the marking up of the Saleable Area in the agreed manner is not possible due to any applicable law, the same would be worked out on the basis of permissible built up area of 13,43,935 square feet as per applicable law.

(l) Clause 1A.1 Capitalization and funding of the SPV

(i) As of Effective Date, the shareholding pattern of the SPV is as follows:

Shareholder Developer	Number of Shares 5,000
Promoter	5,000
Investor	NIL

(ii) On the Closing Date, SPV shall further issue the following securities to the Investor in the following proportion:

Instrument	Number of Securities
A. Equity Shares	
-Investor	9,800
B. Class A Shares (Investor)	10,000
C. Class B Shares (Developer)	10,000

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(iii) Promoter and Developer hereby acknowledge that the Investor has agreed to make the investment in the SPV on the understanding that the Parties shall generally adhere to the terms and conditions contained under this Agreement and the Business Plan attached hereto as per Schedule

2, as amended with prior approval of the Board from time to time. Parties agree that any extension of timelines stipulated in the Business Plan and attendant extension in the Project Completion Date by the Board shall not be regarded as a breach on part of the developer of the Promoter or the SPV.

(m) Clause 1A.2 Payment by SPV

(a) On or before the Closing Date, the SPV shall be obligated to pay a sum of Rs. 54,99,00,000 (Rupees Fifty Four Crores Ninety Nine Lakh Only) to the Developer or its Affiliates for the surrender of all rights with respect to the Project Land in favour of the SPV by the Developer or its Affiliates.

(n) Clause 1A.3 Capital Structure The capital structure of the SPV pursuant to the issuance of Investor Debentures and Developer Debentures against the Investor Contribution and the developer Contribution, Company Appeal (AT) (Ins) No. 06 of 2021 which issuance shall happen on the date of infusion of Investor Contribution by the Investor into the SPV, shall be as described below:

Securities	Investor (Rs.)	Developer and Promoter (Rs.)
Equity Shares	98,000	1,02,000
Class A Shares	100,000	--
Class B Shares	--	100,000
Investor Debentures	134,93,63,430	--
Developer Debentures	--	14,044,43,570
TOTAL	134,95,61,430	140,46,45,570

(o) Clause 1A. 4 Application and Distribution of revenues/cash flows from the Project

(a) Subject to provisions of Article 12 and Clause 5.5, all revenue proceeds/cash flows (net of expenses and taxes as detailed herein) from the sale/lease of whole or any part or portions of the Project and any other receipts emanating from the Project shall be utilized in the following order of priority and manner:

(i) Firstly towards cost and expenses of the Project (including but not limiting to the cost of construction and development, management fees, marketing cost, interest on sums borrowed from Company Appeal (AT) (Ins) No. 06 of 2021 banks/third parties and/or any such cost directly attributed to the Project Land or Project) and all taxes and statutory expenses relating to the Project Land or SPV, payable by the SPV incidental or subsequent to the execution of the conveyance deeds in favour of the Company;

(ii) Secondly, towards repayment of sums borrowed from banks/third parties, if any;

(iii) Thirdly, towards payment of Default Amount and 25% per annum interest on such default Amount payable to the Contributor under Clause 5.5;

(iv) Fourthly, towards proportionate repayment of sums borrowed from the Investor as Additional Investor Contribution and developer/Promoter as Additional Developer Contribution.

(v) Balance revenues/cashflows shall be distributed between the developer and Investor on the following basis:

Company Appeal (AT) (Ins) No. 06 of 2021 a. Upto Profit Before Tax of Rs. 671,00,00,000/-

(Rupees Six Hundred and Seventy One Crores) in the ratio of 49:51 between investor and the Developer/Promoter respectively. The payment of interest by SPV on Investor debentures and Developer debentures shall be considered as payment towards the Investor's share of 49% and developer's share of 51% respectively as per this para a.

Beyond Profit Before Tax of Rs. 671,00,00,000/-

(Rupees Six Hundred and Seventy One Crores) in the ratio of 20:80 between Investor and the developer/Promoter respectively. The payment of interest by SPV on Investor debentures and developer debentures shall be considered as payment towards the Investor's share of 20% and developer's share of 80% respectively as per this para b.

It is clarified that the cashflows would be shared between Investor and the developer/Promoter net of Company Appeal (AT) (Ins) No. 06 of 2021 taxes of SPV. It is also clarified that any payment made by the SPV to Promoter/developer/Investor over and above the issue price of the developer Securities or Investor Securities, as the case may be, shall be considered as part of their respective share in the distribution of balance revenues/cash flows as above.

5. It was also stated by the Ld. Sr. Counsel for the Appellant that the Respondent No. 1 is a trustee of (India REIT fund Scheme-IV) which is registered as a venture capital fund for making investments in securities of venture capital undertakings engaged in real estate property management, infrastructure and allied sectors in India.

6. It was also stated by the Ld. Sr. Counsel for the Appellant that the IRP appointed by the Adjudicating Authority to conduct the CIRP of the Corporate Debtor by the impugned order is under move to be substituted which is pending before the Adjudicating Authority :in any case here the IRP has been made as Respondent No. 2. However, Respondent No. 2 has no authority to act as the IRP of Corporate Debtor

when the financial Creditor has already moved the proposal for changing him.

7. As stated above the Share Subscription cum Shareholder Agreement is the Principal agreement between Vistra ITCL, Corporate Debtor and the Joint Company Appeal (AT) (Ins) No. 06 of 2021 Venture Company and the same is placed at Annexure -3 in appeal paper book (APB)at pg 107.

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8. So, stated agreement is an investment agreement & Vistra ITCL is an investor and it was formerly known as IL & FS trust Company Ltd. (Trustee to India REIT fund Scheme-IV). The purpose of Shareholder agreement was to record the terms of investment to be made into the Joint Venture Company by Vistra ITCL and Ambience/Corporate Debtor and also to provide for the management of Joint Venture Company between the subscribers for construction and development of the project as stated above. The investments so made into the Joint Venture Company would then be used by the Joint Venture Company to construct & develop the project which will be owned by the Joint Venture Company. This is very much clear from the stated recital as reproduced above.

