

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT)(INS) No.1499 of 2019**

(Arising out of Order dated (25.10.2019) passed by the (National Company Law Tribunal) Kolkata Bench in C.P(IB) No 1388/KB/2018)

**IN THE MATTER OF:**

**Partha Sadhan Bose,  
Suspended Director,  
M/s.E.C.Bose & Co. Pvt. Ltd  
13A, St. George Terrace, Hastings,  
Kolkata – 700 022**

**...Appellant**

**Versus**

**M/s.Sugesan Transport Private Limited  
340, 1<sup>st</sup> South Main Road,  
Kapaleshwarar Nagar, Neelankkarai,  
Chennai- 600 115**

**...Respondent**

**Present:**

**For the Appellant: Mr. Pinaki Addy and Ms. Arpita Singh, Advocates.  
For the Respondents : Mr. Udian Sharma, Mr. Shivam Singh, Mr. Harpraat  
Singh Gupta and Mr. Jaideep Khanna, Advocate for R-1  
Ms. Shruti Agarwal and Mr. Saurabh Chaudhary,  
Advocate for IRP.**

**J U D G M E N T**

**VENUGOPAL M.J.**

1. The Appellant (Suspended Director of the Corporate Debtor) has preferred the instant Appeal as an 'Aggrieved Person', being dissatisfied with the impugned order dated 25.10.2019 passed by the Adjudicating Authority ('National Company Law Tribunal') Kolkata Bench.
2. The Adjudicating Authority ('National Company Law Tribunal') Kolkata Bench while passing the impugned order dated 25.10.2019 at para 6 & 7 had observed the following:

*" 6- We have considered submissions made by both the sides and material on record. This Petition has been filed by M/s. Sugesan Transport pvt. Ltd. It is not in dispute that in addition to this party, two other entities which appear to be group companies have also given money to the Corporate Debtor. The money has been given to the Corporate Debtor by these entities as evidence from the*

*promissory note of Corporate Debtor in the following manner:-*

*Sugesan Transport Pvt. Ltd., Rs. 1,00,00,000/- vide UTR No.CORPR92015121112850002*

*Sugesan Ware Housing Pvt Ltd., Rs. 75,00,000/- vide UTR No. CORPR92015121112850003*

*Sugesan Mines and Minerals Pvt. Ltd., Rs. 75,00,000/- vide UTR No. CORPR92015121112850004*

*As far limitation aspect is concerned, there is no doubt that the Petition has been filed within limitation period.*

*We have also carefully perused the terms and conditions of MOU whereby both the parties in addition to this Financial transaction have entered for creation of a SPV which has not materialized. It is to be noted that the Corporate Debtor was already having tender in its favour from Kolkata Port Trust which as per its claim only has been illegally terminated by the Kolkata Port Trust and which has resulted into default in the payment of the loan taken by the Corporate Debtor. In our view, MOU consists of two transactions i.e. one is related to granting of loan and other is in regard to formation of SPV. From the perusal of MOU, it is evident that both these transactions are independent of each other. In any case, transaction loan has not been made for equity, hence, it remains of the nature of financial debt.*

*7- As far as the condition that the Petition should have been filed by all the three entities independently or by the Financial Creditor on behalf of other two parties only when such purpose would have assigned the debt payable by the corporate debtor to them to the financial creditor. In this regard, provisions of Section 5(7) of the IBC, 2016 are absolutely clear. No material has been placed on record that to the fact that such debt has been*

*legally assigned or transferred to the Financial Creditor. Hence, to this extent, we accept this plea of the corporate Debtor. However, the loan given by the Financial creditor itself is more than threshold limit of Rs. 1 Lakh, hence, this fact has not help the cause of the Corporate Debtor as far as maintainability of this Petition is concerned. The other two parties may lodge their claims before IRP/RP as per the provisions of IBC, 2016 read with relevant Regulations. We further hold that pending arbitration proceedings cannot be limiting factor.”*

And resultantly admitted the Application filed by the ‘Respondent/Financial Creditor’.

