NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT)(CH)(Ins) No. 02/2021

Under section 61 of the Insolvency & Bankruptcy Code

(Arising out of Order dated 19.03.2020 in CP (IB) No. 662/07/HDB/2019 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench)

In the Matter Of:

Pradeep Kumar Sekar
(Suspended Director of M/s. Solar Semiconductor Energy Systems (India) Private Limited)
Survey No. 183 Part,
CF Area, Phase III,
Industrial Development Park
Ghatkesar Mandal
APIIC – IALA Cherlapalli Municipality
Rangareddi
Telangana – 500051 ….. Appellant

versus

1. Solar Semiconductor Energy Systems (India) Private Limited
   Represented by Mr. Murali Prasanth Nalam IRP
   DRK College of Engineering
   Bowrampet,
   Hyderabad – 500 043
2. Orix Leasing and Financial Services India Limited
   Plot No. 94, Marol Co-operative Industrial Estate
   Andheri-Kurla Road
   Andheri (East)
   Mumbai – 400059 ….. Respondents

Present:

For Appellant: Mr. V. Ramakrishnan, Sr. Counsel
Mr. Vijayaraghavan SP, Advocate
For Respondent 1 Ms. Mano Ranjani, Advocate
For Respondent 2 Mr. Y. Suryanarayana, Advocate

JUDGMENT
(VIRTUAL MODE)

Venugopal M. J

INTRODUCTION:

The 'Appellant' has filed the present 'Appeal' being aggrieved against the order dated 19.03.2020 in CP (IB) No. 662/07/HDB/2019 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench) in admitting section 7 'Application' filed by the Second Respondent/Petitioner/Financial Creditor (under I & B Code, 2016).

2. The 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench) while passing the impugned order on 19.03.2020 at paragraph 16 had observed the following:

"In the present case, this Adjudicating Authority is satisfied with the submissions put forth by the Petitioner/Financial Creditor regarding existence of 'financial debt' and occurrence of 'default'. Further, the Financial Creditor has fulfilled all the requirements as contemplated under IB Code in the present Company Petition and has also proposed the name of IRP after obtaining his written consent in Form-2" and consequently admitted the petition by ordering the commencement of 'CIRP Process etc'.,

APPELLANT'S CONTENTIONS:

3. The Learned Counsel for the 'Appellant' submits that the First Respondent/Corporate Debtor approached the Second Respondent for 'Financial Assistance' and that a 'Lease Agreement' dated 03.04.2017 was entered into between the parties, in and by which, the Second Respondent/Petitioner/Financial Creditor leased out 'Furnitures and Fixtures' to the First Respondent.

4. According to the Learned Counsel for the Appellant, the 'Lease Agreement' does not indicate the 'Liability' thereunder is in consideration for the 'time value of money' and further that there is no indication in the 'Lease Agreement' that it is deemed as a 'Financial or Capital Lease'.

5. It is represented on behalf of the Appellant that the Second Respondent understood the transaction as an ordinary leasing transaction and issued

'Demand Notices' under the I & B Code which reaffirms the fact that the Second Respondent/Petitioner was not a 'Financial Creditor' and a suitable reply was issued by the First Respondent/Corporate Debtor. However, the Second Respondent filed an application under section 7 of the Code as a 'Financial Creditor', instead of following up the 'Demand Notice' with a petition under section 8 of the Code.

6. The Learned Counsel for the Appellant projects an argument that whether or not the 'Lease Agreement' is a 'Finance or Capital Lease' under the 'Indian Accounts Standards' is a factual issue required to be pleaded and proved by the Second Respondent and further that the Second Respondent had not pleaded this issue and failed to adduce any proof.

7. The Learned Counsel for the Appellant takes a stand that the 'Adjudicating Authority' has failed to consider whether the Second Respondent is qualified as 'Financial Creditor' under section 5(7) of the Code. Besides this, it is the contention of the Appellant that the 'Adjudicating Authority' had failed to take into account that the 'Agreement' dated 03.04.2017 is titled as 'Lease Agreement' and the content, nature and terms too are in respect of 'Lease of Furniture and Fixture'.

8. It is the Appellant's plea that the 'Adjudicating Authority' had failed to appreciate that the 'Agreement' dated 03.04.2017 between the Second Respondent and the Appellant is in regard to purported rental dues lease of furniture and fixtures that would not qualify as 'Financial or Capital Lease' under section 5 (8) of the Code.

9. The Learned Counsel for the Appellant comes out with an argument that the 'Adjudicating Authority" failed to note under Part V of Respondent's petition Point 1 'Total amount of debt granted, dates of disbursement' there was no disbursement of money from the Respondent to the Appellant and there is no document filed by the Respondent with regard to the disbursement of money.

10. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' had erred in admitting the 'Application' against the Corporate Debtor without satisfying itself of the question as to whether the 'Lease' is factually a 'Financial or Capital Lease' as required under Section 5(7), 5(8)(d), 5(20), 5(21) of the 'I&B Code' and the 'Accounting Standards'.

10. The Learned Counsel for the Appellant contends that the 'Definition' of "Financial Debt' as per Section 5(8) of the Code requires (1) 'Debt' along with 'Interest', if any, (2) which is disbursed (3) against a consideration of time value

of money and that the aforesaid three requirements are to be satisfied for a 'Financial Debt'. Also, it is represented on behalf of the 'Appellant' that even 'Lease Agreements' falling under section 5(8)(d) must satisfy the aforesaid requirements and refers to the judgment of the Hon'ble Supreme Court of India in 'Phoenix ARC Pvt Ltd Vs Ketulbhai Ramubhai Patel' (Civil Appeal No. 5146 of 2019) wherein at paragraph 21, 46-48 it is observed as under:

"21. Whether the corporate debtor owed any financial debt to the appellant so as to treat the appellant as financial creditor is the question to be answered. The definition of 'financial debt' as contained in Section 5(8) contains the expressions "means" and "includes". The definition begins with the words "financial debt" means 'a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes'…… The main part of the definition, thus, provides that financial debt means a debt "which is disbursed against the consideration for the time value of money". The definition in the second part gives instances which also includes financial debt, Learned Counsel for the appellant in his submission has relied on Section 5(8)(i) to support his claim that the appellant is the financial creditor. Learned Counsel for the appellant has referred both sub-clause (b) and sub-clause (i) and submits that credit facility which was extended to the borrower is referable to Section 5(8) (b) and the corporate debtor pledged his share to sense of guarantee. The debt is a financial debt within the meaning of Section 5(8)(i) and the appellant is the financial creditor. There can be no dispute that credit facility given by the Assignor to borrower by Facility Agreement dated 12.05.2011 is a credit facility which can be covered under Section 5(8)(b). A bare perusal of Section 5(8)(i) indicates that it contemplates 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 clause (8). Sub-clause (i) uses two expressions "guarantee" and "indemnity" for any of the items referred to in sub-clauses (a) to (h)."

"46. 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 dent 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); 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 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 Sub-clauses (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 anther 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 correspondent to, or at least having some traces of disbursal against consideration for the time value of money.

47. 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 owned 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.

48. 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-a -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 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."

11. It is the emphatic stand of the Appellant that in the instant case, the disbursal is against the supply of 'Assets' and against the usage of 'Assets' (Furnitures and Fixtures) and not against the 'time value for money'. In short it is the submissions of the Learned Counsel for the Appellant that the primary ingredients of Section 5(8) of the Code are not satisfied, the application of clause (d) of Section 5(8) of the Code will not arise.

12. The Learned Counsel for the Appellant submits that the Second Respondent had not pleaded in the 'Application' or in the 'Synopsis' as to why the 'Lease Agreement' is a 'Financial Lease Agreement' satisfying the requirement of Section 5(8)(d) of the I& B Code. Moreover, the Second Respondent had not pleaded how and why it falls within the definition of ' Financial Debt' and 'Financial Creditor'.

13. The Learned Counsel for the Appellant in support of the submission that in the absence of pleadings, evidence, if any, cannot be looked into cites the decision of the Hon'ble Supreme Court Union of India V Ibrahim Uddin reported in (2012) 8 SCC 149 wherein at paragraphs 77 and 85.6 it is observed as under:

"77. This Court while dealing with an issue in Kalyan Singh Chouhan V C. P. Joshi (2011) 11 SCC 786), after placing reliance on a very large number of it earlier judgments including Trojan & Co V Nagappa Chettiar (AIR 1953 SC 235), Om Prakash Gupta V Ranbir B Goyal (2002) 2 SCC 256), Ishwar Dutt V Collector (LA) (2005) 7 SCC 190) and State of Maharashtra v Hindustan Construction Co Ltd (2010) 4 SCC 518), held that relief not founded on the pleadings cannot be granted. A decision of a case cannot be based on grounds outside the pleadings of the parties. No evidence is permissible to be taken on record in the absence of the pleadings in that respect. No party can be permitted to travel beyond it pleading and that all necessary and materials facts should be pleaded by the party in support of the case set up by it. It was further held that where the evidence was not in the line of the pleadings, the said evidence cannot be looked into or relied upon.

85.6. The court cannot travel beyond the pleadings as no party can lead the evidence on an issue/point not raised in the pleadings and in case, such evidence has been adduced or a fining of fact has been recorded by the court, it is just to be ignored. Though it may be a different case where in spite of specific pleadings, a particular issue is not framed and the parties having full knowledge of the issue in controversy lead the evidence and the court records a finding on it."

