

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

**Company Appeal (AT) (Insolvency) No. 646 of 2018**

[Arising out of order dated 12<sup>th</sup> October, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai in CP/62/(IB)/CB/2017]

**IN THE MATTER OF:**

**Ranvir Ranjit**

S/o Ranjit Pratap,  
R/o Villa Enchantress  
No.3(14) Ranjit Road,  
Kottur,  
Chennai – 600 085.

**...Appellant**

**Vs**

**1. M/s Vijay R. Vakharia,**

No.1, Whites Road,  
Opp. Express Avenue,  
Royapettah,  
Chennai – 600 014.

**2. Vijay R. Vakharia and Ajay R Vakharia,**

No.1, Whites Road,  
Opp. Express Avenue,  
Royapettah,  
Chennai – 600 014.

**3. Vijay Kumar HUF,**

No.1, Whites Road,  
Opp. Express Avenue,  
Royapettah,  
Chennai – 600 014.

**4. Vijay R. Vakharia,**

Legal heir of  
Lt. Ramanlal N. Vakharia,  
No.1, Whites Road,  
Opp. Express Avenue,  
Royapettah,  
Chennai – 600 014.

**5. Sumit V. Vakharia,**

No.1, Whites Road,  
Opp. Express Avenue,  
Royapettah,  
Chennai – 600 014.

**6. Aasman Financial Services Pvt. Ltd.,**

D-5, Shanti Appartments,  
21, 1<sup>st</sup> Cross Street, TTK Road,  
Chennai – 600 018.

**7. Zeal Warehousing Pvt. Ltd.,**

No.1, Whites Road,  
Opp. Express Avenue,  
Royapettah,  
Chennai – 600 014.

**8. Rayala Corporation Pvt. Ltd.,**

Regd. Office at  
144/7, B Rajiv Gandhi Salai,  
Old Mahabalipuram Road,  
Kottivakkam,  
Chennai – 600 006.

**9. LIC Housing Finance Limited,**

No.22/29, 1<sup>st</sup> Floor, VRB Complex,  
Venkatrathan Nagar,  
Chennai – 600 020.

**....Respondents**

**Present:**

**For Appellant:** Mr. Abhishek Gupta, Mr. George Cherian, Ms. Rohini  
Musa and Mr. Ujas Kumar, Advocates.

**For Respondents:** Mr. Aksaay Sharma and Mr. TanvirNayar, Advocates  
for Respondent No. 1 to Respondent No.7.

Mr. Pawan Kishore Singh and S. Madhusmita Bora,  
Advocates for Respondent No. 9.

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

### **BANSI LAL BHAT, J.**

Appellant, a Shareholder of the Corporate Debtor-‘Rayala Corporation Pvt. Ltd.’, is aggrieved of order dated 12<sup>th</sup> October, 2018 (hereinafter referred to as ‘impugned order’) passed by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai in CP/62/(IB)/CB/2017 filed by the Respondent Nos. 1 to 7 (hereinafter referred to as ‘Financial Creditors’) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’) by virtue whereof the aforesaid application of Financial Creditors came to be admitted with consequential directions in the nature of slapping of moratorium on Corporate Debtor, appointment of Interim Resolution Professional and further measures pursuant thereto. The impugned order has been assailed on certain grounds which shall be adverted to as the narrative proceeds.

2. The flashback of events may be noticed briefly. Financial Creditors comprising of Shri Vijay R. Vakharia and six others sought initiation of Corporate Insolvency Resolution Process against the Corporate Debtor by approaching the Adjudicating Authority with a joint application in the prescribed format alleging default on the part of Corporate Debtor in discharging the obligation in respect of the Financial Debt to the tune of Rs.4,46,08,990.28/- as on 31<sup>st</sup> October, 2017 which arose out of financial

assistance provided by the Financial Creditors to Corporate Debtor by way of multiple transactions in course of business against consideration of time value of money since the year 2005 wherein the Corporate Debtor had been paying interest on the borrowings as accrued. According to Financial Creditors, the Corporate Debtor defaulted in repayment of outstanding amounts after the year 2013 though in the year 2016 a minimal part of the outstanding dues was paid. The Financial Creditors alleged that the Corporate Debtor willfully refused to clear the outstanding debt despite admitting its liability qua the financial debt. The Financial Creditors, apart from other relevant documents placed before the Adjudicating Authority, relied upon Renewed Promissory Notes dated 15<sup>th</sup> May, 2015 in terms whereof the Corporate Debtor admitted its liability in relation to each of the Financial Creditors. The Financial Creditors also relied upon various cheques issued by the Corporate Debtor to discharge the financial debt after arranging payments. Reference has also been made to various emails assuring payment of pending dues. In its reply before the Adjudicating Authority, the Corporate Debtor denied the claim of Financial Creditors advancing multiple pleas. On consideration of the record, the Adjudicating Authority observed that the Corporate Debtor had failed to produce any document pertaining to One Time Settlement (OTS) as claimed by it. In regard to plea of outstanding debt having being paid, the Adjudicating Authority observed that the Corporate Debtor failed to explain as to why it had not obtained No Dues Certificate (NDC) from the Financial Creditors. Upon noticing that the assertion of Corporate Debtor in regard to repayment

of outstanding dues was not supported by any documentary evidence, the plea of Corporate Debtor was dismissed. The Adjudicating Authority repelled the Corporate Debtor's contentions in regard to plea of limitation, joining of the Financial Creditors for initiation of Corporate Insolvency Resolution Process by filing a joint application, maintainability of the application and the borrowing of loan by Corporate Debtor being violative of its Articles of Association and initiated the Corporate Insolvency Resolution Process against the Corporate Debtor in terms of the impugned order as noticed hereinabove.

