

**IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD**  
**COURT - 2**

ITEM No302  
IA/690(AHM)2022  
in  
CP(IB) 268 of 2020

**Proceedings under Section 60(5) IBC, 2016**

**IN THE MATTER OF:**

Sheth Developers Private Limited  
V/s

.....Applicant

Vichitra Narayana Pathak IRP of Golden Tobacco Limited

.....Respondent

**Order delivered on 16/03/2023**

**Coram:**

Dr. Madan B Gosavi, Hon'ble Member(J)  
Ajai Das Mehrotra, Hon'ble Member(T)

**PRESENT:**

For the Applicant No.1 : Mr. Navin Pahwa, Sr. Adv. a.w Mr. Jay Kansara, Adv.  
For the Applicant No.2 : Mr. Saurabh Soparkar, Sr. Adv. a.w Mr. Jay Kansara, Adv.  
For the Respondent : Mr. Anurag Bisaria, Adv.

**ORDER**

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

-Sd-

**AJAI DAS MEHROTRA**  
**MEMBER (TECHNICAL)**

-Sd-

**DR. MADAN B GOSAVI**  
**MEMBER (JUDICIAL)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**AHMEDABAD (COURT NO.II)**

**IA No. 690 / NCLT / AHM / 2022**

**IN**

**CP(IB) No. 268 / NCLT / AHM / 2020**

**Application Under Section 60(5) of the IB Code, 2016**

**IN THE MATTER BETWEEN**

**Sheth Developers Private Limited &  
Suraksha Realty Limited**

**.... Applicants**

**Versus**

**Dr. Vichitra Narayan Pathak**

**.... Respondent**

**IN THE MATTER OF**

**Arrow Engineering Limited**

**... Applicant / Financial Creditor**

**Versus**

**Golden Tobacco Limited**

**... Respondent/Corporate Debtor**

**Order pronounced on :16/03/2023**

**Coram:**

**DR. MADAN B GOSAVI,  
HON'BLE MEMBER (JUDICIAL)  
AJAI DAS MEHROTRA  
HON'BLE MEMBER (TECHNICAL)**

**MEMO OF PARTIES**

**1. Sheth Developers Private Ltd.**

having registered office at Gr. & 3<sup>rd</sup>  
Floor, Prius Infinity, Paranjpe B Scheme,  
Subhash Road, Vile Parle (E),  
Mumbai – 400057

**2. Suraksha Realty Limited**

having registered office at 3, Narayan  
Building, 23 LN Road, Dadar East,  
Mumbai – 400 014

**... Applicants**

**Versus**

**Dr. Vichitra Narayan Pathak**

Having its office at  
120, Jharneshwar Colony,  
Madhuban Vihar, Nr. International  
Public School, Hoshangabad Road,  
Bhopal - 462047

**... Respondent**

**Present:**

For the Applicant No.1 : Mr. Navin Pahwa, Sr. Adv. a.w Mr. Jay  
Kansara, Adv.  
For the Applicant No.2: Mr. Saurabh Soparkar, Sr. Adv. a.w Mr. Jay  
Kansara, Adv.  
For the Respondent : Mr. Anurag Bisaria, Adv.

**ORDER**

1. The present IA 690 of 2022 has been filed in CP(IB) 268 of 2020 by M/s. Sheth Developers Pvt. Ltd. (applicant no.1) & M/s. Suraksha Realty Ltd. ( applicant no.2) seeking following reliefs:

*“ (a) That this Hon'ble Tribunal be pleased to quash and set aside the impugned emails dated 26<sup>th</sup> June 2022 (Exhibit ‘P’ and Exhibit ‘P-1’ hereto) issued by the respondent to the applicant nos. 1 & 2 rejecting the said claims (Exhibit ‘M’ and Exhibit ‘M-1’ hereto) of a ‘secured financial debt’ submitted by the applicants under Regulation 8 of the Insolvency and*

*Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 in the Corporate Insolvency Resolution Process of the Corporate Debtor.*

