

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

**Company Appeal (AT) (Insolvency) No.158 of 2022**

**IN THE MATTER OF:**

**1. Athena Demwe Power Ltd.**

Through its Resolution Professional,  
Mr. Umesh Garg,  
1413, 14<sup>th</sup> Floor, 6, Devika Tower,  
Nehru Place, New Delhi - 110019

**...Appellant**

**Versus**

**1. Abir Infrastructure Private Limited,**

B-215-216, Somdatt Chamber -1, 5  
Bikhaji Cama Place, New Delhi 110066

**...Respondent No. 1**

**2. SREI Multiple Asset Investment Trust,**

Through its Authorized Representative,  
Ms. Shilpa Modi, 83, Trinity Tower, Topsia Road  
(South) Office No. 6, 04<sup>th</sup> Floor, Kolkata – 700046

**...Respondent No. 2**

**For Appellant:** Mr. Kunal Godhwani, Advocate

**For Respondent:** Mr. P. Ramesh Babu, Advocate for R-1 (RP).  
Mr. Ramji Srinivasan, Sr. Advocate with Mr. R. S.  
Sravankumar, Advocate for R-2 (SRA).

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

**Ashok Bhushan, J:**

1. This Appeal has been filed against the Order dated 12<sup>th</sup> January, 2022 passed by the National Company Law Tribunal, Court No. IV, New Delhi (hereinafter referred to as “The Adjudicating Authority”). By which Order, I.A. No. 3197/ND/2020 filed by the Appellant has been rejected.

2. Brief facts of the case necessary to be noted for deciding this Appeal are:

- On 24<sup>th</sup> December, 2010, the Appellant awarded a contract to Corporate Debtor for execution of 1750 MW Demwe Lower Hydroelectric Project, Arunachal Pradesh. Mobilization advance of Rs. 7,48,40,06,136/- was transferred by the Appellant to the Corporate Debtor through the Bank Transfer. On 14.02.2011, Corporate Debtor issued Corporate Guarantee in favour of the Appellant. The Corporate Guarantee was extended till 23.11.2021 on 30<sup>th</sup> January, 2019.
- An Order was passed by the Adjudicating Authority initiating Corporate Insolvency Resolution Process against the Corporate Debtor. In the Corporate Insolvency Resolution Process, the Appellant on 26<sup>th</sup> April, 2019 filed its claim to the Interim Resolution Professional (IRP) for an amount of Rs. 1784,99,28,651/- as a Financial Creditor. The Appellant received an Email from RP to attend meeting of the Committee of Creditors on 21<sup>st</sup> June, 2019. On 25<sup>th</sup> June, 2019, the Resolution Professional informed the Appellant that his claim does not fall as a Financial Creditor rather it falls as an Operational Creditor. On 24<sup>th</sup> July, 2019, the Appellant filed his claim as an Operational Creditor. On 3<sup>rd</sup> June, 2020, the Resolution Professional informed the Appellant that his claim does not fall under the category of Operational Creditor. The Appellant on 05<sup>th</sup> June, 2020 filed his claim as an other creditor reserving his right to approach the Adjudicating Authority. The Resolution Professional informed the Appellant that his claim will be considered in the capacity of other Creditor only when Appellant accepts that he is neither Financial Creditor nor the Operational Creditor.

- I.A. No. 3197 of 2020 was filed by the Appellant before the Adjudicating Authority challenging the rejection of his claim. On 20<sup>th</sup> January, 2021, Committee of Creditors approved the Resolution Plan submitted by Respondent No. 2. I.A. No. 3197 of 2020 filed by the Appellant was heard on 10<sup>th</sup> August, 2021 and reserved for Orders. On 04.10.2021, the Adjudicating Authority heard the Application I.A. No. 1139 of 2021 filed by the Resolution Professional for approval of the Resolution Plan and reserved for orders. On 28.10.2021, the Adjudicating Authority allowed the I.A. No. 1139 of 2021 and approved the Resolution Plan filed by the Respondent No. 2.
- A Company Appeal (AT) Ins. 1092 of 2021 was filed by the Appellant against the Order dated 28.10.2021. On 12.01.2022, the Adjudicating Authority passed the Impugned Order dismissing the I.A. No. 3197/ND/2020 filed by the Appellant. Aggrieved by the Order dated 12<sup>th</sup> January, 2022, this Appeal has been filed by the Appellant.

