

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
MUMBAI BENCH -I**

**CP (IB) No.877/MB/2023**

Under section 7 of the Insolvency and  
Bankruptcy Code, 2016

*In the matter of*

**Edelweiss Asset Reconstruction Company  
Limited.**

**[CIN :U67100MH2007PLC174759]**

Edelweiss House, off C.S.T. Road, Kalina,  
Mumbai, Maharashtra-400098.

... Financial Creditor /Petitioner

Versus

**Ajmera Realty and Infra India Limited**

**[CIN:L27104MH1985PLC035659]**

Citi Mall, Link Road, Andheri West, Mumbai-  
400053.

...Corporate Debtor / Respondent

**Order Delivered on :29.01.2024**

***Coram:***

Hon'ble Member (Judicial) : Justice V.G. Bisht, (Retd.)  
Hon'ble Member (Technical) : Mr. Prabhat Kumar

***Appearances:***

For the Financial Creditor : Mr. Gaurav Joshi, Senior  
Counsel a/w Mr. Ankit Lohia,  
Advocate, Mr. Varun Nathani,  
Advocate, Ms. Suchitra Valjee,  
Ms. Riya Kamdar, Ms. Riya  
Vasa, Advocates i/b Manilal  
Kher Ambalal & Co.

For the Corporate Debtor : Mr. Shyam Kapadia, Advocate  
a/w Ms. Rati Patri, Mr. Vikrant  
Dere, Ms. Sanchi Jain,  
Advocate i/b M/s. Wadia  
Ghandy & Co

**ORDER**

***Per: Prabhat Kumar, Member (Technical)***

1. This is a Company Petition filed under section 7 (“the Petition”) of the Insolvency and Bankruptcy Code, 2016 (IBC) filed by **Edelweiss Asset Reconstruction Company Limited** ("the Financial Creditor"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Ajmera Realty and Infra India Limited** ("the Corporate Debtor ").

**Facts:**

2. The Petitioner submits that the date of default in the present Petition is 1<sup>st</sup> January 2023 and the amount in default is Rs. 28,40,00,000/- along with interest totalling to Rs. 31,01,08,937/- as on 15th May 2023.
3. The Petitioner submits that one Meeti Developers Private Limited [**“MDPL”**] had executed a Development Agreement dated 27<sup>th</sup> December 2006 with New Kamal Kunj Co-op Housing Society Limited [**“Society”**] for redevelopment of the Society’s building. For the purpose of redevelopment, MDPL had issued Non- Convertible Debentures [**“NCDs”**] of Rs. 55 Crores to the predecessor of the Petitioner under a Debenture Trust Deed dated 29<sup>th</sup> November 2016. These NCDs stood assigned to the Petitioner under an Assignment Agreement dated 21<sup>st</sup> May 2019.
4. Thereafter, MDPL defaulted in the repayment of the NCDs. The Petitioner filed a Company Petition being CP No. 783 of 2020 against

MDPL under Section 7 of the Insolvency and Bankruptcy Code, 2016 [“Code”]. By an order dated 5<sup>th</sup> March 2021, this Tribunal was pleased to admit CP No. 783 of 2020.

5. After the order of admission, the Corporate Debtor along with MDPL approached the Petitioner to purchase the NCDs from the Petitioner for a sum of Rs. 31,66,00,000/-. Accordingly, the Petitioner and the Corporate Debtor executed a Transfer Agreement dated 8<sup>th</sup> July 2022 and Financial Undertaking dated 8<sup>th</sup> July 2022.
6. The Petitioner submits that the recitals of the Transfer Agreement and Financial Undertaking narrate the sequence of events in regard the issuance of NCDs by MDPL, execution of Debenture Trust Deed and default committed by MDPL and the Admission Order in CP 783 of 2020. The Transfer Agreement specifically provides that words not defined therein shall have the meaning attached to them under the Debenture Trust Deed. These agreements record the terms and conditions for purchase of NCDs by the Corporate Debtor. These agreements expressly provide that the liability of the Corporate Debtor to pay the aforesaid sum was absolute, unconditional, and irrevocable. It was agreed that out of the Rs. 31,66,00,000/-, the Corporate Debtor would make an upfront payment of Rs. 3,26,00,000/- and the balance sum of Rs. 28,40,00,000/- was to be paid by 31<sup>st</sup> December 2022. On default, the Corporate Debtor was also liable to pay interest at 24% p.a.