- (b) That this Hon'ble Tribunal be pleased to allow and admit the said claims (Exhibit 'M' and Exhibit 'M-1' hereto) for a 'secured financial debt' as submitted by the applicants under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 in the Corporate Insolvency Resolution Process of the Corporate Debtor.*
- (c) That this Hon'ble Tribunal be please to order and direct the respondent – Interim Resolution Professional to include the name of the applicants in the list of Financial Creditors of the Corporate Debtor, Golden Tobacco Limited and the applicants be admitted to the Committee of Creditors having voting rights proportionate to the debt owed to it.*
- (d) That this Hon'ble Tribunal be pleased to order and direct the respondent – Interim Resolution Professional to give notice of the next meeting of the Committee of Creditors of the Corporate Debtor, Golden Tobacco Limited in timely manner.*
- (e) Pending the hearing and final disposal of the present applicant, this Hon'ble Tribunal be pleased to restrain the respondent from proceeding with the Corporate Insolvency Resolution Process of the Corporate Debtor. In any manner whatsoever.*
- (f) Pending the hearing and final disposal of the present application, this Hon'ble Tribunal be pleased to direct that no meeting of the Committee of Creditors of the Corporate Debtor, Golden Tobacco Limited be held.*
- (g) Pending hearing and final disposal of the present application, no orders be passed in the captioned petition including any order for approval of a resolution plan by the Committee of Creditors of the Corporate Debtor, Golden Tobacco Limited.*
- (h) For ad-interim reliefs in terms of the prayer clause(c) to (g).*

- (i) *For such further and other reliefs as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case.*
2. The facts of this case, relevant for decision in the present IA, are as follows:
- (i) On 26.12.2009, M/s. Goldan Tobacco Ltd. (in short, GTL), the Corporate Debtor entered into Memorandum of Understanding (hereinafter called MoU) with the applicants for commercial exploitation / development of land at Vile Parle, Mumbai. Copy of the MoU is available at page 38 to 57 of the IA. As per the MoU, applicants, referred as Developers in the said MoU were to be granted development rights in relation to the property at Vile Parle of the Corporate Debtor such that both parties were to jointly develop the said property. The Corporate Debtor, as per para 6.1, was to execute a formal joint development agreement in favour of the developers. Payment of Rs.132 crores, including Rs.100 crores mentioned in the MoU was made by the applicant nos.1 & 2 together to the Corporate Debtor. There is no dispute that amount received by the Corporate Debtor from the two applicants is Rs.132 crores. The amount was paid in the period 16.12.2009 till 15.03.2011. Both applicants had paid Rs.66 crores each. The applicants after joint development agreement and further payment of Rs.442.70 crore were to get right over 90% of built up area of the joint developed property.
- (ii) However, the joint development agreement was never executed.
- (iii) BIFR vide order dated 31.03.2011, which was affirmed by the Appellate Authority held that the said MoU was entered in breach of the sanctioned scheme.

- (iv) The Hon'ble Supreme Court, in its order dated 12.05.2016, on an application by the Income Tax Department held that MoU dated 26.12.2009 had no legal force and ordered as under:

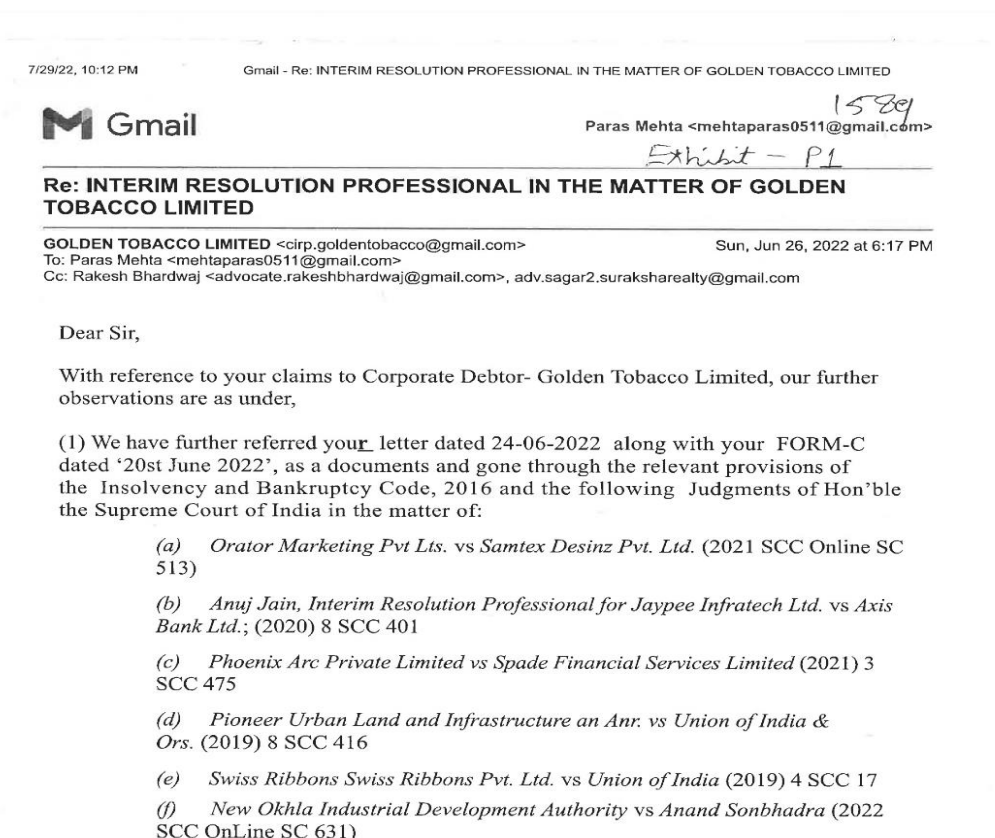
*“33) The Income Tax Department shall be entitled to take steps for attachment of the properties of the Company, including Ville Parle land as per the provisions of the Income Tax Act and shall be entitled to sell the same. If there are any secured creditors in respect of these properties, such attachment and sale shall be subject to the rights of those creditors. Out of the proceeds, the Principal amount of tax due to the Income Tax Department and even the admitted excise dues shall be paid to the Revenue. Insofar as payment of interest and penalty is concerned, that would be dependent upon the decision which the Board would give.*

*34) Before parting with, we may point out that M/s. Sheth Developers Private Limited and Suraksha Realty Limited have filed applications to intervene in the matter as they submit that in respect of Ville Parle Land, MOU was entered into by the Company with them. However, once it is found that such an agreement was in violation of the Scheme, the arrangement with the aforesaid interveners entered into by the Company loses its legal force and no right would accrue to these interveners on the basis of the said agreements. We, thus, dismiss the plea raised by the intervener”.*

- (v) M/s. Arrow Engineering Ltd. had filed application u/s 7 of the IBC, 2016 which was rejected by the Adjudicating Authority vide order dated 25.01.2021. Subsequently, Hon'ble NCLAT vide order dated 02.12.2021 ordered admission of application u/s 7 of IBC, 2016. The order of Hon'ble NCLAT was challenged before Hon'ble Supreme Court which vide order

dated 05.05.2022 upheld the order of Hon'ble NCLAT and dismissed the appeal of the Corporate Debtor. In compliance to the said orders of Hon'ble NCLAT and Hon'ble Supreme Court, application u/s 7 of IBC, 2016 was admitted by NCLT, Ahmedabad Bench vide order dated 07.06.2022. Dr. Vichitra Narayan Pathak was appointed as Interim Resolution Professional (hereinafter referred as IRP) and moratorium u/s 14 of IBC, 2016 was ordered.

- (vi) Both applicants had filed their claim as Financial Creditors before the IRP. Copies of the claims forms (Form-C) are given at page no.1526 onwards in volume-8.
- (vii) Through email dated 26.06.2022, IRP rejected the claims of the applicant and advised them to submit their claim in Form-B as Operational Creditors. Email, which is sent to each applicant herein but is worded the same, is reproduced below for ready reference:



**(2) Accordingly , our observations are as under, :**

- (a) The MOU dated 26-12-2009 has admittedly '*lost its legal force*' in light of the judgment and order dated 12-05-2016 of Hon'ble the Supreme Court of India
- (b) However, the nature of disbursements at the relevant time, i.e., at the time that they were made, can only be ascertained from the said MOU and the surrounding circumstances.
- (c) It is apparent from the plain words of the MOU and the contemporaneous correspondence between the parties thereto that the said disbursements were made **in consideration of the development rights** that were sought to be granted to the Claimant in respect of a specified property in accordance with the terms of a development agreement between the parties to the said MOU.