3. The impugned order has been assailed on the ground that the Financial Creditors have miserably failed to establish the existence of a financial debt; that the liability with regard to principal amount and interest in terms of the promissory notes dated 15<sup>th</sup> May, 2015 has been discharged; that the claim of Financial Creditors is hopelessly time barred and that in terms of demand notice dated 3<sup>rd</sup> November, 2017 the Financial Creditors claimed to be Operational Creditors and as such are estopped from making a claim against the Corporate Debtor as Financial Creditors.

4. It is submitted on behalf of the Appellant that in support of their application under Section 7 in the prescribed format the Respondents have not furnished any record maintained by the information utility service or from other sources to prove the particulars of financial debt and existence of default. It is further submitted that the demand promissory note being in the nature of a negotiable instrument together with the offer and acceptance

letter for taking the space on lease does not give rise to a financial debt and in view of the same Respondent No. 1 cannot be said to be a Financial Creditor. It is further contended that the claim of Respondent No. 1 is on three counts. While no payment is due in regard to part of first count and third count, payment as regards second count is barred by limitation. As regards Respondents No. 3, 4, 5, 6 and 7 discharge of debt is pleaded while in regard to Respondent No. 2, plea of limitation has been setup.

5. Per contra it is submitted on behalf of Respondents that the balance sheet provided by the Insolvency Resolution Professional clearly shows that Rs.1.70 Crore is still outstanding towards Ramanlal Vakharia and Rs.25 Lakhs debt is still outstanding towards Rayala Phase II Loan given by Vijay Vakharia. It is further submitted that the Respondents – ‘Financial Creditors’ were entitled to substantiate the default either by submitting the record of default recorded with the information utility or other such record as evidence of default. The balance sheet of the Corporate Debtor till date shows that money is owed to Respondent No. 1 and 2. It is submitted that Respondents No. 1 to 7 had filed a joint application before the Adjudicating Authority on the basis of various financial contracts. Respondents other than Respondent No. 2 were similarly situated as their cases were based on Promissory Notes while Loan II transaction of the Respondent No. 1 and transaction of Respondent No. 2 with the Corporate Debtor were based on financial contracts other than Promissory Notes, details whereof were furnished in the affidavit supporting the application further supported by

the relevant documents. It is submitted that the Corporate Debtor was in default of the outstanding amounts and had paid a minimal part of the outstanding dues in March, 2016 whereafter it refused to clear the remaining dues of Respondents - Financial Creditors despite admitting its liability towards the financial debt. It is further submitted that the plea of limitation set up by the Appellant is bogus as there has been a continued cause of action due to persistent defaults committed by the Corporate Debtor, which made part payment in March, 2016 and extended assurances till October, 2017. It is further pointed out that as late as in December, 2015, Corporate Debtor delivered cheques worth Rs.9.14 Crores to the Respondents - Financial Creditors towards partial discharge but subsequently sought extension of time for encashment of cheques. It is further pointed out that even on 18<sup>th</sup> March, 2016 and 29<sup>th</sup> March, 2016 the Corporate Debtor issued cheques worth Rs.4.84 Crores favouring the Financial Creditors towards partial discharge of its liability but the Corporate Debtor again requested for extension of time in encashment of the same. Reference is also made to email dated 17<sup>th</sup> April, 2017 from the Corporate Debtor admitting its liability to pay the dues to the Financial Creditors and seeking time to discharge its liability. It is submitted that the claim in the application is a legally enforceable claim both in fact and in law and such claim being based on Promissory Notes and Lease and Purchase Agreements clearly falls within the purview of 'financial debt' which have the commercial effect of a borrowing and are for time value of money. As regards, the plea of One Time Settlement between the Corporate Debtor and

Respondents – Financial Creditors it is submitted that no such settlement was mutually agreed between the parties and the plea was a pure concoction. Lastly it is submitted that the Resolution Professional at the third meeting of the Committee of Creditors has approved a claim amount of Rs.14,15,08,515/- viz-a-viz a claim of Rs.30,23,64,198/- made by the Financial Creditors and the plea of discharge of debt by the Corporate Debtor on 18<sup>th</sup> March, 2016 and 29<sup>th</sup> March, 2016 was a hoax as the Corporate Debtor failed to produce ‘No Dues Certificate’ as evidence of discharge of its liability.