9. Under the Shareholder Agreement, Vistra ITCL and Ambience/Corporate Debtor subscribed & allotted equity shares in the Joint Venture Company in the ratio of 49:51. Accordingly the holding of Joint Venture Company was up to 49% was by Vistra ITCL and 51% by Corporate Debtor/Ambience.

10. It was also stated by the Ld. Sr. Counsel of the Appellant that the Vistra ITCL/Respondent No.1 and Corporate Debtor/Ambience were required to infuse funds into the Joint Venture Company to be utilized for construction of the Project. Funds were accordingly infused by Vistra ITCL/Respondent No.1 and Ambience/Corporate Debtor into the Joint Venture Company by way of optionally convertible debentures and unsecured loans without any applicable interest on the advances. The same are reproduced below:

Company Appeal (AT) (Ins) No. 06 of 2021 Securities of JV Vistra ITCL Ambience
Company Equity Shares 9,800 (49%) 10,200 (51%) Class A Shares 100,000 Class B
Shares 100,000 Value of Debentures 134,93,63,430 140,44,43,570 issued by JV
Company (in (49%) (51%) INR) Additional Contribution INR 65.05 Crores INR 67.69
Crores Total Investment in JV INR 200 Crores by Vistra INR 208 Crores by
Company (INR) ITCL Ambience

11. It was also stated by the Ld. Counsel that once the project progressed requirement of additional funds were expressed by the Joint Venture Company. This shortfall was funded by Respondent No.1 by providing further unsecured loan of over Rs. 323 Crore as further additional contribution.

12. The SHA was amended for the first time on 3 September 2011, wherein it was inter alia agreed between the parties that the Debentures issued by JV Company to Vistra ITCL and Ambience shall not carry any guaranteed coupon payment. It may be noted that the originally the Debentures issued by JV Company was to carry a coupon rate of 15% per annum. After the amendment, even the

debentures issued by JV Company did not provide for any consideration for time value of the debentures.

13. The Amended Agreement are reproduced below for ease of convenience. Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021

14. Thereafter Second Amendment to the Shareholder Agreement was made on 07.02.2012 and the same was reproduced below for the purpose of linking. Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021 Company Appeal (AT) (Ins) No. 06 of 2021

15. It was also stated by the Ld. Sr. Counsel for the Appellant that all the Investment made by Vistra ITCL/Respondent No.1 were into the Joint venture Company and no money were invested by Respondent No.1 either by way of equity subscription or debentures or loan into the Corporate debtor/Ambience & hence there is no relationship of creditor- debtor between Respondent No.1 & Corporate Debtor.

16. It was also stated by the Ld. Sr. Counsel for the Appellant that the SHA does not provide for guaranteed return or interest to be paid by JV Company to either of the investors, i.e. Vistra ITCL or Ambience. The only manner to recoup the investment by Vistra ITCL and Ambience was by way of profit sharing from revenue generated through sale of the residential units by JV Company. Clause 1A.4 of the SHA provides for a detailed mechanism for the distribution of profits from revenues and cash flows of JV Company between Vistra ITCL and Ambience. This was the only return on investment contemplated by the SHA. The SHA did not provide for any consideration for the time value of money invested by Vistra ITCL or Ambience into the JV Company.

17. It is also reflected from the Appeal Paper Book that the dispute between Vistra ITCL/Respondent No.1 & Ambience/Corporate Debtor/Appellant are as follows:

o. By 2015, the Construction Cost of the Project had arisen to INR 3199.2 Crores with the due knowledge of Vistra ITCL. Accordingly, by letter dated 2nd November 2015, JV Company addressed a letter to Vistra Company Appeal (AT) (Ins) No. 06 of 2021 ITCL wherein it was proposed to bring in additional funding into the Project and requested Vistra ITCL also to contribute to the Project in the same ratio as that of Ambience, the other investor. It may be noted that as of November 2015, Ambience's exposure in the Project escalated to INR 600+ Crores. Accordingly, JV Company requested Vistra ITCL to also contribute additional funds for funding the development in the ratio 49:51, since the Respondent would ultimately benefit from the profit sharing from ultimate sale of flats, as per Clause 1A.4 of the SHA. p. By letter dated 9th November 2015, Vistra ITCL refused to fund the Project any further.

Between November 2015 - March 2016 several letters were exchanged between Vistra ITCL and JV Company, wherein JV Company requested for further funds. However, the same were refused by Vistra ITCL. By letter dated 29.01.2016, Vistra ITCL once again reiterated its position that no additional funding to the JV Company would be possible, and that JV Company must explore additional options to raise funds for completion of the Project. It is important to note that Vistra ITCL admits that the funding was only made into JV Company for the construction and development of the Project by JV Company.

q. By a letter dated 31st March 2016, Vistra ITCL sent an Event of Default Notice to Ambience, the Promoter and JV Company raising Company Appeal (AT) (Ins) No. 06 of 2021 frivolous disputes alleging breach of milestones of construction as represented in the Business Plan and certain non-compliance of the reporting requirements as stipulated in the SHA. It is crucial to note that even as per Vistra ITCL, the event of default only pertained to milestone events and purported non-compliance of reporting requirement. There was no allegation or claim of any outstanding payment or return of investment by Ambience under the SHA.

r. From the event of default notice, it is clear that the only grievance of Vistra ITCL under the SHA was with regard to non-completion of the Project within the agreed milestone and reporting of certain corporate actions. There was no dispute/allegation with regard to any debt or claim of any outstanding payment to be made by Ambience or JV Company. s. The Event of Default Notice was promptly denied by Ambience as there was no default under the SHA as alleged by Vistra ITCL. t. By letter dated 13 April 2016, Ambience denied any such defaults. It was clarified that the construction of the Project was in line with the milestone for completion (as amended by the Second Amendment Agreement) and that JV Company was in compliance of all reporting requirement under the SHA. It was specifically highlighted that the Event of Default Notice was bereft of particulars and were wholly sketchy, Company Appeal (AT) (Ins) No. 06 of 2021 vague and incapable of any remedy or cure. As the actual default was not notified, it is impossible to cue the same within 90 days. u. Thereafter, Vistra ITCL issued a further Legal Notice dated 20.05.2016 seeking certain information and clarifications from JV Company.