It was further agreed that the NCDs would not be transferred to the Corporate Debtor till the time the Corporate Debtor complies with the payment obligations under the Transfer Agreement and Financial Undertaking. Further, on the payment of the upfront amount, the Petitioner was required to withdraw CP No. 783 of 2020. The relevant Clause 3 of the Transfer Agreement is reproduced herein below:

### **3. UNDERTAKING FOR FINANCIAL OBLIGATION**

*“In consideration of the premises, the Transferee hereby agrees, undertakes, confirms and declares that it shall furnish an irrevocable and unconditional undertaking (hereinafter referred to as **"Financial Undertaking"**) in favour of the Transferor undertaking and guaranteeing to make the payment of the Balance Purchase Price payable by the Transferee. On occurrence of Event of Default (as defined hereinafter) on the part of the Transferee or its nominee in terms of this Agreement, the Transferee shall, upon demand, forthwith pay to the Transferor without demur the Balance Purchase Price payable by the Transferee under this Agreement, together with interest at the rate of 24% (twenty four) percent per annum (compounded annually) from the Final Payment Date till the date of actual payment (hereinafter referred to as **"the Financial Obligation"**) by the Transferee. The Transferor shall be considered as Financial Creditor of the Guarantor under the Applicable Law for the period after the Final Payment Date till the time the Financial Obligation is fully discharged to the satisfaction of the Transferor. The Guarantee shall not be affected by any action/ event*

*whatsoever, including nomination of its group company by the Transferee to perform its obligations as per Clause 4 of this Agreement or exercise of by the Transferor under the Debenture Documents.”*

7. The Petitioner complied with its obligation and withdrew CP No. 783 of 2020. After such withdrawal, the Corporate Debtor kept on seeking extension of time for paying the balance amount of Rs. 28,40,00,000/- By their letter dated 24th December 2022, the Corporate Debtor acknowledged their financial liability and requested for a new timeline to make final payment and honor their commitment. The same was acceded to by the Petitioner who granted extension of 1 month for payment of balance consideration. However instead of honoring their liability the Corporate Debtor once again sought an extension by their communication dated 1st February 2023 and admitted that they were determined to complete the payment of full and final obligation of their outstanding consideration for the completion and effective transfer/assignment of the debt. The Petitioner refuted such excuses and repeatedly called upon the Corporate Debtor to make the balance payment. Given the default committed by the Corporate Debtor, the Petitioner filed the present Petition. At the outset, it is clarified that the Petitioner has its independent remedy against MDPL, and the

Petitioner has filed CP No. 624 of 2023 which is presently reserved for orders.

8. The Petitioner submits that under the Transfer Agreement and Financial Undertaking, the Corporate Debtor has inter alia given an indemnity/ guarantee in regard the liability, demand and claim under the Debenture Trust Deed. The relevant clauses are iterated hereinbelow for ready reference:

**“2) GUARANTEE**

*The Obligor hereby agrees, undertakes, guarantees, confirms, and declares that it shall make the payment of the Balance Purchase Price payable to the Company in the manner as set out in the Transfer Agreement. On occurrence of Event of Default on the part of the Obligor or its nominee in terms of the Transfer Agreement, the Obligor guarantees that it shall, upon demand, forthwith pay to the Company without demur the Balance Purchase Price payable by the Obligor under the Transfer Agreement, together with interest at the rate of 24% per annum (compounded annually) from the Final Payment Date till the date of actual payment ("Financial Obligation") by the Obligor. The Company shall be considered as Financial Creditor of the Obligor under the Applicable Law for the period after the Final Payment Date till the time the Financial Obligation is fully discharged to the satisfaction of the Company. This Financial Undertaking shall not be affected by any action/ event whatsoever, including*

*nomination of its group company or otherwise by the Obligor to perform its obligations as per terms of the Transfer Agreement or exercising of rights by the Company under the Debenture Documents.*

### **3) INDEMNITY**

*Without prejudice to any other right available to the Company in law or under equity, **the Obligor shall indemnify, defend and hold harmless the Company from and against any and all liabilities, losses, damages, demands, claims** (including third party claims), actions, judgments or causes of action, assessments, interest, fines, penalties/ and other costs or expenses (including, without limitation, amounts paid in settlement, court costs and all reasonable attorneys' fees) incurred by the Company **based upon, arising out of or in connection with or otherwise in respect of its obligations under this Financial Undertaking or the Transfer Agreement or any other agreement related agreements.**"*