14. The Learned Counsel for the Appellant brings to the notice of the Tribunal that the Second Respondent/Petitioner/Financial Creditor issued two notices under I & B Code for the payment of Rs. 94.81 lakhs and they were issued under Section 8 of the Code, although the notices were not in the prescribed form. In reality, it is the stand of the Appellant that the Second Respondent would issue a notice under the I & B Code if it was really a 'Financial Creditor'. Also that, a

reply notice was issued by the First Respondent disputing the claim of the Second Respondent.

15. The Learned Counsel for the Appellant contends that the Second Respondent cannot plead a new case in appeal nor introduced new documents and the new documents filed along with the reply of the Second Respondent were not before the 'Adjudicating Authority". In short, the Second Respondent is building up a new case that it is a 'Non-Banking Finance Company' and therefore that the alleged debt is 'Financial Debt' and this is impermissible at the Appellate Stage.

16. The Learned Counsel for the Appellants submits that Rs. 17,25,697/- became Rs. 94,81,209/- in one month as 'Lease Rental Due' and this is impermissible. In this connection the Learned Counsel for the Appellant points out that under section 74 of the Indian Contract Act, 1872 the aforesaid clauses in the 'Lease Agreement' are in the nature of penalty and that the Second Respondent must prove the damages caused to it, by the First Respondent's alleged breach of Agreement.

17. Further any difference or dispute is to be resolved by an Arbitration under clause 26 of the 'Lease Agreement'.

18. The Learned Counsel for the Appellant contends that the 'Disbursal' was not made to the 'Corporate Debtor' and made to the 'Supplier' M/s. Interio and Architecture, Bangalore and refers to the decision of Hon'ble Supreme Court in 'Pioneer Urban Land and Infrastructure Limited & another v union of India & another reported in (2019) 8 SCC 416 at special page 511 wherein at paragraph 70 & 71 it is observed as under:

"70. The definition of 'financial debt' in Section 5(8) then goes on to state that a 'debt' must be 'disbursed' against the consideration for time value of money "Disbursement" is defined in Black's Law Dictionary (10th Edn.) to mean:

"1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose."

71. In the present context, it is clear that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression " disbursed" refers to money which has been paid against consideration for the "time value of money". In

short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby the fact that such money is now no longer with the lender, but is with the borrow, who then utilizes the money. Thus far, it is clear that an allottee "disburses" money in the form of advance payments made towards construction of the real estate project. We were shown the Dictionary of Banking Terms (2nd Edn.) by Thomas P Fitch in which "time value of money" was defined thus:

"present value: today's value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUT RATE. Also called the time value of money. Today's value of stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis." (emphasis supplied)

That this is against consideration for the time value of money is also clear as the money that is "disbursed" is no longer with the allottee, but, as has just been stated, it with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of installments that he would if he were to pay for the ultimate price of the flat/apartment.)"

19. It is represented on behalf of the Appellant that the 'disbursement' is against the supply and there is no pleading in the application (filed under section 7 of the Code) by the Second Respondent/Financial Creditor that it is a time value of money and further that merely saying 'Lease Agreement' is not good enough. As a matter of fact, it is the stand of the Appellant that a decision of a case cannot be based on the grounds outside the pleadings of the parties and that a 'Court of Law/Tribunal' cannot travel beyond pleadings.

20. The Learned Counsel for the Appellant points out that factual issues cannot be raised at Appellate Stage and they cannot be converted into Legal Issues by the concerned. Also, it is pointed out on behalf of the Appellant that 'Law' is not to be pleaded, but requirement of 'Law' has to be followed.

21. The Learned Counsel for the Appellant submits that 'Factual Pleadings' not pleaded by a party before the 'Adjudicating Authority' cannot be permitted in Law to be raised for the first time in Appeal. Moreover, if requisite pleadings are not pleaded in an application, the same cannot be relied upon by the

concerned party, thereby adding new materials before the 'Appellate Tribunal' is not to be permitted.

22. The Learned Counsel for the Appellant contends that the so called admission of the Appellant, as projected by the Second Respondent/Financial Creditor is to be seen as a whole especially, in the light of the reply dated 10.08.2018 to the demand notice dated 27.07.2018 given by the Second Respondent/Financial Creditor.

First Respondent's Contentions:

23. The Learned Counsel for the First Respondent submits that the 'Appellant' is well aware about the 'CIRP' process, when it appeared before the 'Adjudicating Authority' with reference to the application filed under Section 19 of the Code, by the 'Insolvency Resolution Professional'. In fact, the 'Insolvency Resolution Professional' had initiated 'CIRP' and made the public announcement on 26.8.2020 and further that the 'Insolvency and Bankruptcy Code of India' was also informed through email on 26.8.2020.