v. Pursuant thereto, on 06.09.2016, Vistra ITCL purportedly exercised the Put-Option in terms of clause 12.3(A) of the SHA and called upon Ambience and the Promoter to purchase the Investor Securities held by Vistra ITCL, i.e. the Equity shares, debentures issued by JV Company along with the interest free unsecured loans taken by JV Company.

w. Ambience addressed a detailed reply dated 4.10.2016 wherein it was categorically stated that the defaults mentioned by Vistra ITCL including breach of milestone for construction, and non-compliance of reporting requirements were bereft of any material. In any event, the Event of default Notice did not contain any specific defaults to be rectified. Therefore, the put option cannot be exercised by Vistra ITCL. x. In view of the above disputes, Vistra ITCL, the JV Company, the

Appellant and Ambience jointly approached a mediator under the conciliation mechanism under the Arbitration and Conciliation Act, Company Appeal (AT) (Ins) No. 06 of 2021 1996. The joint memo of disputes submitted to the sole conciliator, Mr. Justice K S Gupta (Retd.) by the parties.

y. On 7 April 2017, a Settlement Agreement was entered into between Vistra ITCL, the Appellant herein, Ambience and JV Company bringing an end to the SHA.

z. By the said agreement the parties recorded that:

"M. The claim of the Investor [Vistra ITCL] has been denied and disputed by the Promoter [Appellant herein] and the developer [Ambience]. For the sake of convenience, the issues raised by the Investor against the developer, Promoter and JV Company in its various communications, and more specifically referred in the notice dated May 20, 2016 and letter dated September 2016, sent on behalf of the Investor to the Promoter, developer and JV COMPANY, are collectively referred to as the ("Disputed Items").

N. Since the Developer and Promoter have denied the Disputed Items, the developer, Promoter and the Investor had several meetings to amicably resolve the disputed items in good faith and eventually referred the matter to conciliation;

...

Company Appeal (AT) (Ins) No. 06 of 2021 P...the Parties have by mutual consent and with the assistance of the Conciliator, arrived at a settlement in relation to the disputes that arose between them."

aa. Vistra ITCL and Ambience consequently agreed to treat the Settlement Agreement as an Arbitral Award on consent terms which was specifically to be enforced under the provisions of the Arbitration and Conciliation Act, 1996. The Parties were aware of the existence of the I&B Code and had expressly intended the Award to be enforced only under the Arbitration and Conciliation Act, 1996.

bb. Under Clause 2.2 of the Settlement Agreement, it was agreed that Vistra ITCL would be paid INR 200 Crores, its total investment in JV Company, in three tranches with 6% interest, and in consideration, Vistra ITCL shall transfer simultaneously proportions of its equity and debentures in JV Company, and similarly, offset the defined proportions of the loans to JV Company.

cc. The Settlement Agreement was a complete departure from the SHA and forms an independent transaction, recorded in the form of an arbitral award.

dd. Along with the Settlement Agreement, the parties also entered into a Securities Purchase Agreement of the even date which reflects the arrangement between the parties, that Vistra ITCL shall release the Company Appeal (AT) (Ins) No. 06 of 2021 securities held by it in JV Company to

the purchasers of the securities in the manner set out in the Settlement Agreement. ee. On the same date, i.e. 7 April 2017, the first tranche of INR 85,10,81,529 (Rs. 65 Crores plus interest) was received by Vistra ITCL under the following transactions:

(i) INR 43,039/- from Aman Holdings Private Limited for the sale and transfer of 3,185 equity shares;

(ii) INR 43,917/- from Aman Holdings Private Limited for the sale and transfer of 3,250 equity shares;

(iii) INR 27,41,56,654/- from JV_Company for partial refund of unsecured loan along with interest as set out in the Settlement Agreement.

(iv) INR 57,68,37,929/- from JV_Company towards redemption of 43854311 unsecured optionally convertible Debenture of JV Company along with interest as set out in the Settlement Agreement.

ff. It may be noted that the above payments were made by Aman Holdings Pvt. Limited for purchasing the equity shares held by Vistra ITCL and by JV Company for the repayment of the unsecured loan and redemption of the debentures issued by it. No payment was ever made by Ambience.

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18. Proceedings initiated by Vistra ITCL pursuant to the Settlement Agreement gg. Thereafter, due to several difficulties faced in the real estate sector, the price fixed in the Settlement Agreement could not be made for the purchase of the securities by JV Company. On not receiving the subsequent two tranches of payment, Vistra ITCL filed an application under Section 7 of the I&B Code against Ambience. While admittedly there was no debt disbursed to Ambience by Vistra ITCL. Vistra ITCL did not file any Petition against the JV Company. hh. A bare perusal of the Form 1 filed by Vistra ITCL would indicate that the entire case is based on the non-payment of the purchase price as per the schedule of payment set out in the Settlement Agreement. Vistra ITCL makes out no case against Ambience in the underlying transaction in relation to any debt or default emanating from a financial transaction. Vistra ITCL admits that the investments were made only to JV Company but seeks to recover the same from Ambience only by relying on the Settlement Agreement / Consent Award. Relevant extract of the Form --- 1 is below:

Part IV PARTICULARS OF FINANCIAL DEBT FOR EACH APPLICANT

1. TOTAL AMOUNT OF DEBT "As on 31.10.2018 Rs. 234,69,62791/-

GRANTED are in default.

As per Settlement Agreement dated 07.04.2017 the total liability of the Corporate Debtor is of Rs.

200,00,00,000/- (Rupees Two Hundred Crore Only) Company Appeal (AT) (Ins) No. 06 of 2021 DATE OF DISBURSEMENT The date of disbursement of the aforesaid amount were as follows:

a. The amount of Rs. 35,95,61,430/-

was disbursed to Ambience Projects and Infrastructure Pvt. Ltd. on 30.05.2011. The applicant was entitled to recover Rs.