6. We have given a patient hearing to the learned counsel for the parties and also waded through the record.

7. At the very outset, we may observe that the contention raised qua the nature of transactions inter-se the parties bringing the same within the fold of ‘Financial Debt’ has been duly considered by the Adjudicating Authority with reference to Clause 6 of the Memorandum of Agreement dated 1<sup>st</sup> November, 2010 and 1<sup>st</sup> December, 2010, on consideration whereof the Adjudicating Authority was of the view that the amount disbursed by the Creditors to the Corporate Debtor was against the consideration for time value of money which had the commercial effect of borrowing. This view of Adjudicating Authority is in consonance with the position of law emerging from provisions of I&B Code and the factual position obtaining under the terms of agreements referred to hereinabove. Section 5(7) of I&B Code defines the legal expression ‘financial creditor’ as a person to whom a



financial debt is owed which also includes an assignee or a transferee. Section 5(8) of I&B Code defines the term 'financial debt' as a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes the money borrowed against the payment of interest, amounts raised under credit facility, purchase facility, issue of bonds, notes, debentures, loan stock or similar instrument, amount of liability in respect of any lease or hire purchase contract, receivables other than on non-recourse basis, amount raised under any other transaction including forward sale or purchase agreement having commercial effect of a borrowing, derivative transactions in connection with protection against fluctuation in price, counter indemnity obligations in respect of guarantee, indemnity, bond, letter of credit or any instrument issued by a bank or financial institution and the amount of any liability in respect of any guarantee or indemnity with reference to the aforesaid transactions. This Appellate Tribunal, while dealing with the interpretation of 'financial debt' in **'Shailesh Sangani Vs. Joel Cardoso, Company Appeal (AT) (Insolvency) No. 616 of 2018 decided on 30<sup>th</sup> January, 2019'** observed as under:-

*6. A plain look at the definition of 'financial debt' brings it to fore that the debt alongwith interest, if any, should have been disbursed against the consideration for the time value of money. Use of expression 'if any' as suffix to 'interest' leaves no room for doubt that the component of interest is not a sine qua non for bringing the debt within*

*the fold of 'financial debt'. The amount disbursed as debt against the consideration for time value of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (i) of Section 5(8) embody the nature of transactions which are included in the definition of 'financial debt'. It includes money borrowed against the payment of interest. Clause (f) of Section 5(8) specifically deals with amount raised under any other transaction having the commercial effect of a borrowing which also includes a forward sale or purchase agreement. It is manifestly clear that money advanced by a Promoter, Director or a Shareholder of the Corporate Debtor as a stakeholder to improve financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the part of Corporate Debtor notwithstanding the fact that no provision is made for interest thereon. Due to fluctuations in market and the risks to which it is exposed, a Company may at times feel the heat of resource crunch and the stakeholders like Promoter, Director or a Shareholder may, in order to protect their legitimate interests be called upon to respond to the crisis and in order to save the company they may infuse funds without claiming interest. In such situation such*

*funds may be treated as long term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money. The interests of such stakeholders cannot be said to be in conflict with the interests of the Company. Enhancement of assets, increase in production and the growth in profits, share value or equity enures to the benefit of such stakeholders and that is the time value of the money constituting the consideration for disbursement of such amount raised as debt with obligation on the part of Company to discharge the same. Viewed thus, it can be said without any amount of contradiction that in such cases the amount taken by the Company is in the nature of a 'financial debt'.*

8. Dwelling on the scope of provisions of Section 7 of I&B Code dealing with triggering of Corporate Insolvency Resolution Process at the instance of 'Financial Creditors' and converging on the procedure regulating initiation of such process, the Hon'ble Apex Court held in **'Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.'**, **Writ Petition (Civil) No. 99/2018 (2019 SCC OnLine SC 73)** as follows:-

*“36. A perusal of the definition of “financial creditor” and “financial debt” makes it clear that a financial debt is a debt together with interest, if any, which is disbursed*

*against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an “operational debt” would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.*

**37.** *A financial creditor may trigger the Code either by itself or jointly with other financial creditors or such persons as may be notified by the Central Government when a “default” occurs. The Explanation to Section 7(1) also makes it clear that the Code may be triggered by such persons in respect of a default made to any other financial creditor of the corporate debtor, making it clear that once triggered, the resolution process under the Code is a collective proceeding in rem which seeks, in the first instance, to rehabilitate the corporate debtor. Under Section 7(4), the Adjudicating Authority shall, within the prescribed period, ascertain the existence of a default on the basis of evidence furnished by the financial creditor; and under Section 7(5), the Adjudicating Authority has to be satisfied that a default has occurred, when it may, by*