<https://mail.google.com/mail/u/0/?ik=b4ddf56ebc&view=pt&search=all&permmsgid=msg-f%3A1736701550246131917&siml=msg-f%3A1736701...> 1/2



7/29/22, 10:12 PM

Gmail - Re: INTERIM RESOLUTION PROFESSIONAL IN THE MATTER OF GOLDEN TOBACCO LIMITED

(d). The consideration for the aforesaid that disbursements does not appear to be the 'time value of money', which is an essential condition to be met for a debt to be categorised as a 'financial debt' for the purposes of IBC.

1590

(e) The transaction contemplated by the MOU does not appear to have the 'commercial effect of borrowing' either, considering among other things that the Corporate Debtor's obligation to refund of amounts paid by the Claimant, together with interest thereon, could only have been triggered if and when the Claimant were to exercise its option to terminate the MOU in the event of default by the Corporate Debtor. It is not discernible from the Documents that the Claimant, as a matter of fact, became entitled to terminate the MOU and then indeed exercised such an option and thereby sought the refund of amounts due and payable thereunder.

(f) Further, the provisions in respect of the payment of interest (from the date and at the rate specified in the MOU, even if it had any legal force, which it manifestly lacks) could only have be operationalised in the event that the Claimant had exercised the said option to terminate the MOU.

In view of the above, we are of the view that the Claimant's disbursement of Rs 66 crore, as referred to in Form-C, does not appear to be in the nature of a 'financial debt' as so defined under section 5(8) of the IBC whereby the Claimant would be regarded as a 'financial creditor' in accordance with section 5(7) of the IBC. Therefore you are advised to submit your claims in relevant form B ( Operational Creditor) for further course of necessary action at our end.

With regards

Dr.Vichra Narayan Pathak

Interim Resolution Professional

Golden Tobacco Limited

[Quoted text hidden]





(viii) Being aggrieved by the decision of the IRP, present IA has been filed by the applicants seeking to be treated as Financial Creditors.

3. Before discussing the facts and merits of the case, it shall be relevant to refer to the relevant provisions of IBC, 2016 which are reproduced below:

- *3(10) “creditor” means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;*
- *3(11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;*
- *5(7) “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;5(8) “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes*

.....

.....

*5(8)(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

- *5(20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;*
- *5(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”.*

4. Learned Senior Counsel appearing for the applicant submitted that the applicants had advanced Rs.66 Crores each to the Corporate Debtor consequent to MoU dated 26.12.2009 which was held to be void by the Hon'ble Supreme Court. There is no dispute about disbursement of money, amount and receipt of money by the Corporate Debtor. As per Section 65 of the Contract Act, money given under void contract is also to be refunded. For ready reference, Section 65 of the Contract Act, is reproduced as under:

*“ 65 Obligation of person who has received advantage under void agreement, or contract that becomes void.—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it. —When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.”*

5. Learned Senior Counsel further submitted that no joint development agreement was signed and as per MoU and specifically clause 9.1 (b)(4), if the Corporate Debtor fails in fulfilling its obligation, including signing of joint development agreement, then the developers will have option to terminate the MoU and upon such termination, Corporate Debtor was bound to refund the money to the developers, together with interest @ 18% per anum. Learned Senior Counsel further submitted that the MoU got terminated as it was declared as void by the Hon'ble Supreme Court and therefore, the applicants were entitled to refund with interest of the amounts advanced in terms of the said MoU.