24. The Learned Counsel for the First Respondent brings to the notice of this 'Tribunal' that the 'Insolvency Resolution Professional' received the claims from three 'Financial Creditors' and one 'Operational Creditor', verified and collated the same which runs as follows:

Name of the Financial Creditor	Amount claimed	Amount admitted
Karur Vaisya Bank*	Rs.1,70,000	Rs.1,53,000
Reliance Commercial Finance Limited	Rs.3,20,27,162	Rs.3,20,27,162
Orix Leasing & Financial Services I Ltd (Respondent 2)	Rs.1,35,42,577	Rs.1,05,96,714

- Later the suspended Directors personally paid Karur Vysya Bank and closed the vehicle loan account.

Name of the Operational Creditor	Amount claimed	Amount Admitted
CTO Audit Bangalore	Rs.39,84,024	Rs.39,84,024

25. The Learned Counsel for the First Respondent points out that the Second Respondent submitted its claim in Form C for Rs.1,35,42,577/- which was collated and verified by the 'Insolvency Resolution Professional' as per Section 18(b) read with Regulation 13 Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulation, 2017 and admitted the claim of Rs.1,05,96,714/-. Further, based on the 'Lease Agreement' dated 3.4.2017, between the 'Second Respondent' and the 'Corporate Debtor' read with Section 5(7), 5(8)(d) of the Code and the 'Indian Accounting Standards', the claim was admitted for Rs.1,05,96,714/-.

26. According to the First Respondent, the 'Resolution Professional' prepared 'Information Memorandum' in accordance with Section 29 and appointed the 'Registered Valuers' as per Regulation 27, but the 'Valuation Assignment' could not be carried out and the 'Invitation For Expression of Interest' under Regulation 36A could not be prepared because no assets were handed over by the 'Suspended Board' till date.

27. It is represented on behalf of the First Respondent that the 'Net Block Value Of Assets', as per 'Financial Statements of the Financial Year ending 2019, is Rs.5,35,26,607/- and inspite of repeated follow ups and even after projecting an application under Section 19 of the Code by the 'Insolvency Resolution Professional', the 'suspended Board' had not handed over the assets to the 'Insolvency Resolution Professional'/'Resolution Professional' and as such, an Application was filed by the 'Resolution Professional' on 16.2.2021 before the 'Adjudicating Authority' under Sections 68, 69, 70(a), (b) and (e) and 236 of the Code read with Regulation 35A of Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, wherein various issues faced by the 'Insolvency Resolution Professional'/'Resolution Professional' during his search for the assets of the 'Corporate Debtor' were mentioned.

28. The Learned Counsel for the First Respondent contends that as the basic review of 'Bank Statements of Corporate Debtor' looked suspicious

and no significant sale and purchase related transactions were observed, the 'Resolution Professional' appointed a 'Certified FAFP Professional' to conduct 'Forensic and Fraud Detection Audit (FAFD) on the preferential, undervalued, extortionate credit or fraudulent transactions as per 'Insolvency and Bankruptcy Code', 2016. In fact, the 'Audit' was conducted by Mr.Sunil Kumar Kabra (FAFP No.2910) for the period 1.4.2016 to 24.8.2020 (CIRP date). Also that, 'FAFD Auditor in his 'Report' mentioned that, the 'Suspended Board' had not cooperated with 'FAFD Auditors' and not shared any of the required 'Information and Explanations'.

29. The Learned Counsel for the First Respondent submits that the 'Sales Tax Authorities in their 'Orders/Notices' had mentioned to the effect "the dealer has failed to furnish the books of account despite the issue of notice and failed to utilize multiple opportunities provided by them". As such, the 'Resolution Professional' filed an application under Sections 43,44,45,46, 48,49,66,70(c) and 236 of Insolvency and Bankruptcy Code read with Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 before the 'Adjudicating Authority' on 16.2.2021.

30. The Learned Counsel for the First Respondent points out that the 'Committee of Creditors' in its nineth meeting that took place on 4.2.2021 decided not to extend CIRP period (ending on 20.2.2021) and to file necessary application for liquidation of the 'Corporate Debtor' and further that an application for 'Liquidation of 'Corporate Debtor' was filed on 18.2.2021 before the 'Adjudicating Authority'. In short, the 'Appellant' has filed this present 'Appeal' at the fag end of 'CIRP' to avoid the consequences resulting from the aforesaid applications filed before the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench).

Second Respondent's Pleas:

31. It is the submission of the Learned Counsel for the Second Respondent that the 'Corporate debtor' on numerous occasions confirmed

that 'Lease' is a 'Financial Lease' and further that the Second Respondent is a 'Non Banking Financial Company' and is in the business of providing finance to various Corporate Customers, inter alia by way of lease/loan/hire purchase/deferred payment scheme and is registered by Reserve Bank of India.