3. The Learned counsel for the Appellant submits that the ‘Corporate Debtor’ (E.C.Bose Co. Pvt. Ltd) was awarded handling agency license to operate “shore handling facility’ at Berth No. 2 and 8 of Haldia Dock vide MTO/G/607-E/SHORE/2015 and Work Order No. MTO/G/607-E/SHORE/2016/2849 dated 09.10.2015. Further, the Corporate Debtor, under this contract had to furnish the ‘Performance Bank Guarantee’ of Rs. 3.52 Cr favoring KOPT within thirty days as per clause 7.2 of the tender document and also to initiate action for completion of supply, installation and commissioning of all equipments as per clause 7.3 of the tender document within ninety days which lapsed on 06.01.2016.
4. It is represented on behalf of the Appellant that the ‘Corporate Debtor’ (ECB) was looking for a partner who could execute the work along together with it and hence entered into a ‘Memorandum of Understanding’ dated 11.12.2015 with the Respondent (Sugesan Transport Pvt. Ltd) who was willing to invest Rs. 2.5 Cr. Towards margin money for issuance of ‘Performance Bank Guarantee’ and also participate in the execution of work by forming a private limited Company which was to be incorporated preferably by 25.12.2015 or a later date.
5. The Learned Counsel for Appellant points out that as per clause 1.5 of ‘Memorandum of Understanding’ the money which would be given by the Respondent was to be utilized as margin money to enhance the limit of bank

guarantee of Rs. 3.25 Crore also that, it was stipulated that the same was to be returned to Respondent with Bank rate of interest within thirty days but not later than eighty-nine days at any cost. Moreover, it is the stand of the Appellant that in terms of Clause 1.6 of 'Memorandum of Understanding' till the money was not returned as contemplated under clause 1.5, the Respondent shall hold 91.63% shareholding of the 'Corporate Debtor (ECB)' as security along with a cheque of Rs. Three crores as available security.

6. The Learned counsel for the Appellant brings it to the notice of this Tribunal that 'Memorandum of Understanding' contemplates of a formation of 'Special Purpose Vehicle' through incorporation of a private limited company under clause 2.1 which was scheduled to be completed by 25.12.2015 under clause 2.2. Further, the 'SVP' was to be formed for the purpose of assisting in the execution of tenders as awarded in favour of the 'Corporate Debtor' by 'KOPT' or any work to be awarded in future under clause 2.3. Apart from that the Corporate Debtor and the Respondent are required to invest in 'SPV' in equal ratio under clause 2.4. Besides these contributions/loans into the 'SPV' would be in the same ratio under clause 2.9 and further it was stipulated that the Corporate Debtor shall transfer its contract with 'KOPT' in the name of 'SPV' as per stipulation in the Agreement with 'Port Trust' and till such time the existing contract shall be given on back to back basis to 'SPV' under clause 2.13.
7. The Learned counsel for the Appellant proceeds to point out that all disputes under the 'Agreement' was required to be referred to 'Arbitration' as per clause 3.6. In this connection, it is projected of the Appellant that in terms of 'MOU', the Corporate Debtor (ECB) took the amount from 'STPL' and deposited in 'State Bank of India' towards 'margin money' which later on furnished the 'Performance Bank Guarantee' in favour of 'KOPT'. Added further, the Corporate Debtor (ECB) vide email dated 11.12.2015 sent to 'STPL' scan copy of the 'Bank Guarantee' and 'Fixed Deposit Receipt' as per requirement of Clause 1.5 of 'Memorandum of Understanding'. The Appellant also had submitted the necessary information through email dated 17.12.2015 and document for the formation of SPV by the name "Seth and Bose Infrastructure

Pvt. Ltd”. and also deposited a sum of Rs. Two lakhs for incorporating the new Company.