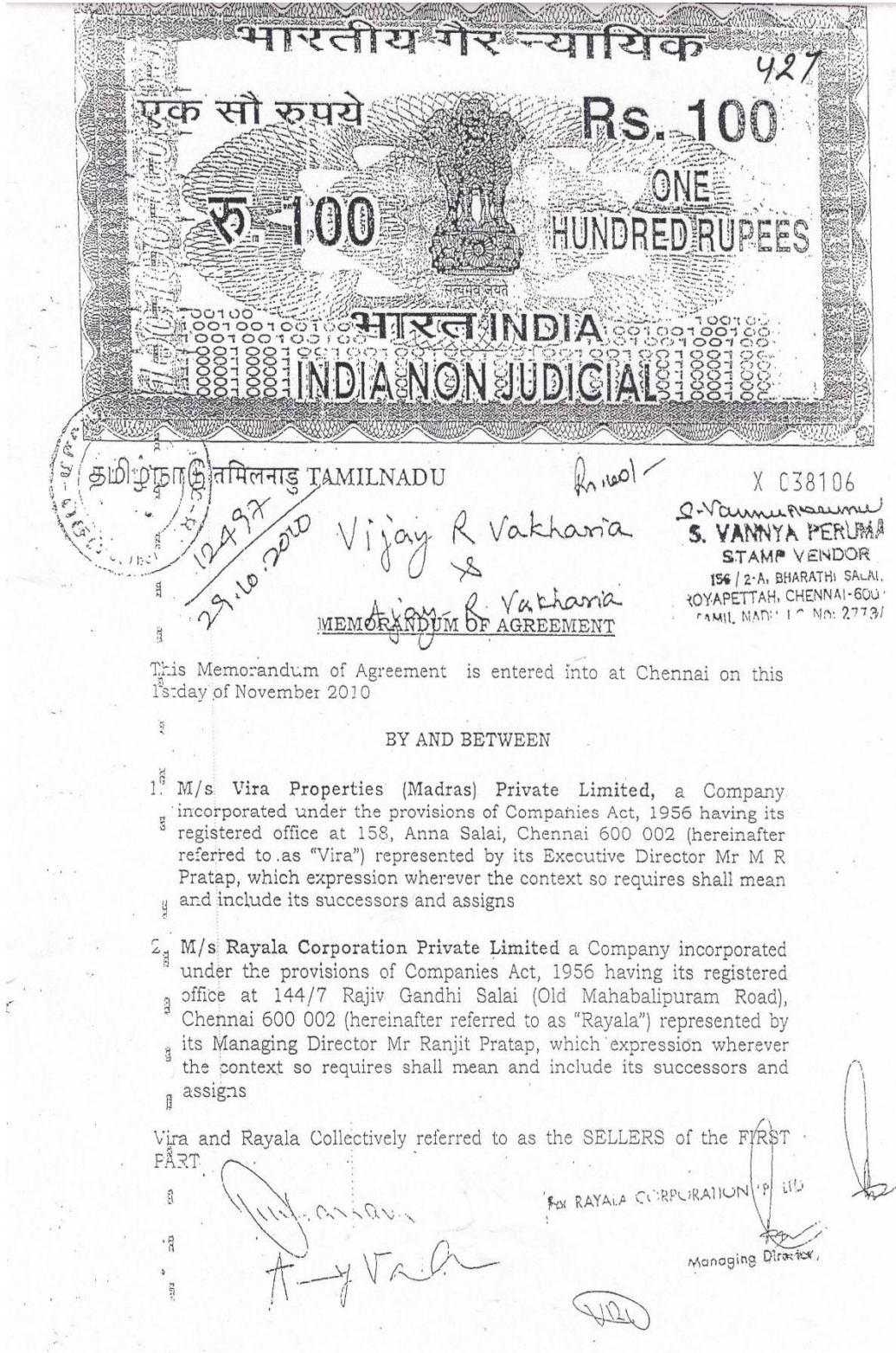
*order, admit the application, or dismiss the application if such default has not occurred. On the other hand, under Sections 8 and 9, an operational creditor may, on the occurrence of a default, deliver a demand notice which must then be replied to within the specified period. What is important is that at this stage, if an application is filed before the Adjudicating Authority for initiating the corporate insolvency resolution process, the corporate debtor can prove that the debt is disputed. When the debt is so disputed, such application would be rejected.”*

9. Wading through the factual matrix, it emerges that the Respondents Creditors numbering seven jointly filed application under Section 7 of I&B Code against the common Corporate Debtor – ‘M/s Rayala Corporation Pvt. Ltd.’ seeking initiation of Corporate Insolvency Resolution Process based on allegations that the Corporate Debtor had committed default in repayment of debt to Respondents Creditors quantified at Rs.4,46,08,990.28/-. According to Respondents, they were in the business of providing financial assistance against consideration of time value of money and had provided financial assistance to the Corporate Debtor in multiple transactions during the course of business, and that the Corporate Debtor had been paying interest accrued thereon. The financial assistance was stated to have been provided on the basis of contractual documents from year 2005 onwards. According to Respondents, the Corporate Debtor declined to clear the