32. The Learned Counsel for the Second Respondent contends that Second Respondent issued regular 'Legal Notices' to the 'Corporate Debtor' and 'Personal Guarantors' and not the 'Demand Notice' in such form or such manner as prescribed under the Insolvency and Bankruptcy Code. Pg 6

33. The Learned Counsel for the Second Respondent relies on the 'Judgement' of this 'Appellate Tribunal' in Comp. Appl. (AT)(Ins)No.117 of 2017 between M/s Sabari Inn Pvt. Ltd. Vs. M/s Ramesh Associates Pvt.Ltd., wherein at Paragraph 7,8, 17 and 18, it is observed as under:

> *Paragraph 7. "Learned counsel for the Appellant submitted that no notice under sub-section (1) of Section 8 was issued in Form-3 or prior to treating the application as under Section 9 of the 'I&B Code' or before the admission. The application was also not filed in the proper format i.e.Form 5, as required under Section 9 of the 'I&B Code' read with Rule 6 of the Adjudicating Authority Rules, 2016 in terms of which details of record of default etc. were required to be provided.*
>
> *Paragraph 8 . The aforesaid stand taken by the Appellant has not been disputed by the Respondent, as he failed to appear.*
>
> *Paragraph 17. Admittedly, no notice was issued under sub-section (1) of Section 8 of the 'I&B Code'. In terms with Rule 5, other informations were also not placed before the Adjudicating Authority'.*
>
> *Paragraph 18 . The Respondent having failed to provide all the details as required under form 5 as noticed above, the application under sections 433 and 434 of the Companies Act,*

1956 cannot be treated to be an application under Section 9 of the 'I&B Code' in terms of Rule 5 of Transfer Rules, 2016. In such circumstances, in view of proviso to rule 5 of the Transfer Rules, the application under Sections 433 and 434 of the Companies Act, 1956 stands abated."

34. The Learned Counsel for the Second Respondent cites the Judgement of this 'Tribunal' in Comp.App.AT(CH)(Ins)39/17 dated 28.7.2017 between M/s Uttam Galva Steels Ltd. V. M/s DF Deutsche Forfait AG & Anr., wherein at Paragraphs 17, 18,19 and 20 it is observed as under.

Paragraph 17 : Under sub-section (1) of Section 8 of the I&B Code, an 'Operational Creditor' on occurrence of a default, is required to deliver the notice of payment of unpaid debt or get copy of the invoice payment of the defaulted amount served on the Corporate Debtor. This is the condition, precedent under Section 8 & 9 of the I&B Code, unlike Section 7 before making an application to the adjudicating authority under Section 9 of the I&B Code. Under sub-section (1) of Section 9 of the Code, the right to file an application accrues after expiry of ten days from the delivery of Demand Notice or copy of invoice, as the case may be. If the Operational Creditor does not receive payment from the Corporate debtor or notice of dispute under sub Section (2) of Section 8, the Operational Creditor only thereafter may file an application before the Adjudicating authority for the initiation of corporate insolvency resolution process.

Paragraph 18. An application under Section 9 of I&B Code is required to be filed in such format and manner and accompanied by such fee, as may be prescribed…….etc."

Paragraph 19. ……"it is clear that unlike Section 7, a notice under Section 8 is to be issued by an 'Operational Creditor" individually and the petition under Section 9 has to be filed by Operational Creditor individually and not jointly.

Paragraph 20. Otherwise also it is not practical for more than one 'operational creditor' to file a joint petition. Individual 'Operational Creditors' will have to issue their individual claim notice under Section 8 of the I&B Code. The claim will vary which will be different. Date of notice under Section 8 of the I&B Code in different cases will be different. It will have to be issued in format(s). Separate Form-3 or Form-4 will have to be filled. Petition under Section 9 in the format will contain, separate individual data."

35. According to the Learned Counsel for the Second Respondent in reply to the 'Legal Notice' the 'Corporate Debtor' stated that it entered into a 'Lease Deed' and the Second Respondent provided financial lease assistance of Rs.1,07,76,815/- in respect of furniture and fixtures, but it had not released entire amount. Further, in the same reply to the 'Legal Notice', the 'Corporate Debtor' had contradicted and mentioned that they had not executed any 'Agreement' at any point of time for any amount allegedly claimed by the Second Respondent and moreover, it had not obtained any loan from the Second Respondent.

36. The Learned Counsel for the Second Respondent proceeds to point out that the 'Corporate debtor' had confirmed that the Second Respondent is a 'Financial Creditor' but had stated before the 'Adjudicating Authority' that it had no jurisdiction because of the fact that Second Respondent's head office is at Mumbai and that the transaction took place at Mumbai and then contradicted and denied that it is indebted for a total sum of Rs.1.16 Crores to the Second Respondent. Further, the 'Corporate Debtor' took a stand that it signed blank forms and documents and hence signatures could

be there, but those documents were not executed by the 'Corporate Debtor' etc. and it assailed the correctness and genuineness of the account.