35,95,61,430/- from the Corporate Debtor along with interest...."

ii. This Petition was thus filed only for the execution of the Settlement Agreement / Consent Award dated 7.4.2017. This is despite the fact that no disbursement of monies has been shown by Vistra ITCL to Ambience, for Vistra ITCL to even assert its status as a Financial Creditor.

jj. Not stopping with the misconceived Section 7 Petition, Vistra ITCL approached the Hon'ble Delhi High Court during the pendency of the Section 7 Petition to execute the Consent Award. Clearly, Vistra ITCL engaged itself in forum shopping to somehow arm twist and recover its dues from multiple proceedings. In its execution proceedings, Vistra ITCL proceeded to execute the Award against three parties, viz. Ambience, the Appellant and JV Company. kk. The Hon'ble Delhi High Court took cognizance of the said execution petition and proceeded with executing the Awards a decree of the Court and passed an interim order restraining JV Company, Corporate Debtor and the Appellant herein from dealing with the assets other than in regular course of business. The Hon'ble Court was further pleased to direct the Respondents thereto to file Company Appeal (AT) (Ins) No. 06 of 2021 affidavit of assets, proposing a schedule of payment and providing securities to secure the Award.

ll. Pursuant to the directions of the Hon'ble High Court, JV Company has submitted an affidavit to the High Court assuming all liability arising out of the Award on itself. The JV Company also provided an undertaking to secure the monies due under the Award and has provided a list of assets which could be sold by JV Company to repay the Award sum.

mm. The JV Company has specifically identified 59 apartments in 2 towers situated at the Project, valued at excess of INR 260 Crores, as valued by a reputed independent valuer, which have been earmarked only for clearance of Vistra ITCL's claims under the Award. It may be noted that VistraITCL has not objected to the properties provided by the JV Company for the purpose of sale for satisfying the Award.

nn. Vistra ITCL's conduct of enforcing the award under the Arbitration Act, clearly shows that it only expects recovery of balance of the award amount payable for purchase of securities (shares and

debentures) by the Corporate Debtor and /or its nominees in the agreed manner (which JV Company has now further secured) and is not interested in the financial affairs/debt resolution of Ambience. The insolvency application was clearly thus filed for purposes other than resolution of insolvency and only as an abusive tactic to expedite debt recovery and enforce the award.

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19. The Ld. Sr. Counsel submitted that in spite of the fact as stated as above the Adjudicating Authority has admitted the Respondents application under the Code against Corporate Debtor without going into the objections & the issue raised by Corporate Debtor. In view of above facts & circumstances he has sought the relief to set aside the impugned order dated 21.12.2020 passed by Adjudicating Authority etc.

20. The Ld. Sr. Counsel for Respondent No.1/Vistra ITCL India Ltd.as stated as follows:

(i) It is financial Creditor to the Corporate Debtor viz., Ambience Pvt.

Ltd. for the following reasons-

3.1. The Debt owed to Vistra ITCL (India) Limited (hereinafter 'FC') is a Financial Debt in as much as :-

(a) The debt is in respect of Optionally Convertible Debentures (OCD) of Rs. 10 each held by the Financial Creditor (after the redemption of 4,38,54,311 OCD; this unpaid total OCDs being 13, 49,36,343 valued at a Rs. 134,93,63,430/-.

(b) The debt is also in respect of Unsecured Loan Rs. 37,62,81,916 extended by the Financial Creditor (after the repayment of Rs.

27,41,56,654).

(ii) The Ld. Sr. Counsel for the Respondent No.1 further submitted that:

Company Appeal (AT) (Ins) No. 06 of 2021 3.2. The obligation to repay the debt is that of the Corporate Debtor viz., Ambience Pvt. Ltd. (hereinafter 'CD') both under the Share Subscription cum Shareholders Agreement dated 28 May 2011 ("Subscription Agreement") and Settlement Agreement dated 7 April 2017 (hereinafter "Settlement Agreement").

3.3 The Share Subscription cum Share Holders Agreement dated 28.05.2011 (hereinafter 'SHA') an amount of Rs. 134,93,63430/- has been disbursed towards receipt of 13,49,36,343 Optionally Convertible Debentures of Rs. 10 each from Ambience Projects and Infrastructure Limited (hereafter 'SPV'), which carried a coupon rate of 15% p.a., (clause b/ Schedule 4 to SHA). Further an amount of

Rs.65,04,38,570/- were inducted as loan to Ambience Project and Infrastructure Pvt. Ltd.(Clause 5.5 of SHA). Therefore, the transaction has always contemplated issuance of Financial Debt.

3.4 Further, a co-joint reading of Clause 12.1 and Clause 12.2 clarifies that in case of a default the Promoter, i.e., the Appellant and Developer, i.e., Ambience Pvt. Ltd., and the SPV, i.e., Ambience Projects and Infrastructure Limited shall be jointly and severally liable for the default.

It is submitted that the SHA also provided the answering Respondent an option to exercise put option, which obligates the Promoter, i.e., the Appellant and Developer, i.e. Ambience Pvt. Ltd., and the SPV, i.e., Ambience Projects and Infrastructure Ltd. to repay the entire investment Company Appeal (AT) (Ins) No. 06 of 2021 of the answering Respondent along with an IRR @ 20% p.a. Consequently, even under the SHA, upon exercise of Put Option (Clause 12.3 of the SHA) on 06.09.2016, Ambience Pvt. Ltd. was liable to pay an amount equivalent to inducted funds together with IRR @ 20% p.a. within 90 days i.e., by 05.12.2016. Therefore, even under the SHA, Ambience Pvt. Ltd. had defaulted, which default warrants triggering of Corporate Insolvency Resolution Process.

3.5. The entire liability on aforesaid default was assumed by the Corporate Debtor jointly and severally with the Appellant and Ambience Project and Infrastructure Limited under the terms of Settlement Agreement. It remains undisputed that the repayment obligation along with interest under Settlement Agreement was also repeatedly defaulted by the Appellant, Ambience Pvt. Ltd. and the SPV on 07.04.2017 due to non-payment of interest, and thereafter on 30.09.2017 and 28.02.2018 by non-payment of principal and interest.

3.6. The Settlement Agreement is only a sequel to the earlier Agreements, and in any case the Settlement Agreement treats the total amount as debt payable with interest, which cannot be denied by the Corporate Debtor in the capacity as a promoter/developer as both of them are jointly and severally liable for amounts due to the financial Creditor having signed the agreements jointly.