**3.** Learned Counsel for the Appellant submits that Appellant is a Financial Creditor having advanced an amount of Rs. 7,48,40,06,136/- as a mobilization advance. It is submitted that the Corporate Debtor has issued a Corporate Guarantee in favour of the Appellant on 14.02.2011 which was extended up to 23<sup>rd</sup> November, 2021. The amount advanced by the Appellant was received by the Corporate Debtor by Bank Transfer which is a Financial Debt within the meaning of sub-section 8 of Section 5 of the Code. The Corporate Debtor having given guarantee towards the mobilization advance, the provisions of Section 5(8)(i) is fully attracted in the present case making the transaction as a Financial Debt, the Adjudicating Authority committed

error in rejecting the claim of the Appellant as Financial Debt. The mobilization advance was refundable any time before the adjustment of the said advance against the running bills. The Resolution Professional has no power to adjudicate the claim filed by the Appellant. The Resolution Professional initially accepted the claim of the Appellant as Financial Creditor which *suo moto* was subsequently rejected by the Resolution Professional. In any view of the matter, the mobilization advance by the Appellant was an Operational Debt and the Adjudicating Authority wrongly rejected the claim of the Appellant as an Operational Debt also.

**4.** Learned Counsel appearing for the Respondent No. 1 refuting the submissions of the Appellant submits that mobilization advance is not a loan/borrowing raised and meant to be repaid by the Respondent. Mobilization advance was not a Financial Debt. The transaction does not come under Section 5(8)(i) since the Corporate Guarantee has not been provided to support any liability falling under or within the meaning of (a) to (h) clauses of Section 5(8) of the Code. The Appellant has not rendered any services or delivered any goods to the Corporate Debtor hence the Appellant is not an Operational Creditor.

**5.** We have considered the submissions of Learned Counsel for the parties and perused the record.

**6.** The mobilization advance which was given by the Appellant to the Corporate Debtor was in pursuance of a contract agreement between the Appellant and the Corporate Debtor. The Corporate Debtor was to carry on the contract work as per the contract agreement. The Contract work could not be completed since site was never made available by the owner.

7. Following are two issues which need to be considered:

- (i) Whether the mobilization advance given by the Appellant to the Corporate Debtor is a Financial Debt within the meaning of Section 5(8) of the Code;
- (ii) Whether the mobilization advance given by the Appellant to the Corporate Debtor is an Operational Debt within the meaning of Section 5(21) of the Code.

8. We first take up the claim of the Appellant as a Financial Debt. Financial Debt is defined in Section 5(8) of the Code which is to the following effect:

*“(8) **“financial debt”** means a debt along with 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;*
- (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 nonrecourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

*[Explanation. -For the purposes of this sub-clause,-*

*(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*

*(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]*

*(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;”*

**9.** Mobilization advance which was given by the Appellant to the Corporate Debtor was for mobilization of material and workforce on the site. Mobilization advance was not disbursed against the consideration for the time value of money. The submissions which has been pressed by the Learned Counsel for the Appellant is that the Corporate Debtor having given guarantee by the Guarantee Deed dated 14.02.2011 which was extended up 23.11.2021 transaction becomes a Financial Debt within the meaning of Section 5(8)(i). When we look into Section 5(8)(i) it is clear that the guarantee

referred to in Section 5(8)(i) relates to any of the items referred to in sub-clauses (a) to (h) of Section 5(8) of the Code. The mobilization advance is not covered by any of the sub-clauses (a) to (h) of sub-section 8 of Section 5 of the Code hence the provisions of Section 5(8) (i) does not lend any support to the Appellant. Learned Counsel for the Appellant has relied on the Judgment of this Tribunal in Company Appeal (AT) Ins. No. 356 of 2022 in the matter of **“IDBI Trusteeship Services Limited vs Mr. Abhinav Mukherji & Ors.”**.