8. The Learned Counsel for the Appellant submits that the Corporate Debtor (ECV) entered into a back to back contract with “Collate Consultants Pvt. Ltd through Mukesh K.Seth, Director, a Corporate entity under the same management of ‘STPL’ for supply and maintain equipments for execution of work. The plea taken on behalf of the Appellant is that the Respondent (STPL), despite having provided detailed information or documents by Corporate Debtor (ECB) with an ulterior motive to cause loss and damage to ECB failed to complete the formation of the Company and had also not arranged for the machinery required for commissioning the work by 06.01.2016 as per Clause 7.3 of Tender document.
9. As a matter of fact, ‘KOPT’ was sending reminders to mobilise all minimum equipments and machineries and also extended the date but STPL could not mobilise the equipment nor their sister concern ‘Collate Consultants’. Finally, the ‘KOPT’ through letter dated 10.02.2016 had cancelled the contact and encashed the bank guarantee of Rs. 2.5 Cr. Invested by ‘STPL’; Since the work had not commenced by mobilising the man power and resources. The Learned counsel for the Appellant takes stand that the Corporate Debtor ‘ECB’ through letter dated 06.06.2016 and 06.06.2016 continued to issue cheques or replace it after expiry of its validity period as ‘security’ for a sum advanced towards the ‘Bank Guarantee’ and in fact these cheques were never meant to be encashed but given as security which was indicated in the letter itself. Therefore, a contention is advanced on behalf of the Appellant that the investment by Respondent (STPL) was not as a ‘Loan’ but was given as margin money to be kept deposited in the form of FDR with SBI for enabling the said bank to increase the limit of ‘ECB’ for issuance of bank guarantee of Rs. 3.52 Crore in favour of ‘KOPT’ as a precursor to fulfill obligation under the tender awarded by ‘KOPT’ for “shore handling facility” at berth No.2 and 8 and for subsequent execution the said work jointly with the Corporate Debtor by forming a private Limited Company.
10. It is the version of the Appellant that finally, the entire amount deposited as margin money with ‘State Bank of India’ went back to ‘KOPT’ upon

encashment of 'Bank Guarantee' on 'cancellation of contract' due to laxity on the part of 'STPL' to honour its commitment by mobilising manpower and resources. Further, it is not pure and simple Loan transaction associated with an interest between 'ECB' and 'STPL' because of the reason that "MOU" does not say that a specific rate of interest or any particular period for which it was taken or any particular date when it becomes due and payable or whether it shall be payable irrespective of the contract between 'ECB' and KOPT is cancelled or MOU is cancelled for any reason or the other. It is the contention of the Appellant that owing to the uncertainties and ambiguities as referred supra, it is not correct to consider it as a 'Loan Transaction' but should be treated as a joint and concerted action of consortium of partners to bring in money which is utilised as margin money for issuance of Bank Guarantee'.

11. The Learned counsel for the Appellant comes out with the argument that clause 1.5 of 'Memorandum of Understanding' visualizes to return of money by the Corporate Debtor (ECB) to STPL "not later than 89 days at any cost" because it has a direct bearing or link with the contractual obligation of the Corporate Debtor (ECB) to KOPT for completion of supply, installation and commission of all equipments as per clause 7.3 of tender document within Ninety days. Therefore, it is the submission of the Learned counsel for the Appellant that only after completion of the installation of equipments within ninety days, the business could be generated by raising of bills on KOPT by the Corporate Debtor and the Respondent(STPL). Further, without successful generation of the business and earning of profits, there is no question of returning of the money by ECB to STPL as it is directly linked to sharing of profit.
12. The Learned counsel for the Appellant contends that the Respondent (STPL) by stipulating in MOU to pay interest at bank rate has tried to pass on its interest burden on ECB which availing overdraft facility from its banker of Rs. One core as would be evident from the statement of its current account with 'Corporation Bank' which has been annexed to the Section 7 Application, but that too having crossed the limit of borrowing, it has to put in the money of Rs. 75 lacs each through its sister concern without any legal authorisation to the STPL for grant of loan ECB as has been rightly noted by the 'Adjudicating

Authority' in the impugned order and hence, the claim of the Respondent (STPL) for Rs. 1.5 crore as financial debt was rightly rejected.