6. Learned Senior Counsel further submitted that as per declaration contained in Clause 4.1 of the MoU, GTL had declared, represented and warranted that the property was owned by it, title was clear and it was free from encumbrance, etc.. It was further submitted that the applicant had filed police complaint against the management of the Corporate Debtor against which arrest warrants were also issued, which shows that the applicants were not at fault in signing a void agreement. It was further submitted that it was a secure debt as title deeds were deposited with the Advocate and Solicitor pending execution of the joint development agreement in view of Clause 6.5 of the MoU. It was further submitted that the debts were acknowledged in all balance sheets and title deed of the land are still lying with the Advocate and Solicitor.
7. It was submitted that the debt was continuously shown in the balance sheets of GTL and are therefore, within limitation. Learned Senior Counsel, as an example, showed 65<sup>th</sup> annual report of F.Y. 2020 - 2021 of the Corporate Debtor wherein the following entries are made in Schedule 8 (Page 1450, Volume - 8). The same is reproduced below for ready reference:

## 18 OTHER CURRENT LIABILITIES

(₹ in Lakhs)

|  | As at March<br>31, 2021 | As at March<br>31, 2020 |
|--|-------------------------|-------------------------|
| Statutory dues payable   | 6,798.83                | 6,563.91                |
| Undisputed Excise dues payable including Interest                                      | 446.94                  | 1,313.98                |
| Unearned Income- Rent received in advance  | -                       | 23.09                   |
| Advances from customers  | 484.50                  | 529.76                  |
| Advance Received Towards Property Development- Vile Parle, Mumbai (Refer Note 36(a-i)) | 13,200.00               | 13,200.00               |
| Advance Received Towards Project Development- Vile Parle, Mumbai (Refer Note 36(a-ii)) | 4,075.00                | 4,075.00                |
| Advance Received Towards Project Development- Guntur (Refer Note 36(c))                | 7,400.84                | 9,085.35                |
| Advance for sale of Land at Ganpavaram Guntur  | -                       | 338.00                  |
| Advance for sale of Land at Palghar (Refer Note 36(d))                                 | -                       | 480.00                  |
| Advance for sale of Flat at Mumbai   | 1.00                    | 1.00                    |
| <b>Total</b>   | <b>32,407.11</b>        | <b>35,610.09</b>        |

8. Learned Senior Counsel further submitted that the corresponding note appears in the balance sheet as on 31.03.2021 (at page 1463 of the compilation) and relevant portion is scanned below:

1463



36 The Company as a part of development activities of Realty Division :-

a) Land and Building at Vile Parle-Mumbai

- (i) The Company had entered into Memorandum of Understanding (MOU) in December, 2009 with M/s Sheth Developers Pvt. Ltd. and Suraksha Realty Ltd. (Developers) and had received advances in earlier years aggregating to ₹ 13,200 Lakhs (as at March 31, 2020 ₹ 13,200 Lakhs) to jointly develop its Vile Parle property. However, on Intervention Application filed by Sheth Developers Pvt Ltd and Suraksha Realty Ltd (the interveners), in the SLP filed by the Income Tax Department before the Hon'ble Supreme Court, the Hon'ble Court vide its order dated 12.05.2016 held that MOU entered into by the Company with them was in violation of the Sanctioned BIFR Scheme 2002. Therefore, such MOU with the aforesaid interveners entered into by the Company loses its legal force and no right would accrue to these interveners on the basis of said MOU. Thus the Hon'ble Court dismissed their plea. The said developers have also filed an appeal u/s 9 and 11 of the Arbitration and Conciliation Act before the Hon'ble Bombay High Court which is pending.

Further, necessary steps are being taken to release the title deeds of the said property lying in Escrow Account with the Solicitor.

The Hon'ble High Court Gujarat at Ahmedabad vide its order dated 05-05-2015 restrained the Company from transferring its Vile Parle property pursuant to a petition filed by a group of minority shareholders pending with the National Company Law Tribunal (NCLT).