9. The Transfer Agreement and Financial Undertaking are commercial contracts entered between the Petitioner and the Corporate Debtor. The terms thereof are clear and unambiguous. The clauses therein are bilateral and mutually agreed upon. Such contracts have to be construed strictly without altering the nature of the contract. The Petitioner relies upon the judgment in the matter of Ramana Dayaram

Shetty v. International Airport Authority of India & Ors. 1979 SCC (3) 489 and in paragraph no. 7, the Hon'ble Supreme Court has held as under:

*“7.... It is a well settled rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce silence any part of the document and make it altogether inapplicable.....”*

10. The Petitioner submits that the transaction between MDPL and the Petitioner is transaction which falls within the scope of a financial debt under the provisions of the Code. The transaction between the Corporate Debtor and the Petitioner emanates pursuant to this issuance of NCDs. Under the Transfer Agreement and Financial Undertaking, the Corporate Debtor has given a guarantee / indemnity inter alia for all liabilities, losses, damages, demands and claims arising out of or in connection with or otherwise in respect of obligation under the Transfer Agreement, Financial Undertaking or any other related agreement,



which would include the Debenture Trust Deed. Given the fact that the transaction between MDPL and the Petitioner falls under the scope of financial debt, an indemnity / guarantee given by the Corporate Debtor for such financial debt would also be classified as a financial debt only. Notably, even the Transfer Agreement and Financial Undertaking expressly provide that the Petitioner is a Financial Creditor of the Corporate Debtor viz. the liability owed by the Corporate Debtor is a financial debt. The definition of financial debt under Section 5(8)(i) of the Code is reproduced below:

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

*(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;*

11. The Petitioner submits that the Corporate Debtor through its advocates issued a Public Notice dated 14.01.2023 to investigate right, title interest of MDPL in the property. The society replied to the said notice and alleged that MDPL had committed default of its obligations under the Development Agreement. Further, the society vide notice dated 24.02.2023 terminated the Development Agreement with MDPL citing reasons that that the termination is on account of several defaults committed by MDPL under the Development Agreement. The

Corporate Debtor vide letter dated 14.03.2023 informed the Financial Creditor about the termination of the Development Agreement.

12. In the meantime, the Society and MDPL had filed cross-petition against each other under section 9 of the Arbitration and Conciliation Act, 1996. Vide order dated 12.09.2023, the Hon'ble Bombay High Court granted reliefs in favor of the society and against MDPL. By letter dated 25.10.2023 the Corporate Debtor terminated the Transfer Agreement and Financial Undertaking.

**Submissions advanced by the Respondent:**

13. The Respondent submits that no money whatsoever has been lent to the Respondent by the Petitioner for 'temporary use' or otherwise, in other words there has been no borrowing by the Respondent whatsoever from the Petitioner. It is further submitted that any reliance on the 'Transfer Agreement and/or Financial Undertaking' is also misconceived as any purported obligation under the 'Transfer Agreement' and/ or 'Financial Undertaking' would not constitute a 'financial debt' under section 5(8) of the Code. The Respondent has not 'guaranteed any of the amounts payable by Meeti Developers Private Limited ("MDPL") to the Petitioner.
14. As far the transaction between the Petitioner and the Respondent is concerned, the Respondent submits that entire premise of the arrangement as agreed by the Respondent was that MDPL continues

to have valid and subsisting development rights over the Subject Property which in turn will ensure that the NCDs are duly secured and ultimately such duly secured NCDs are assigned by the Petitioner in favour of the Respondent.

15. In furtherance of the arrangement the Respondent executed Transfer Agreement dated 8th July 2022 ("Transfer Agreement") wherein the Petitioner agreed to sell to the Respondent the NCDs along with all the underlying Security Interest and all the rights, title, interest, claims and causes of action available to the Petitioner (Transferor therein) under the Debenture Documents (as defined in the DTD) at the lump sum consideration of Rs. 31,66,00,000/- (Rupees Thirty-One Crores and Sixty-Six Lakhs) ("Purchase Price") and on the terms and conditions as set out therein. Simultaneously with execution of the Transfer Agreement, the Respondent paid a sum of Rs. 3,26,00,000/- (Rupees Three Crores Twenty-Six Lakh only) ("Advance Sum") to the Petitioner under the Transfer Agreement. A Financial Undertaking dated 8th July 2022 whereby the Respondent agreed to pay to the Petitioner the Purchase Price in consideration of the transfer of the NCD's along with underlying Security Interest to the Respondent. The Financial Undertaking also specifically records that the Petitioner is required to transfer NCDs in favour of the Respondent along with all

rights, title, interest, claims. causes of action available with the Petitioner under the debenture documents.