outstanding dues after year 2013 on various excuses though in year 2016 the Corporate Debtor paid a small portion of the outstanding dues. According to Respondents default on the part of Corporate Debtor occurred despite admission and acknowledgement of its liability to clear the debt. Respondents, in this regard, relied upon a mail emanating from the Corporate Debtor sent on 8<sup>th</sup> January, 2013 acknowledging the dues and seeking to clear the liability depending upon the availability of loan from Kotak Mahindra Bank. Reference is also made to issuance of cheques dated 5<sup>th</sup> February, 2013, 20<sup>th</sup> August, 2014, 17<sup>th</sup> November, 2014, 14<sup>th</sup> February, 2015, 21<sup>st</sup> December, 2015 and 18<sup>th</sup> March, 2016 to 20<sup>th</sup> March, 2016 in favour of Respondents towards liquidation of the outstanding liability which, however, could be presented for clearance only after seeking approval of Corporate Debtor. Further reference is made to various emails dated 8<sup>th</sup> January, 2013, 25<sup>th</sup> June, 2013, 5<sup>th</sup> February, 2014, 10<sup>th</sup> February, 2014, 6<sup>th</sup> November, 2014, 24<sup>th</sup> November, 2014, 29<sup>th</sup> January, 2015, 11<sup>th</sup> August, 2015, 30<sup>th</sup> December, 2015, 11<sup>th</sup> January, 2016, 4<sup>th</sup> February, 2016, 15<sup>th</sup> March, 2016, 24<sup>th</sup> March, 2016, 26<sup>th</sup> April, 2016 and 17<sup>th</sup> April, 2017 sent by the Corporate Debtor to Respondents assuring payment of pending dues and further assuring that in the event of Respondents raising money on higher rate of interest, the Corporate Debtor would pay such higher interest rate to Respondents.

10. The Memorandum of Agreement initially executed between 'M/s Vira Properties (Madras) Pvt. Ltd.' and 'M/s Rayala Corporation Pvt. Ltd.' with

Respondents 1 and 2 on 1<sup>st</sup> November, 2010 relevant for purposes of ascertaining the nature of transaction is extracted herein below:-



AND

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1. Mr. Vijay R. Vakharia S/o Shri Ramanlal N. Vakharia, aged 50 years residing at No.81, Chamiers Road, R.A.Puram, Chennai-600 028. which expression unless the context otherwise requires shall mean and include his legal heirs, associates, successors in interest.
2. Mr. Ajay R. Vakbaria, S/o.Shri Ramanlal N. Vakharia, aged 54 years, residing at 'BRITTO VILLA', 23-A, St.Pauls Road, Bardra (West), Mumbai-400 050, which expression unless the context otherwise requires shall mean and include his legal heirs, associates, successors in interest.

Mr. Vijay R. Vakharia and Mr. Ajay R. Vakharia collectively referred as PURCHASERS of the SECOND PART

WITNESSETH:

WHEREAS Rayala represent that they are the absolute owner of the land admeasuring about 8300 sq.mts or thereabouts in RS No 22/1 (hereinafter referred to as "Land") more fully described in the Schedule A written hereunder, having acquired the same under the Sale Deed dt. 25.03.1949.

AND WHEREAS Rayala entered into an Agreement to Lease dt 19.01.1981, in terms of which Rayala agreed to lease its land to Vira and Vira was entitled to put up the commercial complex admeasuring about 2,91,000 sq.ft and lease back building admeasuring about 91,200 sq.ft. to Rayala (hereinafter referred to as "Tower I")

AND WHEREAS due to certain unforeseen circumstances Vira could not complete the project as envisaged and hence a Quadra-partite Agreement dt. 08.04.1996 was entered into between Rayala, Vira, Mohan Breweries and Distilleries Limited (hereinafter referred to as MBDL) and M/s Baba Enterprises, in terms of which MBDL agreed to re-pay to Canara Bank the loan taken by Vira for putting up the construction and to complete the construction in all respects and hand over 91,200 sq.ft to Rayala and to sell the other portions to the respective Purchasers with whom Vira had entered into agreements of sale. In consideration of the said obligations, MBDL were entitled to appropriate for themselves the sale consideration of the unsold portion of 43,376 sq.ft and further entitled to put up additional construction in VIII and IX floors in Tower II & III and appropriate the sale consideration of the same to themselves.

WHEREAS MBDL discharged their obligation to Canara Bank and completed the construction and further put up the additional construction admeasuring about 30,585 sq.ft.

WHEREAS after completion of construction in the year 2000, certain disputes arose between MBDL and Vira in respect of the rights of MBDL under the Quadra-Partite Agreement dt 08.04.1996 and various suits were filed by the respective parties.

WHEREAS Vira, Rayala and MBDL have resolved the disputes in respect of the litigations pending between themselves and in terms of the understanding reached between them, MBDL have agreed to surrender/

*Vijay R. Vakharia*

*Ajay R. Vakbaria*

*(Signature)*

For RAYALA CORPORATION P LTD

Managing Director



give up their rights under the Quadra-partite Agreement dt 08.04.1996 and their rights in respect of 22,390 sq.ft area under their occupation, which is not covered under any agreements, for a total consideration of Rs. 50 crores (Rupees fifty Crores only) to be paid by Rayala and Vira to them.