The Company had received advances of ₹ 4075 Lakhs (₹ 4075 Lakhs as at March 31, 2020) in the financial year 2011-12 & 2012-13 from a strategic investor for development of the said property. The strategic investor, however, has filed a recovery suit along-with interest before Hon'ble Bombay High Court against which the Company has filed counter claim for the higher amount due to non compliance of terms and conditions of the letter of Intent dated June 3, 2011, which is pending. Hon'ble Bombay High Court vide order dated 14.10.2019 granted the ad interim relief to restrain the Company from transferring the said property. The investor had also filed a petition under the Insolvency and Bankruptcy Code, before NCLT Ahmedabad, for recovery of the advances given and also expenses incurred and interest thereof on the said amount which are not admitted by the Company in absence of evidences supporting such claim. The NCLT, Ahmedabad vide its order dated January 25, 2021 has dismissed the petition filed by the investor on the Ground of maintainability. The Investor has approached to NCLAT against the aforesaid order, which is pending.

- (ii) The Goods and Service Tax Department, Mumbai (erstwhile Excise Department), vide its letter dated February 5, 2021 has withdrawn its attachment on said property.

9. Learned Senior Counsel further submitted that the case of the applicant is similar to the case of M/s Arrow Engineering Ltd which was strategic investor for development of another property of the Corporate Debtor and M/s Arrow Engineering had already been admitted as Financial Creditor.
10. Learned Counsel for the IRP submitted that the MoU has been held to be void and no legal rights flow from the said MoU in terms of the order of the Hon'ble Supreme Court. It is also to be seen that whether the claim is within limitation and whether the applicants are to be equally blamed for illegality of MoU. Learned Counsel

further submitted that there are differences between the transaction with M/s Arrow Engineering Ltd. and Corporate Debtor and between the applicants and the Corporate Debtor. Learned Counsel further submitted that MoU with the Arrow Engineering Ltd., treated as Financial Creditor, has been held to be valid by the Hon'ble Supreme Court, nature of agreement is finance and marketing of the project and Corporate Debtor was to undertake development on its own and that there were differences in application of revenue earned. Thus, accepting Arrow Engineering Ltd. as Financial Creditor does not ipso-facto entitle the applicants to become Financial Creditors.

- 11.1 We have heard Learned Sr. Counsels for the applicants and Learned Counsel for the Interim Resolution Professional and have also gone through the documents and case laws submitted by them.
- 11.2 In this case, there is no dispute about the amount involved which is Rs.66 crores claimed by each of the two applicants totalling to Rs. 132 crores. There is also no dispute that the amount involved was advanced subsequent to the Memorandum of Understanding dated 26.12.2009. The said MoU was not converted into joint development agreement and was subsequently declared by the Hon'ble Supreme Court that it has no legal force. The issue for decision before us is as under:

*Whether the amount advanced of Rs. 132 crores is recoverable by the applicant companies, if so, what is the nature of the debt, i.e, whether it is an operational debt or a financial debt.*

- 11.3 The amount of Rs.132 crores is repayable to the applicant companies as per the provisions of Section 65 of the Contract Act reproduced in para 6 above. Learned Senior Counsel for the applicant companies have asserted that there was no lapse or complicity of the applicant companies in signing of void agreement

and they had filed police complaints on discovering that the Corporate Debtor had illegally represented to them and got MoU signed. Thus, the applicants are entitled to recover the said amount. Since the amount of advance given of Rs.132 crores is repayable to the applicant companies by the Corporate Debtor, it is covered by the definition of debt contained in sub-Section 11 of Section 3 of IBC, 2016 which is reproduced below:

*“3(11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt”;*

11.4 In his reply dated 26.06.2022, IRP has rejected the claim of the applicants companies as Financial Creditors and has instead advised them to submit their claim in Form-B as Operational Creditor for further course of necessary action.

Sub-Section 20 of Section 5 of IBC, 2016 defines the Operational Creditor as follows:

*“5(20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;*

Operational debt is defined in sub-Section 21 of Section 5 of the IBC, 2016, as follows:

*“5(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”.*

The Operational Creditor is a person to whom an operational debt is owed. Operational debt means a claim in respect of

provisions of goods or services. Though, MoU has lost its legal force, IRP in his letter has admitted that the nature of disbursement at the relevant time can only be ascertained from the said MoU and the surrounding circumstances. The advances were made in consideration of the development rights in the property of the Corporate Debtor at Vile Parle. The MoU was held to have no legal force and no joint development agreement was ever entered. It is apparent that the applicant companies no.1 & 2 did not supply any goods or render any services to the Corporate Debtor and therefore, as per definition of operational debt given in sub-Section 21 of Section 5 of IBC, 2016, it cannot be said to be an operational debt.