16. It is submitted that the Respondent has neither taken over MDPL's liabilities nor guaranteed the obligations of MDPL under the Debenture Documents (as defined in the DTD) under any circumstance whatsoever. On the contrary, Petitioner has agreed to transfer to the Respondent the said NCDs along with its Security Interest and the actionable claims against MDPL (which Petitioner represented to the Respondent that they have considerable value on account of the underlying security on the Subject Property) for a valuable consideration. Further, no security whatsoever for payment of the balance purchase price under the Transfer Agreement has been created by the Respondent in favour of the Petitioner either under the Transfer Agreement or under the Financial Undertaking. It is material to note that there has been no disbursement of any amount from the Petitioner to the Respondent under the Transfer Agreement, Financial Undertaking or otherwise.
17. The Respondent qua termination of MDPL Development Agreements dated 24<sup>th</sup> February 2024, submits that the termination on account of gross defaults by MDPL signifies that the entire premise of the transaction between the Respondent and the Petitioner (as comprised

in the Transfer Agreement and the Financial Undertaking) stood extinguished.

18. The Respondent submits that despite being aware of the termination of Development with MDPL and complete deterioration of the security interest underlying the NCDs, the Petitioner with a mala fide intent address a misconceived demand notice dated 2nd March 2023 to the Respondent calling upon the Respondent to clear the balance payment in accordance with the terms of the Transfer Agreement. Pursuant thereto, the Respondent intimated the Petitioner, that the Petitioner had failed from fulfilling its obligations under the Transfer Agreement as it has failed to protect its Security Interest for the NCDs; the NCD's were rendered without any value on account of the termination of the MDPL's development rights to the Subject Property. The Respondent further intimated the Petitioner that their obligation to make payments under the Transfer Agreement and Financial Undertaking were at all times subject to the transfer and purchase of the NCD's along with all the Security Interests in favor of the Petitioner and not otherwise
19. Moreover, it is submitted that the Hon'ble Bombay High Court after extensively hearing the parties in the MDPL's Arbitration Petition, the Society's Arbitration Petition and the Petitioner's Intervention Application, vide its order dated 12th September 2023 ("Section 9 Order"): (i) dismissed the MDPL's Arbitration Petition; (1) made the

Society's Arbitration Petition absolute in terms of prayer clauses (a), (e), (f), (h), (i), (j) and (k); (iii) did not grant any relief to the Petitioner in the Petitioner's Intervention Application and directed the Petitioner to exercise its remedies only against MDPL.

20. The Respondent submits that there is no disbursal of any amount whatsoever by the Petitioner to the Respondent till date against consideration for the time value of money. On the contrary, the Respondent has paid the Advance Sum to the Petitioner which has been usurped by the Petitioner. It is settled law that 'disbursal' is sine qua non for a debt to fall within the ambit of the definition of the 'financial debt' under the Code. No money has been lent to the Corporate Debtor/ Respondent for 'temporary use'
21. The Petitioner has attempted to confuse and cleverly interweave two absolutely distinct and independent transactions in the present petition, one of the financial debt taken by MDPL from the Petitioner under the debenture documents (as set out in the DTD) and the other transaction of purchase of the said NCDs by the Respondent as envisaged under the Transfer Agreement and the Financial Undertaking with the sole intent of misleading the Tribunal. As is evident, the Respondent has neither taken over the obligations of MDPL under the debenture documents nor guaranteed repayment of dues of MDPL to the Petitioner. On the contrary, if the Petitioner would have been able to

protect its Security Interest to the NCDs, the Respondent upon the purchase of the said NCD's would have stepped in the shoes of the Petitioner and would have exercised its rights and securities against MDPL.

22. On account of termination of by the society, MDPL has neither development rights to the Subject Property nor possession or control over the Subject Property. Thus, the Security Interest created in favour of the Petitioner stands completely deteriorated and the said NCDs have been rendered without any value. Therefore, the Transfer Agreement has become incapable of performance and thus stands terminated, cancelled, null and void.