Company Appeal (AT) (Ins) No. 06 of 2021 3.7. Since no disbursement was made directly to the CD, the Debt would not constitute a financial debt is per-se misconceived and contrary to law. It is submitted that the Financial Debt as defined Section 5 (8) of the Code is a "means and includes" as has been reiterated by the Hon'ble Supreme Court in "Pioneer Urban Land and Infrastructure Ltd. v Union of India (2019) 8 SCC 416

82. This statement of the law, as can be seen from the quotation hereinabove, is without citation of any authority. In fact, in Jagir Singh v. State of Bihar [Jagir Singh v. State of Bihar, (1976) 2 SCC 942:

1976 SCC (Tax) 204], SCC paras 11 and 19 to 21 and Mahalakshmi Oil Mills v. State of A.P. [Mahalakshmi Oil Mills v. State of A.P.,(1989) 1 SCC 164: 1989 SCC (Tax) 56], SCC paras 8 and 11 (which has been cited in P.Kasilingam [P. Kasilingam v. PSG

College of Technology, 1995 Supp (2) SCC 348]), this Court set out definition sections where the expression 'means' was followed by some words, after which came the expression 'and includes' followed by other words, just as in *KrishiUtpadanMandiSamiti v. Shankar Industries*, 1993 Supp (3) SCC 361 (2)]. In two other recent judgments, *Bharat Coop. Bank (Mumbai) Ltd. v. Employees Union* [Bharat Coop. Bank (Mumbai) Ltd. v. Employees Union, (2007) 4 SCC 685 : (2007) 2 SCC (L&S) 82], SCC paras 12 and 23 and *State of W.B. v. Associated Contractors* [State of W.B. v. Associated Contractors, (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1], SCC para 14, this Court has held that wherever the expression "means" is followed by the expression "and includes"

whether with or without additional words separating "means" from "includes", these expressions indicate that the definition provision is exhaustive as a matter of statutory interpretation. It has also been held that the expression "and includes" is an expression Company Appeal (AT) (Ins) No. 06 of 2021 which extends the definition contained in words which follow the expression "means".

From this discussion, two things follow. *KrishiUtpadanMandiSamiti v. Shankar Industries*, 1993 Supp (3) SCC 361 (2)] cannot be said to be good law insofar as its exposition on "means" and "includes" is concerned, as it ignores earlier precedents of larger and coordinate Benches and is out of sync with later decisions on the same point. Equally, Dr.Singhvi's argument that clauses (a) to (i) of Section 5 (8) of the Code must all necessarily reflect the fact that a financial debt can only be a debt which is disbursed against the consideration for the time value of money, and which permeates clauses (a) to (i), cannot be accepted as a matter of statutory interpretation, as the expression "and includes" speaks of subject-matters which may not necessarily be reflected in the main part of the definition."

3.8 Supreme Court has clearly laid down that the Section 5 (8) (f) of the Code is a "catch all" provision, which includes wide array of transactions. 3.9 *B.V.S. Lakshmi vs. Geometrix Laser Solutions Pvt. Ltd.* reported in MANU/NL/0221/2017, the National Company Law Appellate Tribunal (hereinafter "NCLAT") has held that it is not necessary to show disbursement to the corporate debtor.

3.10 Disbursement to CD is not an essential condition to constitute a Financial Debt under Section 5(8) of the Code. This is evident from inclusion of Guarantees etc., (where there is no disbursement to Guarantor) within the ambit of Section 5 (8) (f) of the Code. Furthermore, Disbursement that was made to the subsidiary of the CD under the Company Appeal (AT) (Ins) No. 06 of 2021 Subscription Agreement was made on the strength of the Representations, Warranties and Obligations undertaken by the CD, including the obligation of repayment of the debt and redemption of Debentures.

IV. Relationship between CD and FC is that of joint venture partners under the Subscription Agreement, and therefore, the amounts due would this does not amount to a Financial Debt is also untenable and misconceived. 4.1 Initiation of CIRP Process under Section 7 of the Code is filed arises out of a Financial Instrument in the nature of the Debentures, as also the Outstanding Unsecured Loan.

4.2 The obligation to make redemption repayment of such Debentures and Unsecured Loan was squarely undertaken by the CD, and the disbursement of which was also made on the strength of the Warranties, Representations, and Obligations etc. furnished and undertaken by the CD.

4.3 The Financial Creditor also holds share in the SPV is of no relevance as the Petition under Section 7 is only qua the Debentures and unsecured loan. The absurdity of the contention is also borne out from the fact that as much as Rs. 199,98,02,000 were disbursed towards debt instruments and the equity contribution in the SPV is less than Rs. 2 Lakh.

Company Appeal (AT) (Ins) No. 06 of 2021 4.4 There was a default in repayment of the debt by the CD which culminated in the entire Financial Debt being payable by the CD. The default resulted in a Settlement Agreement dated 07 April 2017, which has the force of a decree. Under the Settlement Agreement the CD was also liable to pay an aggregated sum of Rs. 200 Crores towards, inter alia, Unsecured Loan of Rs. 65,04,38,570/- and (ii) Investor Securities comprising of 13,49,36,343/- Investor Debentures. Materially, Rs. 27,41,56,654 towards refund of unsecured loan of Rs. 21,13,92,540 along with interest of Rs. 6,97,37,905/- and Rs. 57,68,37,929/- towards redemption of 4,38,54,311 unsecured optionally convertible debentures of Rs. 10 each of Subsidiary Company comprised in Debenture Certificate No. 3, Folio No. I-01, Distinctive No. 011-43854311 along with interest of Rs. 15,36,60,910/- However, only Rs. 65 Crores were discharged leaving an amount of Rs. 135 Crores along with interest due and payable. Therefore, 9,10,82,032 Debentures remain unredeemed (hereinafter "Unredeemed Debentures") and unsecured loan of Rs. 43,90,28,330 remains unrepaid (hereinafter "Unrepaid Loan") by the CD. 4.5. Therefore, the contention that merely because the original default ended in a settlement having the force of a decree does not, and cannot, change the nature of the debt viz., a Financial Debt i.e., a debt pertaining to Unredeemed Debentures and Unrepaid Loan.

Company Appeal (AT) (Ins) No. 06 of 2021 4.6. In the present case, the Financial Creditor/Respondent No. 1 is seeking redemption of 9,10,82,032 Debentures amounting to Rs. 186,33,79,755 as on Insolvency Commencement Date, the liability of which continues to be that of the CD even under the Settlement Agreement.