13. The Learned Counsel for the Appellant submits that the amount disbursed by the Respondent(STPL) to the Corporate Debtor (ECB) is not a loan or money borrowed or disbursed against consideration for "time value of money" as has mentioned at para 17 in "Nikhil Mehta & sons" wherein it has held:

*"The key features of financial transaction as postulated by Section 5(8) is its consideration for time value of money. In other words, the legislature has included such financial transactions in the definition of 'financial debt' which are usually for a sum of money received today to be paid over a period of time in a single or series of payment in future".*

14. The Learned counsel for the Appellant relies upon the judgment of this Tribunal in Company Appeal (AT) (Insolvency) No. 38 of 2017 B.V.S.Lakshmi Vs. Geometrix Laser Solutions Private Limited wherein at para 28, 29 & 30 it has observed as under:

*"In "Nikhil Mehta and Sons", this Appellate Tribunal while noticed sub-section (8) of Section 5 of the 'I&B Code' observed: -*

*"17. The first question arises for consideration is as to who is a 'Financial Creditor'. Learned Adjudicating Authority, for determination of the aforesaid issue examined the definition provided in Section 5 (7) and 5(8) and in the impugned judgement rightly observed: -*

*"12. A perusal of definition of expression 'Financial Creditor' would show that it refers to a person to whom a Financial debt is owed and includes even a person to whom such debt has been legally assigned or transferred to. In order to understand the expression 'Financial Creditor', the requirements of expression 'financial debt' have to be satisfied which is defined in Section 5(8) of the IBC. The opening words of the definition clause would indicate that a financial debt is a debt along with interest which is disbursed against the consideration for the time value of money and it may include any of the events enumerated in sub-clauses (a) to (i). Therefore the first essential requirement of financial debt has to be met viz. that the debt is disbursed against the consideration for the time value of money and which may*

include the events enumerated in various sub-clauses. A Financial Creditor is a person who has right to a financial debt. The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money. In other words, the legislature has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black's Law Dictionary (9th edition) the expression 'Time Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned". In both the cases, the inflows and outflows are distanced by time and there is a compensation for time value of money. It is significant to notice that in order to satisfy the requirement of this provision, the financial transaction should be in the nature of debt and no equity has been implied by the opening words of Section 5(8) of the IBC. It is true that there are complex financial instruments which may not provide a happy situation to decipher the true nature and meaning of a transaction. It is pertinent to point out that the concept 'Financial Debt' as envisaged under Section 5(8) of the IBC is distinctly different than the one prevalent in England as provided in its Insolvency Act, 1986 and the 'Rules' framed thereunder. It appears that in England there is no exclusive element of disbursement of debt laced with the consideration for the time value of money. However, forward sale or purchase agreement as contemplated by Section-5 (8)(f) may or may not be regarded as a financial transaction. A forward contract to sell product at the end of a specified period is not a financial contract. It is essentially a contract for sale of specified goods. It is true that some time financial transactions seemingly restructured as sale and repurchase. Any repurchase and reverse repo transaction are sometimes used as devices for raising money. In a transaction of this nature an entity may require liquidity against an asset and the financier in return sell it back by way of a forward contract. The difference between the two prices would imply the rate of return to the financier. (See Taxman's Law Relating to IBC, 2016 by Vinod Kothari & Sikha Bansal)."

**29.** For coming within the definition of 'Financial Debt' as defined under sub-section (8) of Section 5, the Claimant is required to show that (i) there is a debt alongwith interest, if any, which has been disbursed and (ii) such disbursement has been made against the 'consideration for the time value of money'. Thereby, if the Claimant claims to be 'Financial Creditor' he will have to show that debt is due which he has disbursed against the 'consideration for the time value of money' and

*that the borrower has raised the amount directly or through other modes like credit facility or its de-materialised equivalent, note purchase facility or the issue of bonds, notes, debentures, loan stock or any other similar instrument. 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 can also be referred to by the Creditor to claim that there is a 'financial debt' due to him which has been disbursed against the 'consideration for the time value of money'. To show that there is a debt due which was disbursed against the 'consideration for the time value of money', it is not necessary to show that an amount has been disbursed to the 'Corporate Debtor'. A person can show that the disbursement has been made against the 'consideration for the time value of money' through any instrument. For example, for 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 for which only the market value of such transaction shall be taken into account, it is not necessary to show that amount has been disbursed. The disbursement against the 'consideration for the time value of money' is the main factor.*