**Submissions advanced by the Petitioner vide Affidavit-in-Rejoinder.**

23. It is submitted that the transaction between the Petitioner and the Corporate Debtor is a financial transaction to purchase NCDs. The NCDs, originally carried interest rate of return of 17% p.a. under the Transfer Agreement and Financial Undertaking the Corporate Debtor was obligated to purchase the NCDs at a predetermined price, which carried interest at 24% p.a. (compounded annually) in the event of default. Further, the Transfer Agreement and Financial Undertaking specifically provides for a guarantee and/or indemnity from the Corporate Debtor and clearly fall within the ambit of financial debt under Section 5(8) of the Code.

24. It is submitted that the transaction fulfils the test of 'commercial effect of a borrowing' under Section 5(8)(f) of the Code. The defense that there is no financial debt owed to the Petitioner is based on a complete misreading of the transaction documents and provisions of the Code.
25. The liability of the Corporate Debtor under the Transfer Agreement and Financial Undertaking is unconditional and absolute. The Corporate Debtor has, on multiple occasions, admitted its liability to pay the amounts under the Transfer Agreement and Financial Undertaking. The mere fact that there is no direct disbursement of monies from the Petitioner to the Corporate Debtor does not in any manner change the nature of debt and/or absolve the Corporate Debtor from the consequences of its default.

**Findings:**

26. Heard learned Counsel for the Financial Creditors and Learned Counsel for the Corporate Debtor. Perused the record.
27. Before we proceed to examine the twin parameters of debt and default under Section 7 Petition, it is essential at the outset to examine the nature of transaction for the purpose of ascertaining whether the alleged debt to be in default falls within the ambit of financial debt under Section 5(8) of the Code. For the purpose of the present Petition, the documents from which the debt emanates is Transfer Agreement



and Financial Undertaking both dated 08.07.2022. The relevant clauses of the said agreements are reproduced hereinbelow:

*“Pursuant to discussion between the parties, the Transferee has agreed to purchase the debentures from the Transferor for the purchase price (defined below) and the transferor has agreed to such proposal of transferring the Debentures along with all rights, title, interest, claims and causes of action available to the Transferor to the Transferee as per the terms and conditions as provided in this Agreement.*

*2.(i) Subject to the terms and conditions of this Agreement, the Transferee has agreed to purchase the Debentures from the Transferor for a total consideration of INR 31,66,00,000/- (Indian Rupees Thirty One Crores Sixty Six Lakhs Only) (hereinafter referred to as the "Purchase Price") and the Transferor as the true, legal and beneficial owner of the Debentures hereby agrees to transfer, assign, sell and deliver the Debentures to the Transferee along with all its rights, title and interest in the Debenture Documents, all agreements, deeds, and documents related thereto and all collateral and underlying Security Interest and / or pledges created to secure, and/or guarantees issued in respect of, the repayment of the Debenture, which the Transferor is entitled to, upon receipt of Purchase Price as per the terms and conditions of this Agreement.*

*(ii) The Transferee shall on or before signing of this Agreement make payment of INR 3,26,00,000/- (Indian Rupees Three Crore Twenty-Six Lakhs Only) to the Transferee in the EARC Bank Account (hereinafter referred to as the*

*"Upfront Amount") to show its commitment to acquire the Debentures on or before December 31, 2022. The Upfront Amount paid by the Transferee to the Transferor in terms of this clause 2 (ii) shall be adjusted by the Transferor against the Purchase Price and appropriated accordingly.*

*(v) The balance amount of INR 28,40,00,000/- (Indian Rupees Twenty-Eight Crore Forty Lakhs Only) (hereinafter referred to as the "Balance Purchase Price) shall be paid by the Transferee to the Transferor in the EARC Bank Account on or before December 31, 2022 ("Final Payment Date").*

### **3. UNDERTAKING FOR FINANCIAL OBLIGATION**

*"In consideration of the premises, the Transferee hereby agrees, undertakes, confirms and declares that it shall furnish an irrevocable and unconditional undertaking (hereinafter referred to as "Financial Undertaking") in favour of the Transferor undertaking and guaranteeing to make the payment of the Balance Purchase Price payable by the Transferee. On occurrence of Event of Default (as defined hereinafter) on the part of the Transferee or its nominee in terms of this Agreement, the Transferee shall, upon demand, forthwith pay to the Transferor without demur the Balance Purchase Price payable by the Transferee under this Agreement, together with interest at the rate of 24% (twenty four) percent per annum (compounded annually) from the Final Payment Date till the date of actual payment (hereinafter referred to as "the Financial Obligation") by the Transferee. The Transferor shall be considered as Financial Creditor of the Guarantor under the Applicable Law for the period after the Final Payment Date till the time the Financial Obligation is fully discharged to the satisfaction of the Transferor. The Guarantee shall not be affected by any action/ event whatsoever, including*