4.7 Similarly, the Respondent No. 1 is seeking repayment of Unrepaid Loan of Rs. 43,90,28,330 amounting to Rs. 89,81,75,506/- as on Insolvency commencement Date, the liability of which continues to be that of the CD even under the Settlement Agreement. V. Petition under section 7 is based on the Outstanding Financial debt namely 1.34 crores of Debentures and Unsecured Loan of Rs. 37,62,81,916 regard to which there has been a default by the Corporate debtor, which liability has been recreated and undertaken in the Settlement Agreement by the Corporate debtor. 5.1 The Subscription Agreement defines FC as "Investor", the Appellant as "Promoter", the CD as "Developer"

and Ambience Projects and Infrastructure Private Limited as "SPV"

5.2 CD and Appellant have represented to the Investor that the Promoter either directly or through Affiliates have won the bid to acquire the Project Land. Promoter and the developer have jointly agreed and undertaken to convey the Project Land in favour of the SPV. Company Appeal (AT) (Ins) No. 06 of 2021 5.3 CD and Promoter have agreed to convey the Project Land at Agreed Price being a sum of 275,42,07,000. Clause 5.3 of the Subscription agreement recorded that the proceeds would be used to acquire Project Land. Clause 1A.2 further recorded that a sum of INR 54,99,00,000 was to be transferred by SPV to CD, i.e., the developer and its affiliates for surrender of rights on Project Land in favour of the SPV.

5.4 The FC agreed to invest the Investor Contribution in the sum of INR 134,95,61,430 to fund acquisition of Project Land from CD and its affiliates.

5.5 Materially, for said induction of funds, the SPV has issued Debentures. Clause 1A.3 records issuance of 13,49,36,343 Optionally Convertible Debentures of Rs. 10 each towards contribution of Rs. 134,93,63,430/- ("Investor Debentures"). The Investor Debentures carried a coupon rate of 15% per annum. Materially, even the CD was issued Debentures, albeit, was no coupon rate. 5.6 The CD was also obliged to Develop the Project Land acquired by SPV.

5.9 Various defaults and breaches by the CD occurred, these included failure of the developer and Promoter to achieve milestones of sales and construction agreed under the Business Plan and non compliance of reporting requirements under the Development Agreement resulting in Company Appeal (AT) (Ins) No. 06 of 2021 the financial debt becoming due and payable. The breaches were notified to CD on 31 March 2016. Materially, vide notice of default dated 31 March 2016, the CD, Promoter and SPV were called upon to rectify the default within 90 days from 31 March 2016.

5.11 The CD and Promoter neither came forward to remedy the Event of Default and in-fact tried to create false record or revised business plan. Materially, on invocation of put option the CD, was required to redeem/repay/purchase all the Investor Securities held by the Respondent in the SPV at a value that will be equal to the Total Investor Contribution invested by the Respondent in the SPV together with an IRR of 20% of such Total Investor Contribution.

5.12 Pursuant to aforesaid disputes, on 07 April 2017 the Settlement Agreement was executed amongst FC, CD, SPV and the Promoter. The Settlement Agreement contemplated that the CD and/or the Promoter and /or the SPV would repay a sum of INR 200 Crores as "Amount Due"

in following manner

a) INR 65 crores on or before 7 April 2017 together with simple interest @6% p.a. with effect from date of payment of such amount by investor till 7 April 2017. In fact, even receipts were issued towards repayment of unsecured loans in the sum of INR 21,13,92,540/- and Debentures comprised in debenture Certificate No. 3, Folio No. I-01, Distinctive No. 011-43854311 in the sum of INR 57,68,37,929/-.

Company Appeal (AT) (Ins) No. 06 of 2021 Materially, no monies have been received by the FC after filing Application under Section 7 of IBC.

b) INR 65 crores on or before 30 September 2017 together with simple interest @ 6% p.a. with effect from date of payment of such amount by investor till 30 September 2017.

c) INR 70 crores on or before 30 September 2017 together with simple interest @ 6% p.a. with effect from date of payment of such amount by investor till 28 February 2018.

5.13 In case of default, the rate of interest chargeable from date of default would be 14% p.a. till actual date of payment. 5.14 The Settlement Agreement was executed in conciliation proceedings under Part III of the arbitration and Conciliation Act, 1996. 5.16 In present case, (i) the underlying transaction is a financial debt (ii) and the application is based out of a Settlement Agreement. 6.3 The Settlement Agreement is still an Agreement/Contract demonstrating commercial effect of borrowing, whereunder the amounts raised by the SPV have been treated as a debt repayable by the Corporate Debtor.

6.4 The factum of filing of execution proceedings is irrelevant for present proceedings under section 7 of the IBC, the Law permits a Decree Holder to initiate and take steps for the execution of decree. If the Decree Holder who is executing a decree is a financial creditor or Company Appeal (AT) (Ins) No. 06 of 2021 operational creditor, it is always open for such creditor independently initiate proceedings under the IBC. The law neither precludes nor prohibits filing or consideration under Section 7 or 9 of the IBC.

21. It was stated by the Ld. Counsel of the IRP that the Respondent No.2 in the first meeting of CoC which was convened on 18.03.2021, placed the agenda/resolutions pertaining to ratify the remuneration to be paid to the IRP and expenses incurred upto the date of the Meeting and Mr. Manoranjan Sharma, Representative of Vistra ITCL (India) Ltd, Financial Creditor agreed with a fees of Rs. 3,50,000/- per month.

22. At the first meeting of CoC, one of the agenda items was the appointment of the IRP as the Resolution Professional ("RP"). The resolution was not approved as it received 38.697% assenting vote.

23. The second meeting of the CoC was held on 12.04.2021, the IRP apprised the status and activities undertaken by him to the members of CoC. Thereafter, the Respondent No.2 discussed and tabled the resolutions pertaining to ratify the remuneration to be paid to the IRP and expenses incurred upto the date of the meeting, however, at the time of meeting, one of the creditors, Vistra ITCL India Limited proposed a monthly fees of Rs. 3,50,000/- while some of the creditors proposed the professional fee ranging from Rs. 2,50,000 - Rs.3,50,000.