**30.** *In the present case, the Appellant has failed to bring on record any evidence to suggest that she disbursed the money has been made against 'consideration for the time value of money'. There is nothing on the record to suggest that the Respondents borrowed the money. In absence of such evidence, the Appellant cannot claim that the loan if any given by the Appellant comes within the meaning of 'financial debt' in terms of sub-section (8)(a) of Section 5 of the 'I&B Code'."*

15. The Learned counsel for the Appellant cites the judgment of this Tribunal in Company Appeal (AT) (Ins) No. 142 of 2017 Neeraj Bhatia Vs. Davinder Ahluwalia and ors., wherein at para 18 & 19 it has observed as under:

**18.** *The amount of Rs. 1.05 Crores, if paid by the contesting respondents, they have so paid to the Bank (Financial Creditor), as 'personal guarantor' as defined in sub-section (22) of Section 5 and such 'personal guarantor' cannot claim to be a 'Financial Creditor' as defined under sub-section (7) read with sub-section (8) of Section 5 of the I & B Code till it is shown that debt amount has been disbursed against the consideration for time value of money.*

**19.** *The amount of Rs. 29,97,000/-, is claimed to have been paid by the contesting respondents either to Captain V. K. Adukia or Captain Rajeev Chauhan or the Punjab National Bank. There is nothing on record to suggest*

*that the amount has been 'disbursed' in favour of 'Corporate Debtor' against 'consideration for the time value of money'. The contesting respondents have also failed to bring on record any evidence to suggest that the money was borrowed or raised by the 'Corporate Debtor' under any other transactions including sale or purchase or other mode having commercial effect of borrowing."*

16. The Learned counsel for the Appellant contends that in the present case it cannot be said that 'ECB' has borrowed the money as the transaction putting in money is linked to business generation and income sharing between two partners who has equal stake in execution of the work for 'KOPT'.
17. Further, the security cheques issued and renewed from time to time cannot be the basis of Respondent claim when there is no liability to pay unless business is generated and liability to pay accrues.
18. The Learned counsel for the Appellant submits that 'Memorandum of Understanding' is not to be treated simple Loan agreement bereft of the formation of Company and execution of work which never happened rendering the contract becoming void and unenforceable on account of frustration due to laxity on the part of STPL.
19. The Learned counsel for the Appellant contends that when the Respondent had approached the 'Adjudicating Authority', the 'Claim' which formed the basis of the Application under Section 9 was also the subject matter of 'Arbitration dispute', a 'Per-existing dispute'. Further, in the 'Arbitration Proceedings', the trial commenced and that the Respondent witness was cross examined in 2018 and the filing of the Application before the Adjudicating Authority after the Trial had progressed substantially, disentitles Respondent (STPL) to claim any relief under I&B Code and STPL has to await for a favourable Award in the 'Arbitration' before moving the 'Adjudicating Authority'.
20. The Learned counsel for the Appellant submits that in the present case no detail was furnished about the default committed by producing Records of 'Information Utility' under Section 214 of I&B Code, 2016 or any evidence exhibiting the default and its exact date.