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WHEREAS Rayala and Vira, viz. the Sellers herein, have approached Vijay and Ajay Vakharia, the Purchasers hereinwith a proposal to fund 5% of the total requirement viz. a sum of Rs. 2.5 crores which would be utilized by the Sellers as margin to raise the remaining Rs. 47.50 crores and in consideration of the Purchasers providing the said margin, to be repaid by the Sellers to the Purchasers free of interest at the time and on the terms and conditions as hereinafter contained, the Sellers have agreed to transfer the constructed area of ~~2.50~~ sq.ft. to the Purchasers in lieu of the interest;

WHEREAS, the parties have agreed to reduce the terms and conditions of the said agreement in writing as hereinafter contained,;

NOW THIS MEMORANDUM OF AGREEMENT WITNESSETH AS UNDER:

1. The Purchasers have paid to the Sellers a sum of Rs.2.5 crores by cheque No.067906, dated: 21.06.10, for Rs.1,00,00,000/- Cheque No.085205, dated : 20.10.10, for ~~Rs.25,00,000/-~~ and Cheque No.085205, dated 29.10.10, for Rs.1,25,00,000/- drawn on Oriental Bank of Commerce, Chennai, as a loan constituting 5% of the sum payable by the Sellers to MBDL and Baba Enterprises under the settlement reached between them to enable MBDL and Baba Enterprises to hand over the extent of 96351 sq.ft. of built-up area to the Sellers more fully and particularly described in Schedule-B hereunder.
2. The Sellers agree and undertake that they shall raise the balance amount of Rs. 47.50 crores payable to MBDL and Baba Enterprises as aforesaid and obtain the release of the Schedule-B property in their favour.
3. In consideration of the Purchasers providing the above loan to the Sellers, the Sellers agree and undertake to execute and register a sale deed conveying an extent of 2500 sq.ft. of built-up area and proportionate undivided share in the land in Rayala Towers Block II in 6<sup>th</sup> floor, more fully and particularly described in Schedule-C hereunder, after obtaining the release of the Schedule-B property from MBDL and Baba Enterprises. The Sellers agree to complete the above transaction of transfer of the Schedule-C property to the Purchasers as aforesaid within 6 months from the date of this agreement i.e. on or before 30<sup>th</sup> April 2011, with a grace period of a maximum of 10 (ten) days.
4. The Purchasers shall have the right to enforce the specific performance of this agreement if the Sellers fail to fulfill their obligation to transfer the Schedule-C property to them within the time mentioned in clause 4 above after obtaining the release of the property from MBDL.

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A. V. V.

For RAYALA CORPORATION 'P' LTD

*[Handwritten signature]*  
Managing Director

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5. The Sellers further agree and undertake that they shall start repaying the sum of Rs. 2.50. crores free of interest to the Purchasers as and when they start selling the portions of Schedule-B property to third party purchasers. In any event, the repayment schedule shall not exceed the period of 18 months from the date of this agreement i.e. on or before 30<sup>th</sup> April 2012. The Sellers agree that the time mentioned in clause 4 and in this clause for the due performance of their obligations shall be of the essence of the contract.
6. The Sellers further agree and undertake that if, for some reason, their agreement with MBDL and Baba Enterprises fails or does not materialize as envisaged under the settlement reached with MBDL, the Sellers shall repay the sum of Rs.2.50 crores to the Purchasers within a period of 10 days from the expiry of the 6<sup>th</sup> month from the date of this agreement and in such an eventuality, the Sellers shall pay interest at the rate of 24% per annum to the Purchasers calculated from the commencement of the fourth month from the date of this agreement till the date of refund..It is however clarified that the repayment of Rs. 2 50 crores with interest as aforesaid shall arise only in the event of the failure of the Sellers to obtain the release of the Schedule-B property from MBDL for reasons beyond their control and shall not be construed as an alternative to or dilution of the right of the Purchasers to enforce the transfer of the Schedule-C property to the Purchasers upon the Sellers obtaining the release of the Schedule-B property in their favour.
7. The Sellers further assure and undertake to the Purchasers that the loan of Rs.2.50 crores shall be utilized only for the purpose of clearing the dues to MBDL and Baba Enterprises and releasing the Schedule-B property and not for any other purpose.
8. The Sellers agree and undertake to provide all the title deeds pertaining to the Schedule A property and to answer all reasonable queries on title that may be put forward by the Purchasers' solicitors and represent that, but for the pending dispute with MBDL and Baba Enterprises which has been now resolved, there is no other encumbrance, claim, demand, litigation, acquisition or requisition pending in respect of the property to be transferred to the Purchasers and if any such claim, demand or encumbrance is found to be subsisting, the Sellers shall have the same cleared at their own cost prior to transferring the Schedule-C property to the Purchasers.
9. The stamp duty and registration costs towards the conveyance of the Schedule-C property in favour of the Purchasers shall be borne by the Purchasers.
10. If any disputes or differences arise in respect of any matters in connection or covered by this agreement or as to the meaning or interpretation of any of the terms, conditions and covenants herein contained, the same shall be referred to arbitration by a sole arbitrator to be appointed by the Nani Palkhivala Arbitration Centre, Mylapore and the award passed by the sole arbitrator shall be final and binding upon both the parties. The arbitration shall take place in Chennai and shall be in English and the provisions of the Arbitration and Conciliation Act, 1996 or such amendment thereof as may be in force then shall be applicable to the proceedings.