37. The Learned counsel for the Second Respondent comes out with a plea that the Second Respondent had invested a sum of Rs.1,07,76,815.36 under 'Financial Lease Contract' with a repayment schedule as 'Lease Rentals' in 36 months and at the end of the 'Lease Contract', the 'Asset' will be purchased by the 'Corporate Debtor' at a residual value of Rs.21,65,190/- that was already received as a 'Security Deposit' by the Second Respondent'.

38. The Learned Counsel for the Second Respondent contends that as per the 'Indian Accounting Standards both (IAS 116 and IAS 17) 'Lease' is classified as 'Financial Lease if it transfers substantially all the risks and rewards incidental to ownership of an underlying asset while a lease is classified as an 'Operating Lease' if it does not transfer substantially all the risks and rewards incidental to ownership of an underlying asset.

39. The Learned Counsel for the Second Respondent submits that a 'Financial Creditor' in the matter of Section 7 of Insolvency & Bankruptcy Code, r.w. Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, is to file an application in Form 1 and to fill up the particulars mentioned in Part I to V and an application to initiate 'CIRP' is not like a 'filing of a plaint' and in short, only the requisite particulars prescribed in the Form under Rules are to be filled up with necessary details. Also that, it is represented on behalf of the Second Respondent that an Application under Section 7 of the Code does not require elaborate pleadings like that of a Civil Suit and that the Second Respondent/Applicant/Financial Creditor had filled up the requisite columns in Form 1 duly and further that no fault can be found with, in this regard.

40. The Learned Counsel for the Second Respondent points out that the 'Lessor' is in the business of providing finance and that in terms of the 'Lease Agreement' dated 3.4.2017, the Second Respondent/Lessor had

offered to provide 'Lease Finance Assistance' to the 'Lessee' in respect of furniture and fixture ("Asset") and which the 'Lessee' was desirous to take for its business purposes on lease basis from the 'Lessor' on the basis of offer made.

41. Further, in the 'Lease Agreement' dated 3.4.2017, in Clause-13 under the heading 'Period of Lease', it was mentioned that 'Lessee hereby takes 'Asset' on Lease for the period as stated in the Schedule except if terminated earlier in accordance with this 'Agreement'.

42. It is projected on the side of the Second Respondent that the 'Appellant' before the 'Adjudicating Authority' had not pleaded that 'Debt' was not a 'Financial Debt'. Also that for the first time, the 'Appellant' takes a plea that 'Lease' in question is not a 'Financial Lease'.

DISCUSSIONS & FINDINGS:

43. In the Application filed by the Second Respondent/Financial Creditor (under Form-1) to initiate 'CIRP' (under Section 7 of the Code r/w Rule 4 of the Insolvency & Bankruptcy Application to Adjudicating Authority) Rules, 2016 in Part-IV -Particulars of Financial Debt' in Serial No.1, it was mentioned that the total amount of debt granted was Rs.1,07,76,815/- and it was mentioned as (i) Rs.64,95,569/- on 5th April 2017, (ii) Rs.42,81,245/- on 28th November 2017. Apart from this, the Second Respondent/Financial Creditor had mentioned that the First Respondent/Corporate Debtor entered into a 'Lease Agreement' with the Applicant Company to avail financial assistance of Rs.1,07,76,815/- (Rupees One Crore Seven Lakh Seventy Six Thousand Eight Hundred and Fifteen only) to carry out interior work on 3rd April 2017.

44. The Second Respondent /Financial Creditor had claimed a default sum of Rs.1,16,98,242.60/-(Rupees One Crore Sixteen Lakhs Ninety Eight Thousand Two Hundred and Forty Two and Paise Sixty only) and that the said amount was not paid by the 'Corporate Debtor'(First Respondent) as per the running statement of accounts maintained by the Second

Respondent/Applicant Company in the name of First Respondent/Corporate Debtor.

45. The stand of the 'Appellant' is that there is no indication in the 'Lease Agreement' dated 3.4.2017 that the said agreement is deemed as a 'Financial or Capital Lease' and that the Second Respondent/Financial Creditor had not pleaded the factual issue as to whether or not the 'Lease Agreement' is a 'Finance or Capital Lease' under 'Indian Accounting Standards'.

46. It comes to be known that the Second Respondent/Financial Creditor had disbursed a sum of Rs.64,95,569/- on 5.4.2017 and Rs.42,8,245/- on 28.11.2017 to the First Respondent/Corporate Debtor's architects 'M/s Interio and Architecture, Bangalore'. According to the Second Respondent, the First Respondent/Corporate Debtor was irregular in repaying the monthly 'Rentals' from February 2018 and totally stopped making the payments and further that the First Respondent/Corporate Debtor had admitted its liability in response to the requests made for the payment made by the Second Respondent. In short, the First Respondent/Corporate Debtor, time and again, had admitted its liability and requested for more time.