21. That part, the Learned counsel for the Appellant refers to the decision of the Hon'ble Supreme Court in Innoventive Industries V. ICICI bank 2018 (1) SCC 407 wherein it has held that the 'Debt' is not due and payable if it is not payable in Law or in Fact.
22. Lastly, it is the plea of the Appellant that the Application filed before the 'Adjudicating Authority' by the Respondent under the I&B Code goes to the root of the matter on the point of jurisdictional issue and that the parties may be relegated to 'Arbitration Proceedings'.
23. Repelling the contentions of the Learned counsel for the Appellant, the Learned counsel for the Respondent submits that in the present case there exists a 'Debt', which is an admitted 'Debt', arising out of the 'Memorandum of Understanding' dated 11.12.2015, mutually entered into between the parties in this regard. The Learned counsel for the Respondent refers to clause 1.3 & 1.5 of the 'MoU' dated 11.12.2015, which states that (i)1.3: the First Party had approached the Second party and that the Second party had agreed to provide the financial assistance to the tune of Rs. 2,50,00,000/- (ii) 1.5: that it is hereby agreed that the said amount utilised for the margin money would be returned to the Second Party after the First Party gets the limit enhanced to Rs. 3,52,00,000/- with bank rate of interest within 30 days but not later than 89 days at any cost."
24. Further, it is stand of the 1<sup>st</sup> Respondent that the Appellant, issued a Promissory Note dated 11.12.2015 in its favour promising to pay jointly and severally to the Appellant a sum of Rs. 2,50,00,000/- together with interest at the Bank lending rate of interest per annum, for the value received as per UTR details mentioned below:
  - a) Sugesan Transport Pvt Ltd, Rs.1,00,00,000/- vide UTR No. CORPR92015121112850002
  - b) Sugesan Warehousing Pvt Ltd, Rs.75,00,000/- vide UTR No. CORPR92015121112850003
  - c) Sugesan Mines & Minerals Pvt. Ltd. Rs.75,00,000/- vide UTR No. CORPR92015121112850004
25. The Learned counsel for the 1<sup>st</sup> Respondent puts forth an argument of the Appellant that the Appellant also issued various Post Dated Cheques in favour

of the Respondent in respect of the Financial debt and also 'Ledger Account' of the Corporate Debtor ('ECB') (01.12.2015 to 30.09.2016) shows the acknowledgment of 'Financial Debt' and the said account was signed by the authorised signature of the Respondent.

26. The Learned Counsel for the Respondent relies on the decision of the Hon'ble Supreme Court Pioneer Urban V. Union of India (2019) 8 SCC 416 wherein it is observed that "Financial Debt" must be interpreted widely, and that if there is a 'Commercial effect of borrowing' then, the 'Debt' would amount to 'Financial Debt'.
27. The Learned Counsel for the 1<sup>st</sup> Respondent refers the judgment of this Tribunal in Nikhil Mehta V. AMR Infrastructure Ltd reported in (2017) 143 SCL 278 (NCLAT) wherein the definition of the expression 'Financial Creditor' as defined under Section 5(7) of the I&B Code was examined. It is the plea of the Respondent that the time value has been defined in Black's Law Dictionary (9<sup>th</sup> Edn.) defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned.
28. The Learned counsel for 1<sup>st</sup> Respondent submits that the Applicant was a 'Financial Creditor' and the Section 7 I&B Code Application filed before the 'Adjudicating Authority' is maintainable, cites a decision of Anubhati Aggarwal V. DPL Builders (2018) 145 SCL 688 (NCLT- New Delhi), wherein it has observed that in the Agreement, as the Corporate Debtor was required to pay interest to the Creditor, as the interest amounted to consideration for the Time value of money. The Learned counsel for the Respondent points out that 'Memorandum of Understanding' dated 11.12.2015 was not a contract for Guarantee and in the present case, the amount was borrowed as 'Financial Assistance' and not as a Guarantee. Apart from this, the Learned Counsel for the Respondent submits that a 'Contract of Guarantee' is a contract to perform a promise, or discharge the liability, of a third person in case of default.
29. The Learned counsel for the 1<sup>st</sup> Respondent takes a stand that in the instant case, the Appellant was required to pay the Respondent the said amount with Bank rate of interest within thirty days but not later than eighty nine days at

any cost and therefore, the 'Debt' is a 'Financial Debt', and the Respondent is a 'Financial Creditor under the provisions of I&B Code.