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24. Taking into consideration the requests hereinabove, monthly Fees of Rs.3,50,000/- was proposed for consideration and approval. The above stated fee was discussed in CoC and it was approved with 83.668% assenting vote that the above fees and expenses to be borne and paid by main applicant Vistra ITCL India Limited in accordance with Regulation 33(3) of the CIRP Regulations under the IBC, 2016. However, the resolution for fees and expenses for the subsequent months of CIRP, which was put to vote after taking suggestions from the members of CoC, was not approved as it received 41.170% assenting votes (8 members), 42.498% dissenting votes (1 member) and the creditors holding 16.332% was absent (2 members).

25. We have gone through the submissions made by the Ld. Counsel/Ld. Sr. Counsel of the parties, documents available on record and the related provisions of law and are having following observations:

(i) It is not in dispute that there is no Shareholders Agreement rather it has been confirmed by the party & the available record also reveals by Annexure - 3, Annexure-4 & Annexure -5 Pg 107 to 191 of the Appeal Paper Book that there is a Share Subscription cum Shareholder Agreement made on 28.05.2011 involving Respondent no.1/Corporate debtor, Appellant and the SPV. The SPV for the construction & development of the Project and accordingly the Investment will be made into the SPV by the Investor/Respondent No.1, Developer, Corporate Debtor into the SPV/Joint Venture Company.

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(ii) All the Investments have been made in the SPV/Joint Venture Company. The Shareholder Pattern of the SPV has stated above and appearing at Pg- 117 is as under:

Clause 1A.1 Capitalization and funding of the SPV

(a) As of Effective Date, the shareholding pattern of the SPV is as follows:

Shareholder Developer	Number of Shares 5,000
Promoter	5,000
Investor	NIL

(b) On the Closing Date, SPV shall further issue the following securities to the Investor in the following proportion:

Instrument	Number Securities
A. Equity Shares	
-Investor	9,800
B. Class A Shares (Investor)	10,000
C. Class B Shares (Developer)	10,000

(c) Promoter and Developer hereby acknowledge that the

Investor has agreed to make the investment in the SPV on the understanding that the Parties shall generally adhere to Company Appeal (AT) (Ins) No. 06 of 2021 the terms and conditions contained under this Agreement and the Business Plan attached hereto as per Schedule 2, as amended with prior approval of the Board from time to time. Parties agree that any extension of timelines stipulated in the Business Plan and attendant extension in the Project Completion Date by the Board shall not be regarded as a breach on part of the developer of the Promoter or the SPV.

(iii) The SPV provided the entire gamut of payment by SPV, Capital structure, application and distribution of revenues from the project including the multiple conditions and as appearing at pg- 121 vide clause 3.1 as follows:

"Clause 3.1 On the Closing date or any other date after the Closing Date as notified to the SPV by the Investor, SPV shall issue, allot and deliver to the Investor the Investor Securities, and shall issue, allot and deliver to the Developer the Developer Securities as described in Clause 1A.3 of this agreement on payment by the Investor of all Investor Contribution payable by it and payment by the Developer of all Developer Contribution under Clause 1A.3.

All sums of money paid by the Investor or its Affiliates to SPV on the Closing date and prior to issue of Investor Securities shall be treated as debt granted to the SPV by the Investor or its Affiliates and shall be secured against all assets of the SPV including the Project Land until the time all the Investor Securities have been issued to the Investor. If the Affiliates of the Investor have infused an amount equivalent to Investor Contribution in the SPV on the Closing Date which is treated as debt to Company Appeal (AT) (Ins) No. 06 of 2021 the SPV and in future if the Investor infuses Investor Contribution in the SPV, the SPV shall be obligated to fully repay the debt to the Affiliate on the same day on which the Investor invests Investor Contribution in the SPV. If the SPV does not repay the debt to the Affiliate on the same day the Investor invests the Investor Contribution, then the SPV shall be obligated to pay an interest of 20% per annum on such debt amount in addition to the amount of the debt from the date of infusion of the Investor Contribution by the Investor."

(iv) It has also not been disputed that the Respondent no.1 is holding 49% of the equity shares of the Joint Venture Company & Corporate Debtor was holding 51% of the Joint Venture Company. The Investment has been made by both the parties into the Joint Venture Company.

(v) In order to prove that Respondent No.1 is a financial Creditor of Corporate debtor it has to meet the following conditions of the Code. Accordingly , we are reproducing Section 5 (7) & Section 5 (8) as given below:

(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes--

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

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(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;"

(vi) From the above it is very much clear that a disbursement of financial debt from Creditor to Corporate Debtor is critical and non negotiable. It is a mandatory requirement to consider Respondent no.

1as financial creditor, the debt should have flown from the Respondent No.1 to the Corporate debtor.

(vii) On going through the various documents it is very much clear that the Respondent no.1 has not disbursed any money to the Corporate debtor and hence, on this count the Judgment of Hon'ble Apex Court in 'Anuj Jain vs. Axis bank (2020 8 SCC 401)' is amply clear. Company Appeal (AT) (Ins) No. 06 of 2021

(viii) From the above Judgment Para 42.3 states that the enunciation aforementioned illuminates the reasons as to why at all a financial creditor is conferred with a major, rather pivotal, role in the processes contemplated by Part II of the Code. It is the financial creditor who lends finance on a term loan or for working capital that enables the corporate debtor to set up and /or operate its business; and who has specified repayment schedules with default consequences. The most important feature, as this Court has said, is that a financial creditor is, from the very beginning, involved in assessing the viability of the corporate debtor who can, and indeed, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress. Hence, a financial creditor is not only about in terrorem clauses for repayment of dues; it has the unique parental and nursing roles too. In short, the financial creditor is the one whose stakes are intrinsically interwoven with the well-being of the corporate debtor.

(ix) Para- 46 of the judgement states that applying the aforementioned fundamental principles to the definition occurring in Section 5 (8) of the Code, we have not an iota of doubt that for a debt to become "financial debt" for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in clauses (a) to (f) of Section 5 (8); it Company Appeal (AT) (Ins) No. 06 of 2021 may also include any derivative transaction or counter-indemnity obligation as per clauses (g) and (h) of Section 5 (8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of "disbursement" against "the consideration for the time value of money" could be forsaken in the manner that any transaction could stand alone to become a financial debt" only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as "financial debt" within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal

against consideration for the time value of money. Company Appeal (AT) (Ins) No. 06 of 2021

(x) Para 48: It is also evident that what is being dealt with and described in Section 5(7) and in Section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code.