47. In this connection, this 'Tribunal pertinently points out that the Second Respondent/Financial Creditor had issued a 'Demand Notice' dated 27.07.2018 addressed to the First Respondent/Corporate Debtor' and its 'Managing Director' stating among other things that the Second Respondent had provided 'Lease Financial Assistance' of Rupees One Crore Seventy Seven Lakhs Six Thousand Eight Hundred and Fifteen, in aggregate to the First Respondent/Corporate Debtor in respect of Furniture and Fixture ('Assets') as detailed in the 'Lease Agreement' dated 3.4.2017 and further that as per Clause 2.3(b) of the said 'Lease Agreement', they were supposed to pay the stipulated lease rentals regularly and punctually without any abetments and deductions except (statutory deduction). But they have grossly neglected to pay the gross rentals during the 'Lease

Tenure', thereby causing an event of default under the said 'Lease Agreement'.

48. Besides the above, the 'Demand Notice' dated 27.7.2018 of the Second Respondent addressed to the First Respondent and Another proceeds to mention that the post dated cheques against the lease rentals (PDC's) and Security Cheque issued by them to the Second Respondent towards discharging of their liability to repay the lease amount/total acquisition cost taken from the Second Respondent (as contained in the said agreement) was also dishonoured for want of insufficient funds in their Bank Account and as such miserably failed to honour the commitment under the said agreements. Moreover, inspite of the Second Respondent's repeated requests and 'Demand Notice' dated 26.6.2018, the promises made through their emails addressed to the Second Respondent/Financial Creditor, for clearing the dues they had failed to discharge their liabilities under the said agreement and had violated the terms of the agreement.

49. In short, in the Demand Notice dated 27.7.2018 issued by the Second Respondent addressed to the First Respondent/Corporate Debtor and Another, it was mentioned that the default was committed by the First Respondent/Corporate Debtor repeatedly and as per terms of the agreement, a sum of Rs.9,481,209/- being the total due was legally due and payable by it to the Second Respondent as on date of the notice dated 27.7.2018. Therefore, the Second Respondent/Financial Creditor without prejudice to its rights under law had called by the First Respondent/Corporate Debtor and Another to pay a sum of Rs.94,81,209/- only within 14 days from the receipt of the 'Demand Notice' by any one of them or both of them, failing which the First Respondent/Corporate Debtor and Another were informed that the Second Respondent/financial Creditor would be constrained to proceed against them as per Law, including, but not limited to initiate 'Insolvency Proceedings' under the Insolvency & Bankruptcy Code against the First Respondent/Corporate Debtor.

50. For the Demand Notice of the Second Respondent/Financial Creditor, the First Respondent/Corporate Debtor through an Advocate on 10.8.2018 had stated that it had not issued 'Post Dated Cheques' against the lease rentals and security cheques to the Second Respondent and that the Second Respondent had collected blank cheques, but those cheques were given by the First Respondent/Corporate Debtor not towards discharging of any liability to repay the lease amount or liability from it. In short, an averment was made in the First Respondent/Corporate Debtor's Lawyer Notice dated 10.8.2018 to the effect that the First Respondent/Corporate Debtor, had not executed/issued any cheques to the Second Respondent for the purposes of repayments of the lease amount. Notwithstanding the above, the reply notice of the First Respondent/Corporate Debtor's Advocate dated 10.8.2018, it was mentioned that the First Respondent/Corporate Debtor had not executed any agreement at any point f time for any amount as claimed by the Second Respondent. Further, the Second Respondent had not released the emptier amount and hence the claim made in the notice of the Second Respondent/Financial Creditor is totally against Law and therefore the payment of alleged amount does not arise etc.

51. It appears that on 28.11.2017, the First Respondent/Corporate Debtor, had confirmed that it would buy back the asset at Rs.2165190 plus taxes after the lease period.

52. Although, a plea is taken on behalf of the 'Appellant' that in the instant case, the 'disbursal' is against the supply of the 'Assets' and against the usage of the 'Assets' (Furniture & Fixture) and not against the 'time value for money' and that the primary ingredients of Section 5(8) of the Code are not satisfied, this 'Tribunal' bearing in mind the meaning of 'Time Value' that it is 'the price associated with length of time that an investor must wait until investment matures or related income is earned' (vide Black's Law Dictionary) and also considered the fact that the Second Respondent/Financial Creditor had invested a sum of Rs.1,07,76,815.35

paise under the 'Lease Agreement' dated 3.4.2017, in and by which a repayment schedule was mentioned as lease rental for a period of 36 months and at the end of the lease, the 'Asset' will be purchased by the First Respondent/Corporate Debtor at a value of Rs.21,65,190/- which was received by the Second Respondent/Financial Creditor as Security Deposit comes to an inevitable and inescapable conclusion that the disbursal of amounts to the manufacturer 'Interio Architecture' comes within the requirement of 'time value for money' and the contra plea projected on the side of the 'Appellant' is not acceded to, by this Tribunal.