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A. J. V. N. A.

*[Handwritten initials]*

For RAYALA CORPORATION / P' LTD.

*[Handwritten signature]*  
Managing Director

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SCHEDULE A

(DESCRIPTION OF LAND BELONGING TO RAYALA)

All that piece and parcel of the land bearing municipal door no 158 Anna Salai 600 002 comprised in RS No 22/1, Block 3 bounded on the

North by	: RS No 21
East by	: RS No. 22/2
South by	: Anna Salai (Mount Road) RS No 23
West by	: RS No 24

Containing 1 cawnie, 15 grounds and 1390 sq.ft equal to 8800 sq.mts or

thereabouts less a portion of land admeasuring about 585 sq.mts gifted to the corporation of Madras and situate in Numgambakkam Village Madras taluk in the Registration sub-district of Triplicane and Registration district of Madras - Chingleput now included in the Registration sub-district of Thyagaraya Nagar.

SCHEDULE B

(ACQUIRED RIGHTS)

Built up area admeasuring about 96,346 sq.ft in the building known as Rayala Towers, Towers II & III delineated on the Plan annexed as Plan A in the following floors together proportionate undivided lease hold interest in land with reversionary rights:

Ground Floor (identified as Shop Nos, 13,14,16,20A, 21 22, 34, 28 and 29)	: 7432 sq.ft
First Floor (identified as Shop No. 3,16,19 & 24)	: 2359 sq.ft
Second Floor - Tower II and III	: 22390 sq.ft
Sixth Floor - Tower III	: 11195 sq.ft
Seventh Floor - Tower II & III	: 22390 sq.ft
Eighth Floor Tower II and III	: 22390 sq.ft
Ninth Floor - Tower III	: 8190 sq.ft

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*[Handwritten signature]*

For RAYALA CORPORATION 'P' LTD

Managing Director

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SCHEDULE C

2500 sq.ft. of built-up area in the 6<sup>th</sup> floor of Block II forming part of the Schedule-B property together with the proportionate undivided share in the land measuring an extent of \_\_\_\_\_ sq.ft.

IN WITNESS WHEREOF THE PARTIES HERETO HAVE SET THEIR RESPECTIVE HANDS TO THESE PRESENTS ON THE DAY, MONTH AND YEAR HEREIN ABOVE WRITTEN.

VIRA PROPERTIES (MADRAS) PVT LTD

For RAYALA CORPORATION PRIVATE LTD

RAYALA CORPORATION PRIVATE LTD

Managing Director

VIJAY R VAKHARIA

AJAY R VAKHARIA

WITNESSES

*[Signature]*  
*[Signature]*  
124/7 one Road Westin  
Chennai - 600 014

2.

*[Signature]*  
B Jayaram  
No 11, Vels Road,  
Royapettah,  
Chennai - 600 014

On a bare perusal of the aforesaid agreement, it emerges that the executants of the first part including the Corporate Debtor sought credit facility from Respondents 1 and 2 in a sum of Rs.2.5 Crores to enable them to utilize the same as 'margin money' for raising Rs.47.50 Crores to work out the settlement arrived between the executants of the first part and MBDL. In terms of the Agreement, the amount was to be disbursed by Respondents 1 and 2 free of interest and in lieu of interest the executants of the first part including the Corporate Debtor agreed to transfer the constructed area of 2500 sq. ft. to Respondents no. 1 and 2. The Corporate Debtor agreed to repay the Principal Amount of Rs.2.5 Crores upon sale of the portions of property to third party purchasers and latest by 30<sup>th</sup> April, 2018. However, interest @ 24% p.a. was agreed to be levied in the event of failure of Corporate Debtor to deliver the property as aforesaid to Respondents 1 and 2. The Agreement dated 1<sup>st</sup> December, 2010 executed inter-se the same parties contains similar terms. A cursory look at the aforesaid terms and stipulations in the Agreements clearly reveals that the amount aforesaid was in the nature of a long term borrowing and had been disbursed by Respondents 1 and 2 against consideration for the time value of money. Even component of interest was taken care of by providing transfer of property in lieu thereof and upon failure of such transfer of property materializing Respondent 1 and 2 were entitled to interest @ 24% p.a. In view of this, there is no difficulty in holding that the credit facility extended to the Corporate Debtor by Respondents 1 and 2 fell within the purview of 'financial debt'. That being so, Respondents 1 and 2 were justifiably held to

be 'financial creditors' within the meaning of Section 5(7) of the I&B Code. Contention raised by the Appellant on this score is accordingly repelled.