- 11.5 As per clause 9.1 of the MoU, if the Corporate Debtor fails to execute and register irrevocable joint development agreement in favour of the developers (the applicant herein), then developers will have option to terminate the MoU and Corporate Debtor shall have to refund all amounts to the developers together with interest @18%. The relevant clause of the MoU is reproduced below:

*“9.1 In the event that:*

*(a) GTL is unable to obtain the approval of its shareholders to this MoU within two (two) months from the date of execution of these presents or within such extended time as the developers may at their discretion agree or;*

*(b) GTL is unable to (1) pay all dues and complete all formalities under the labour agreement dated arrived between GTL and the Labour Union, or (2) make encumbrances; or (3) execute and register the irrevocable joint development agreement and irrevocable power of attorney in favour of the*

*developers; or (4) fulfil its obligation in terms of this MoU within a period of 6 (six) months from the execution of this MoU or within such extended time as the developers may at their discretion agree;*

*Then the developers will have no option to terminate this understanding by giving 2 (two) day notice and upon such termination, GTL shall refund all amounts paid by the developers to (or on behalf of ) GTL till such date together with interest thereon at 18% (eighteen per cent) per annum from the date of termination till the date of refund”.*

Thus, as per the MoU, failure to execute and register the joint development agreement would have converted the advances given to interest bearing refundable advance. Though the applicants had not terminated the MoU, it got terminated by the operation of law according to the judgment of the Hon'ble Supreme Court. The applicants had invested Rs.132 crore as advance and after full payment were to get 90% of built up area or alternatively refund with 18% interest if the joint development agreement could not be executed. We hold that it is a financial debt within the applicable provisions of Section 5(7) and 5(8) of IBC, 2016.

- 11.6 We are not dwelling on the issue of interest payable to the applicant companies as the said MoU had no legal force and this issue has not been considered and decided by the IRP. We are also not dwelling on the issue whether the debt is secured or unsecured. The securities were lodged with the Solicitors as per para 6.4 of the MoU which is reproduced below:

*“6.5 GTL shall within 48 hours upon execution of this MoU, deposit all original documents of title in relation to the*



*said property with Mr. M L Bhakta, Senior Partner, M/s. Kanga and Co. Advocates and Solicitors in escrow pending execution of the joint development agreement. The escrow agent shall handover the original document to the developers on execution of the joint development agreement”.*

The said MoU has lost its legal force and no joint development agreement was executed. This issue as to whether the debt is secured or unsecured has also not been examined by the IRP and it will be premature to decide on this issue. Thus, we wish to decide only on the issue whether the said advance as on date should be treated as operational debt or as financial debt by the IRP. As stated earlier, no joint development agreement was signed and no goods or services were rendered by the applicant companies. Thus, debt cannot be classified as operational debt. On failure to execute the joint development agreement, as per MoU, the debt had acquired the nature of interest bearing refundable advance and therefore, it gathers the character of a financial debt for the reasons stated in foregoing paras.

12. In view of the above discussion, the IRP is directed to consider the claims of the applicant companies as the claims by Financial Creditor of a financial debt and act accordingly. Interim relief granted vide order dated 25.08.2022 is vacated. Other reliefs claimed in this IA are not considered at this stage. IRP and CoC to proceed accordingly. IRP to consider and decide on the applicants claim of interest, and also their claim to be treated as secured creditors, as per facts and applicable laws.
13. With the above direction, IA 690 of 2022 stands allowed and disposed of with no order as to cost.

-Sd-

-Sd-

**AJAI DAS MEHROTRA  
MEMBER (TECHNICAL)**

Prakash - Steno

**DR. MADAN B GOSAVI  
MEMBER (JUDICIAL)**