(xi) The Arbitral Award/Decree cannot be enforced by invoking Section 7 of the Code. A decree/Award holder is not a Financial Creditor and any obligation arising there under will not amount to a financial debt as held in the following cases:

a. In *Shubankar Bhowmik v. Union of India W.P. (C) (PIL) No. 4/2022*, Division Bench, Hon'ble Tripura High Court has held that Decree Holder, although recognized as Creditor under S. 3(10), are a different class of creditor and cannot be treated as Financial Creditor or an Operational Creditor under I & B Code, 2016 as follows:

"[11]... The interest recognized is that in the decree and not in the dispute that leads to the passing of the decree. This is apparent from the fact that decree holders as a class of creditors are kept separate from "financial creditors" and "operational creditors".

No divisions or classification is made by the statute within this class of decree holders. The inescapable conclusion from the aforesaid discussion is, that the IBC treats decree holders as a separate class, recognized by virtue of the decree held. The IBC does Company Appeal (AT) (Ins) No. 06 of 2021 not provide for any malleability or overlap of classes of creditors to enable decree holders to be classified as financial or operational creditors..."

This view was affirmed by the Hon'ble Supreme Court of India in SLP (C) 6104/2022 wherein the SLP to challenge the above Order was rejected. b. In *Sushil Ansal v. Ashok Tripathy CA (AT) Ins. No. 452 of 2020* this Hon'ble Appellate Tribunal has held that an award/decreed holder cannot be a Financial Creditor, as there is no disbursement and return under a decree. A decree is merely a settled/adjudicated amount culminating from the resolution of a dispute. This Tribunal held as follows:

"The answer to the question whether a decree-

holder would fall within the definition of Financial Creditor has to be an emphatic No as the amount claimed under the decree is an adjudicated amount and not a debt disbursed against the consideration for the time value of money and does not fall within the ambit of any of the clauses enumerated under Section 5 (8) of the I & B Code.") SCC Citation- 2020 SCC Online NCLAT 680 Company Appeal (AT) (Ins) No. 06 of 2021 c. In *Digamber Bhondwe v. JM Financial Asset Reconstruction CA (AT)*

(Ins) No. 1379/2019 this Hon'ble Tribunal has held that decree holder cannot be termed as Financial Creditor for initiation of CIRP:

"We further reject the submission that because in Section 3(10) of I & B Code in definition of "Creditor"

the "decree holder" is included it shows that decree gives cause to initiate application under Section 7 of I & B Code. Section 3 is in Part I of I & B Code. Part II of I & B Code deals with "Insolvency Resolution and Liquidation for Corporate Person" & has its own set of definitions in Section 5. Section 3 (10) definition of "Creditor" includes "Financial Creditor", "Operational Creditor" "Decree-holder" etc. But Section 7 or Section 9 dealing with "Financial Creditor" and "Operational Creditor" do not include "decree-holder"

to initiate CIRP in Part II. We accept the submissions made by the Learned Counsel for the Appellant..."

(xii) It is very much clear that the Respondent no.1 cannot be said to be a financial creditor of the Corporate debtor. Simply, relying on the consent award CIRP cannot be invoked .The Code/Adjudicating Authority is not the executing authority for enforcing the Arbitral Award under the provisions of Arbitration & Conciliation Act, 1996.

(xiii) It is abundantly clear that the Respondent no.1 investment of debentures & unsecured loans to the Joint Venture Company are evidently not a disbursement made to the Corporate Debtor. This Appellate Tribunal has already prevented in the following Judgments the enforcement of a decree/Arbitral Award using the provisions of IBC.

(i) G Eswara Rao v. SASF, Judgment dtd. 7.2.2020 - internal para. 26, pg. 22 Company Appeal (AT) (Ins) No. 06 of 2021

(ii) Sushil Ansal v. Ashok Tripathy, Judgment dtd. 14.08.2020- internal para. 23, pg.29

(iii) HDFC Bank v. Bhagwan Das Auto Finance Ltd. Judgment dtd. 9.12.2019.

(iv) C. Shivakumar Reddy v. Dena Bank, Judgment dated 18.12.2019

(v) IARCL v. Jayant Vitamins, Judgment dated 17.12.2019.

26. We are making it clear that Investment made in SPV/Joint Venture through Share Subscription & Shareholders Agreement will not come within the purview of Section 7 R/w Section 5(8) of the 'Code'.

27. It is also further stated that to get it covered under Section 7 R/w Section 5 (7) & (8) of the Code that there must be disbursal of fund by the Financial Creditor to the Corporate Debtor or in simple term, if there is no disbursal then even 'Financial Debt' will not attract Section 7 of the Code, as it

looks from the bare reading of Section 5(8) of the Code in order to qualify under Section 7 of the Code, the following basic ingredients are a requirement to get covered under Section 7 of the Code:

- a. The Creditor must be a 'Financial Creditor' and be covered by Section 5(7) & (8) of the Code.
- b. The Financial Debt must be owed by the Corporate Debtor. However, the default may be occurred in respect of that Financial Creditor or any other Financial Creditor.
- c. Financial Debt to carry interest element and be disbursed against the consideration of time value of money.
- d. Money borrowed against the payment of interest Company Appeal (AT) (Ins) No. 06 of 2021 e. Investment made with the object of profit sharing from revenue generated will also not be covered within the ambit of Section 7 of the Code. f. Award received under Arbitration and Conciliation Act, 1996 or amount emerged from the Settlement Agreement will not come within the purview of Section 7 of the Code.

28. Even the Applicant has mentioned in the Form-1, Part-IV total amount of debt guaranteed as on 31st October, 2018 Rs. 234,69,62,791/- are in default as per Settlement Agreement dated 07.04.2017. This suggests that Section 7 of the Code is being invoked pursuant to Settlement Agreement which is not permissible under Section 7 of the Code.

29. In view of aforesaid facts & Circumstances we are not in a position to sustain the order of Adjudicating Authority & accordingly we are allowing the Appeal.

Interim order, if any, passed by this 'Appellate Tribunal', stands vacated. No order as to costs.

[Justice M. Venugopal] Member (Judicial) [Dr. Ashok Kumar Mishra] Member (Technical) 02nd August, 2022 New Delhi sr Company Appeal (AT) (Ins) No. 06 of 2021