11. Annexure to Form-1 application filed by the Respondents – 'Financial Creditors' forming page 365 of the paper book incorporates the particulars of financial debt. As regards Respondent No. 1, it reveals total outstanding amount of Rs.4,46,08,990.28/-. Mortgage Deed dated 2<sup>nd</sup> March, 2009, letters of Corporate Debtor dated 17<sup>th</sup> September, 2012 and 1<sup>st</sup> June, 2015, Promissory Note dated 15<sup>th</sup> May, 2015 given by Corporate Debtor to the Financial Creditor and Board Resolution of Corporate Debtor dated 21<sup>st</sup> January, 2009 are relied upon by the Respondent No. 1 to support its claim. The Financial Creditors have also relied upon the mail dated 26<sup>th</sup> April, 2016, mail dated 18<sup>th</sup> October, 2012 and mail dated 5<sup>th</sup> February, 2014 emanating from the Corporate Debtor in this regard. The Annexure reveals multiple transactions as evidenced by Promissory Notes executed by the Corporate Debtor on various dates from 10<sup>th</sup> July, 2011 to 12<sup>th</sup> August, 2011 for amount of Rs.65,00,000/- and the Renewed Promissory Notes for amount of Rs.55,00,000/-. It is admitted that the Corporate Debtor has been making part payments of loan, the last being made on 26<sup>th</sup> February, 2016. Total outstanding on this transaction as on 31<sup>st</sup> October, 2017 is stated to be Rs.65,47,134/-. The claim is evidenced by execution of various documents by the Corporate Debtor including the Promissory Notes and Renewed Promissory Notes. The Financial Creditors have also relied upon the request for rollover of the outstanding liability emanating from the

Corporate Debtor in terms of its letters dated 17<sup>th</sup> September, 2012 and 1<sup>st</sup> June, 2015 forming page 383 and 384 of the paper book, respectively. It is manifestly clear that the claim of Financial Creditors is based on Promissory Notes including the Promissory Note dated 15<sup>th</sup> May, 2015 besides Lease and Purchase Agreements bringing the claim within the purview of 'financial debt' payable in law on account of enforceability of these instruments. Part payment of the financial debt made by the Appellant in March, 2016 and issuance of cheques dated 18<sup>th</sup> March, 2016 and 29<sup>th</sup> March, 2016 on its part speaks volumes about such financial debt being payable in law and default committed in discharging the liability. Superadded to it is the clinching evidence in the form of email dated 17<sup>th</sup> April, 2017 emanating from the Appellant in terms whereof the Appellant not only acknowledged the debt but also requested for taking a cut in the interest anticipated while seeking further accommodation in repaying the amount. This not only demonstrates a continuing cause of action but also knocks the bottom of the plea of limitation set up by the Appellant. The evidence placed before the Adjudicating Authority justifiably supports the conclusion that the Corporate Debtor was in default for an outstanding liability of more than Rupees One Lakh qua Financial Creditor – Respondent No. 1, which was payable. Satisfaction recorded by the Adjudicating Authority in this regard cannot be termed erroneous much less perverse.

12. That apart, the Appellant could not substantiate its plea of discharge of debt as regards some of the 'financial creditors' by producing any

documentary proof. In absence of production of a 'No Dues Certificate' obtained from the concerned 'financial creditors' the plea of discharge advanced by the Corporate Debtor would be nothing more than a bald assertion. Viewed thus, the Corporate Debtor cannot be said to have discharged the onus of proof of discharge of debt as pleaded, more so as the transactions were heavy.

13. In the wake of aforesaid finding, it becomes unnecessary for us to examine the nature and extent of debt and default qua other Respondents. It is well settled by now that once the Financial Creditor is able to satisfy the Adjudicating Authority that there is a debt payable in law and a default on the part of Corporate Debtor, whether from record of default recorded with the information utility or other evidence, the Adjudicating Authority is left with no option but to admit application under Section 7 of I&B Code for initiation of Corporate Insolvency Resolution Process unless the application is incomplete, in which case, the Adjudicating Authority has to provide opportunity to the Financial Creditor to rectify the defect. Thus viewed, we find no infirmity in the impugned order by virtue whereof Corporate Insolvency Resolution process has been triggered at the instance of Respondents. The feeble attempt made to question the maintainability of joint application of Respondents numbering seven joining as Financial Creditors deserves outright rejection in view of the express mandate of law incorporated in Section 7(1) of I&B Code, which lays down in unambiguous terms that a 'Financial Creditor' may file application for initiating Corporate



Insolvency Resolution Process against a Corporate Debtor either by itself or jointly with other 'Financial Creditors'. All contentions raised by the Appellant are accordingly repelled.

14. For the foregoing reasons, we are of the considered opinion that the impugned order does not suffer from any legal infirmity or factual frailty. The appeal being devoid of merit is accordingly dismissed. There shall be no orders as to costs.

[Justice S. J. Mukhopadhaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

**NEW DELHI**

**15<sup>th</sup> March, 2019**

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