*nomination of its group company by the Transferee to perform its obligations as per Clause 4 of this Agreement or exercise of by the Transferor under the Debenture Documents.”*

***Financial Undertaking dated 08.07.2022.***

***“2) GUARANTEE***

*The Obligor hereby agrees, undertakes, guarantees, confirms, and declares that it shall make the payment of the Balance Purchase Price payable to the Company in the manner as set out in the Transfer Agreement. On occurrence of Event of Default on the part of the Obligor or its nominee in terms of the Transfer Agreement, the Obligor guarantees that it shall, upon demand, forthwith pay to the Company without demur the Balance Purchase Price payable by the Obligor under the Transfer Agreement, together with interest at the rate of 24% per annum (compounded annually) from the Final Payment Date till the date of actual payment ("Financial Obligation") by the Obligor. The Company shall be considered as Financial Creditor of the Obligor under the Applicable Law for the period after the Final Payment Date till the time the Financial Obligation is fully discharged to the satisfaction of the Company. This Financial Undertaking shall not be affected by any action/ event whatsoever, including nomination of its group company or otherwise by the Obligor to perform its obligations as per terms of the Transfer Agreement or exercising of rights by the Company under the Debenture Documents.*

***3) INDEMNITY***

*Without prejudice to any other right available to the Company in law or under equity, the Obligor shall indemnify, defend and hold*

harmless the Company from and against any and all liabilities, losses, damages, demands, claims (including third party claims), actions, judgments or causes of action, assessments, interest, fines, penalties/ and other costs or expenses (including, without limitation, amounts paid in settlement, court costs and all reasonable attorneys' fees) incurred by the Company based upon, arising out of or in connection with or otherwise in respect of its obligations under this Financial Undertaking or the Transfer Agreement or any other agreement related agreements."

28. It is evident from a bare reading of the afore stated clauses that the relation between the Financial Creditor and the Corporate Debtor under the Transfer Agreement herein was that of a transferor and transferee. The transaction was for purchase of debentures (1100/ 17% secured, redeemable and non-convertible debentures of face value of INR 5,00,000/- aggregating to INR 55,00,00,000/- ) from the Financial Creditor/Transferor for the consideration of Rs.31,66,00,000/-.
29. The Petitioner had contended that the Corporate Debtor has guaranteed or indemnified the Financial Creditor herein for all liabilities, losses and claims not only arising out of Transfer Agreement, Financial Undertaking but also the Debenture Trust Deed. The submission of the Petitioner cannot be considered as Clause 3 of the Transfer Agreement and Clause 2 & 3 of Financial Undertaking iterated hereinabove merely provide that the Corporate Debtor was liable to pay the balance purchase price towards purchase of

debentures, mere stipulation in an agreement stating that the transferor shall be considered as a Financial Creditor of Guarantor, will not rendered the outstanding amount receivable by the Petitioner herein a Financial Debt within the meaning of the Code. The transaction ex-facie is of purchase of NCD's in lieu of Rs.31.99 Crore and lacks the basic element of disbursal against the consideration for time value of money. At this juncture, it is apposite to rely on the Judgement of Hon'ble Supreme Court in Civil Appeal nos. 8512-8527 OF 2019 Anuj Jain vs Axis Bank Limited following paragraphs are relevant for the purpose.

*“43. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become ‘financial debt’ for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential*

*part even in respect of any of the transactions / dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said subclauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money.*

*44. As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended*

*meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.*

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

30. The Hon’ble Supreme Court has settled the position of law that the element of disbursal against the consideration of time value of money has to be traced in the genesis of debt. In the present matter, the transaction was for purchase of debentures for consideration and it is evident that the element of disbursal against the consideration for time value of money is absent. It appears that Petitioner has instituted the captioned Petition for recovery of money and seeks specific performance of the terms of the agreement.
31. Accordingly, CP No. 877 of 2023 is **dismissed**.

**Sd/-**  
**PRABHAT KUMAR**  
**Member (Technical)**

29.01.2024  
Priyal

**Sd/-**  
**JUSTICE V.G. BISHT**  
**Member (Judicial)**