53. In so far as the contention of the 'Appellant' that the Second Respondent/Financial Creditor had not pleaded in the Section 7 of the Application that the 'Lease Agreement' dated 3.4.2017, is a 'Financial Lease Agreement' satisfying the requirements of Section 5(8)(d) of the 'Insolvency & Bankruptcy Code', it is to be pointed out by this 'Tribunal' that the 'Lease Agreement' dated 3.4.2017 entered into between the Second Respondent/Financial Creditor and the First Respondent/Corporate Debtor clearly envisages that the 'Lessor' (Second Respondent) had offered to provide 'Lease Finance Assistance' to the 'Lessee' (First Respondent/Corporate Debtor) in respect of Furniture and Fixture ('Asset') and which the 'Lessee' (First Respondent/Corporate Debtor) was desirous to take for its business purposes on lease basis from the 'Lessor' (Second Respondent) on the basis of offer made. And also that, in Part IV of the Application ' Particulars of Financial Debt' it is mentioned that the Corporate Debtor had entered in to a "Lease Agreement' with the applicant company to avail financial assistance of Rs. 1, 07, 76, 815/- to carry out interior work on 03.04.2017 and further that, the amount of default was mentioned as Rs. 1, 16, 98, 242. 60 which was not paid by the Corporate Debtor, as per the computation and statement of accounts annexed along with the application. Therefore, it cannot be said that the Second Respondent/ Financial Creditor had not pleaded in the application about the 'Financial Lease' in stricto sense of the term. Suffice it for this Tribunal to point out

that requisite averments as required to the application under section 7 of the Code were furnished by the Second Respondent/Financial Creditor. Hence, the contra contention advanced on behalf of the Appellant is not accepted by this Tribunal.

54. It is to be pointed out that in the Rejoinder of the Appellant (filed to the Reply of the Second Respondent/Financial Creditor/Applicant) in paragraph 5 (1), it is mentioned that 'there is neither a Financial Service provided by the Second Respondent as per section 2(16) of the I B Code, nor a 'Financial Product' as per section 2(15) of the I B Code, 2016, but an ordinary lease of furniture and fixtures to the First Respondent Company that are fully owned by the Second Respondent, therefore, the Second Respondent is not a 'Financial Service Provider' under section 2(17) of the I B Code, 2016.

55. Section 3(14) (a to d) of the Code defines "Financial Institution'.(including a financial institution as defined in section 45 -I of the Reserve Bank of India Act, 1934 (2 of 1934). Section 50 of the I & B Code, 2016 provides a carve out to a 'Financial Service Provider' for its credit facility to be regarded as 'extortionate'. Likewise, section 167 of the I & B Code, 2016 provides that any debt extended by a person regulated for the provision of 'Financial Services' shall not be considered as an 'extortionate credit transaction'.

56. As matter of fact, the definition of Corporate Person in section 2(7) of the I & B Code, 2016 excludes any 'Financial Service Provider'.

57. It is not out of place for this Tribunal to make a relevant mention that the procedure envisaged under section 8 of the Code, 2016 differs from the procedure applicable to the "Financial Creditors' as 'Operational Debts' like the trade debts, salary or wage claims etc tend to be small amounts as compared to 'Financial Debts'.

58. Be that as it may, in the light of the detailed qualitative and quantitative discussions mentioned supra, and keeping in mind the

contentions advanced on either side, especially in the teeth of 'Lease Agreement dated 03.04.2017' that the ('Lessor'/Second Respondent) had offered to provide 'Lease Finance Assistance' to the 'Lessee'/First Respondent, this Tribunal without any haziness holds that the 'Lease' in the instant case, is a 'Financial Lease' and comes to an irresistible conclusion that there is 'Financial Debt' as per section 5(8) of the Code, 2016 and the default being committed by the First Respondent/Corporate Debtor in terms of the ingredients of section 3(12) of the Code, 2016. Further, that the 'debt' in question as per section 3(11) of the Code, 2016 cannot be termed as an 'Operational Debt' as per section 5(21) of the Code, 2016. Also that, it cannot be forgotten that the Second Respondent/Financial Creditor had not issued the demand notice in such form and manner as prescribed by the I & B Code. Looking at from any angle, the impugned order of the Adjudicating Authority dated 19.03.2020 (National Company Law Tribunal, Hyderabad Bench) in admitting the section 7 application of I & B Code, 2016 (filed by the Second Respondent/Financial Creditor) is free from any legal flaws. Resultantly the Appeal fails.

RESULT:

In fine, the instant Comp App (AT) (CH) (Ins) No. 2/2021 is dismissed, but without costs. I A No. 06/2021 & 07/2021 are closed.

(Justice Venugopal M.)
Member(Judicial)

(V. P. Singh)
Member(Technical)

19th April, 2021

HR/KM