30. Added further, the Learned counsel for the 1<sup>st</sup> Respondent contends that the Clause 1.0 of the 'MoU' dated 11.12.2015 is worded in such a manner that the Appellant is to mandatorily repay the amount irrespective of the fact that whether 'Special Purpose Vehicle' will be formed, or not.
31. The Learned counsel for the 1<sup>st</sup> Respondent brings it to the notice of this Tribunal that the Appellant filed W.P 3474(W) of 2016 before the Calcutta High Court wherein the submission was made that the 'SVP' could not be formed due to the labour unrest of the 'Kolkata Port Trust'. In reality, the non-formation of 'SVP' is no reason for Appellant to deny that there is an outstanding 'Financial Debt'.
32. The Learned counsel for the 1<sup>st</sup> Respondent points out that in the decision of SSMP Industries V. Peerkam Food (2019) SCC Online Del 9339 wherein it is observed that the prohibition under Section 14 of the I&B Code does not apply to claim preferred by the Corporate Debtor, and as both the claims and the counter claims are being adjudicated together, the pending 'Arbitration' is thus not a limiting factor.
33. It is to be borne in mind that in a subsisting application, liability to pay a sum of money is condition precedent of a 'Financial Debt'. The 'Financial Debt' represents the money payable in respect of loan borrowing made by a Corporate Debtor. In short, the sum of money is certainly and in all events payable is a 'Debt', disregard to the fact whether it is payable now or at a later point of time, in the considered opinion of this Tribunal.
34. Indeed, in Part II of the IBC, Section 63 expressly oust the 'Jurisdiction' of a 'Civil Court' or an 'Authority' and specifies that such Civil Court or an 'Authority' cannot entertain any suit or proceedings which are in the nature of a 'lis' in respect of which the 'National Company Law Tribunal' or 'National Company Law Appellate Tribunal' has jurisdiction. As per Section 7 of the Code, a Financial Creditor' can initiate 'Insolvency Proceedings' against the 'Corporate Debtor' before the 'Adjudicating Authority'. Section 4 of the Code says that Part II applies to all matters relating to 'Insolvency' and 'Liquidation of 'Corporate Debtors' where the minimum amount of the default is Rs. One

Lakh. In terms of Section 9 of the Code, an 'Operational Creditor' after fulfilling the requirements of Section 8, can initiate the 'CIRP' against the 'Corporate Debtor' before an Adjudicating Authority. In pith and substance if the 'Debt' due and payable is above One lakh rupees, then the Application for 'Corporate Insolvency Resolution' can be filed before the Adjudicating Authority i.e. NCLT and not before any other fora. Furthermore, the ingredients of Section 238 of the Code operates against other laws when they are in conflict with the Code. Even as per the 'Memorandum of Understanding' dated 11.12.2015, the registered office address of the Corporate Debtor is only in Kolkata and as such, it cannot be said by any imagination that the Adjudicating Authority (NCLT, Kolkata Bench) has no jurisdiction to determine the Section 7 Application' filed by the 1<sup>st</sup> Respondent/Financial Creditor. Hence, the contra plea taken on behalf of the Appellant that the Application 'has to be' filed before the 'concerned Court at Chennai' based on 'MOU' dated 11.12.2015 is not acceded to by this Tribunal. As a logical corollary, the Application (under Section 7 of the Code) filed by the 1<sup>st</sup> Respondent/Applicant (Financial creditor) is perfectly per se maintainable in Law.

35. As far as the present case is concerned, the 'Memorandum of Understanding' consists of two transactions i.e. one is related to the granting of loan and the other is in regard to formation of SPV. These transactions are quite independent of each other. The Loan was given by the Respondent to the 'Corporate Debtor' and its group Companies and for which promissory notes were executed. Section 5(7) of the Code defines 'Financial Creditor' meaning any person to whom a Financial Debt is owed and includes a person to whom such debt has been legally assigned or transferred.
36. Considering the fact that in the instant case, there is a 'Debt' and 'Due' payable by the Corporate Debtor and a default was committed by the Corporate Debtor, this Tribunal without any haziness holds that the impugned order of the Adjudicating Authority ('National Company Law Tribunal, Kolkata Bench) dated 25.10.2019 in admitting the Section 7 Application filed by the Respondent/Financial Creditor is free from any patent

illegalities. Resultantly, the present Appeal fails and the same is dismissed.

No costs. I.A. No.4258/2019 is closed.

[Justice Venugopal M.]  
Member (Judicial)

[V.P. Singh]  
Member(Technical)

[Shreesha Merla]  
Member(Technical)

27<sup>th</sup> February, 2020

New Delhi