In paragraph 11, this Tribunal laid down following:

*“11. At the outset, we address ourselves to the first issue raised by the Appellants that the Adjudicating Authority has erroneously relied on the Judgement of the Hon’ble Supreme Court in ‘Anuj Jain’ Case and held that there was no direct disbursement of amount by ECL to the ‘Corporate Debtor’ and hence the amount involved is not a ‘Financial Debt’ as defined under Section 5(8) of the Code. This Tribunal is of the considered view that ECL, being the original lender had disbursed the amount in terms of the Facility Agreement entered into and the disbursement of ‘debt’ is essentially to the Issuer/Borrower and not to the ‘Corporate Guarantor’ i.e., ‘Palm Developers’. By providing Corporate Guarantee, ‘Palm Developers’ has agreed to incur the ‘debt’, if ‘due and payable’. A Guarantee is included as one of the illustrations which specifies the definition of ‘Financial Debt’ under Section 5(8)(i) of the Code. This Tribunal in ‘Ascot Realty Private Limited’ (Supra) has held that for initiation of Insolvency Proceedings against the Corporate Guarantor, the element of disbursement for ‘Time Value of Money’ is not required. We are of the considered view that despite the fact that there was*

*no direct disbursement of amount to the Corporate Guarantor, any amounts released to the Issuer/Principal Borrower and not to the Corporate Guarantor does constitute 'Financial Debt' as defined under Section 5(8) of the Code and it cannot be said that such amounts do not have consideration for 'Time Value of Money'. In the facts of the attendant case, it has to be only seen whether there was a 'default' and the amounts are 'due and payable' as on the date of filing of the 'Claim'."*

**10.** There cannot be any quarrel to the proposition as laid down by this Tribunal in "IDBI Trusteeship Services Ltd." (supra). The guarantee is included as one of the illustrations which define Financial Debt. As noted above, guarantee referred to in Section 5(8)(i) must relate to any of the items referred to in sub clauses (a) to (h). The mobilization advance given by the Appellant to the Corporate Debtor does not fall in any of the clauses (a) to (h) hence no benefit can be availed of the Appellant of provisions of Section 5(8)(i).

**11.** Now we come to the submissions of Learned Counsel for the parties as to whether the mobilization advance by the Appellant to the Corporate Debtor was an Operational Debt. The mobilization advance was given by the Appellant in pursuance of a contract entered between the parties i.e. EPC Contract dated 24<sup>th</sup> December, 2010. The advance given was to be adjusted in the running bills as per the terms and conditions of the contract or could have been demanded back by the Appellant. The contract between the parties could not be carried out due to non-providing of site for carrying out the work. The contract was virtually given up and was never implemented. In this reference, we may refer to the Judgement of the Hon'ble Supreme Court



in Civil Appeal No. 2839 of 2020 in the matter of **“M/s. Consolidated Construction Consortium Limited Vs. M/s. Hitro Energy Solutions Private Limited”**. In the above case, Section 9 application was filed by the M/s. Consolidated Construction Consortium Limited against the Corporate Debtor. The Appellant in the above case has entered into contract with the corporate debtor for supply of ‘light fittings’ in a project which was being executed by M/s. Consolidated Construction Consortium Limited with Chennai Metro Rail Limited (CMRL). The Order was placed to the Corporate Debtor on the request of Appellant, advance payment of Rs. 50 Lakhs was made by Chennai Metro Rail Limited (CMRL) to the Corporate Debtor. Subsequently, the contract was cancelled between the Appellant and the Chennai Metro Rail Limited hence the Appellant returned the amount of Rs. 50 Lakhs given to the Corporate Debtor to the Chennai Metro Rail Limited. Subsequently the Appellant demanded back the amount of Rs. 50 Lakhs from the Corporate Debtor which was paid to the corporate debtor by the Chennai Metro Rail Limited on the instructions of the Appellant. The Adjudicating Authority had admitted Section 9 Application which Order was set aside by this Tribunal. The Appellant filed an Appeal in the Hon’ble Supreme Court where the Hon’ble Supreme Court had occasion to consider the statutory provision of the Insolvency and Bankruptcy Code, 2016 with regard to the Operational Debt. Hon’ble Supreme Court allowed the Appeal and held that advance given to the Corporate Debtor was an Operational Debt. After considering the earlier Judgements, the Hon’ble Supreme Court laid down following in paragraph 41, 42, 43 and 45:

“41. We have to now consider the ‘debt’ in the present appeal. According to the appellant, it is the advance payment CMRL made on their behalf to the Proprietary Concern, which was encashed even though the project between CMRL and the appellant was terminated. On the other hand, the respondent has attempted to urge that there was no privity of contract between the appellant and the respondent, and that CMRL had not transferred the debt to the appellant. We reject both these submissions. It is amply clear from the facts that the debt arises from purchase orders between the appellant and the Proprietary Concern (which is the underlying contract), regardless of whether CMRL may have made the payment on behalf of the appellant. Thus, the ultimate dispute still remains between the appellant and the Proprietary Concern, and the debt arises from that.

42. It is then that we come to the core of the dispute – while the appellant has argued that the debt is in the nature of an operational debt which makes them an operational creditor, the respondent has opposed this submission. The respondent’s submission, which was accepted by the NCLAT, seeks to narrowly define operational debt and operational creditors under the IBC to only include those who supply goods or services to a corporate debtor and exclude those who receive goods or services from the corporate debtor. For reasons which shall follow, we reject this argument.

43. First, Section 5(21) defines ‘operational debt’ as a “claim in respect of the provision of goods or services”. The operative requirement is that the claim

*must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. Such an interpretation is also supported by the observations in the BLRC Report, which specifies that operational debt is in relation to operational requirements of an entity. Second, Section 8(1) of the IBC read with Rule 5(1) and Form 3 of the 2016 Application Rules makes it abundantly clear that an operational creditor can issue a notice in relation to an operational debt either through a demand notice or an invoice. As such, the presence of an invoice (for having supplied goods or services) is not a sine qua non, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by Regulation 7(2)(b)(i) and (ii) of the CIRP Regulations 2016 which provides an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, the former is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver of goods or services from the corporate debtor. Finally, the judgment of this Court in Pioneer Urban (supra), in comparing allottees in real estate projects to operational creditors, has noted that the latter do not*

*receive any time value for their money as consideration but only provide it in exchange for goods or services. Indeed, the decision notes that “[e]xamples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees”. Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt.”*

.....

*45. Similarly, in the present case, the phrase “in respect of” in Section 5(21) has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the corporate debtor, which ultimately lead to an operational debt. In the present case, the appellant clearly sought an operational service from the Proprietary Concern when it contracted with them for the supply of light fittings. Further, when the contract was terminated but the Proprietary Concern nonetheless encashed the cheque for advance payment, it gave rise to an operational debt in favor of the appellant, which now remains unpaid. Hence, the appellant is an operational creditor under Section 5(20) of the IBC.”*

**12.** The Judgement of Hon’ble Supreme Court in M/s. Consolidated Construction Consortium Limited (supra) is fully attracted in the facts of the present case. In the present case, the amount of mobilization advance was

given by the Appellant to the Corporate Debtor whereas in the case of M/s. Consolidated Construction Consortium Limited, the amount of Rs. 50 Lakhs was given by the CMRL to the Corporate Debtor on instruction of the Appellant in pursuance of Contract. Hon'ble Supreme Court held the words "in respect of" in Section 5(21) has to be interpreted in a broad and purposive manner, in order to include all those who provide or receive operational services from the corporate debtor, which ultimately lead to an operational debt. In view of the law laid down by the Hon'ble Supreme Court in M/s. Consolidated Construction Consortium Limited, the mobilization advance given by the Appellant to the Corporate Debtor is clearly an Operational Debt and the Adjudicating Authority committed error in rejecting the claim of the Appellant as an Operational Debt. As noted above, in the present case, the Resolution Plan has already been approved by the Adjudicating Authority on 28.10.2021. The present Appellant has also filed an Appeal Company Appeal (AT) Ins. No. 1092 of 2021 challenging the Order dated 28.10.2021 which Appeal stood withdrawn by the Appellant vide Order dated 04<sup>th</sup> August, 2022. In view of the withdrawal of the Appeal filed by the Appellant, Resolution Plan has to be implemented.

**13.** In view of the foregoing discussions, we are of the view that claim of the Appellant is to be treated as an Operational Debt and the Resolution Applicant is under obligation to include the claim of the Appellant as an Operational Debt and make payment to the Appellant also as an Operational Creditor. In result, this Appeal is allowed. This Appeal is allowed directing the Resolution Applicant to treat the claim of the Appellant as an 'Operational Debt' and make payment to the Appellant as an 'Operational

Creditor' as per the 'Resolution Plan' approved on 28.10.2021. Parties shall bear their own costs.

**[Justice Ashok Bhushan]  
Chairperson**

**[Justice M. Satyanarayana Murthy]  
Member (Judicial)**

**[Mr. Barun Mitra]  
Member (Technical)**

**NEW DELHI  
17<sup>th</sup> August, 2022  
Basant**