

**NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI**

ORDER SHEET OF THE HEARING ON 30th NOVEMBER, 2023, 10:30 A.M.

CP (IB)/33/7/GB/2022

**Present: 1. Hon'ble Member (Judicial), Shri H.V. Subba Rao
2. Hon'ble Member (Technical), Shri Satya Ranjan Prasad**

Name of the Company	Chiragsala Sales Pvt. Ltd. Vs Vaishno Devi Traders Pvt. Ltd.
Under Section	U/s 7 of IBC, 2016.

For Petitioner (s) : Mr. A. Kumar, CA.

For Respondent (s) :

ORDER

Order Pronounced through VC *vide* separate sheets.

Sd/-

**Satya Ranjan Prasad
Member (Technical)**

Sd/-

**H.V. Subba Rao
Member (Judicial)**

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CP (IB) No.33/GB/2022

In the matter of:

An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, to initiate Corporate Insolvency Resolution Process;

-And-

In the matter of:

Chiragsala Sales Pvt. Ltd., 61A, Park Street Ambassador, Suite 55, Kolkata-7800 016;

... Applicant/Financial Creditor

-Versus-

Vaishno Devi Traders Private Limited, N.H. 37, Beltola, Guwahati, Assam 781028.

... Respondent/Corporate Debtor

Coram:

Shri H. V. Subba Rao : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

Appearances (through video conferencing):

For the Petitioners : Mr. Arun Kumar, CMA

For the Respondent : Mr. Aditya Jain, Adv.

Order pronounced on: 30.11.2023

ORDER

1. The present application has been filed by the Financial Creditor- Chiragsala Sales Pvt. Ltd. under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, to initiate Corporate Insolvency Resolution Process in the matter of Vaishno Devi Traders Private Limited.
2. Brief facts as stated by the Petitioner are as follows:

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- 2.1 The Petitioner/Financial Creditor is a Private Limited Company, incorporated on 30.03.1995 under the provisions of the Companies Act, 1956. The Financial Creditor is engaged in the business of investment & finance, having its registered office at *61A, Park Street Ambassador, Suite 55, Kolkata-780001*. Copy of Incorporation Certificate & Master Data of the Financial Creditor as downloaded from the MCA Portal has been annexed.
- 2.2 The Respondent/Corporate Debtor is a Private Limited Company incorporated under the provisions of the Companies Act, 1956, having its registered office at N.H. 37, Beltola, Guwahati, Assam- 781 028. The Authorized share capital of the Corporate Debtor is Rs. 5,00,00,000.00 and the paid-up share capital is Rs. 4,49,70,000.00. A copy of the Master Data of the Corporate Debtor as downloaded from the MCA Portal has been annexed.
- 2.3 The Corporate Debtor herein approached the Financial Creditor for the purpose of obtaining financial loan for the participation in the e-Auction held by Canara Bank for sale of land standing in the name of Prism Alloys Pvt. Ltd. Out of the total sale consideration of the Rs. 6,11,00,000.00 (Rupees Six Crore Eleven Lakh Only) Rs. 3,00,00,000.00 was paid by the Financial Creditor, which was disbursed in 5 tranches on following dates (from 19.09.2019 to 02.01.2020):

Sl. No.	Date of Disbursement	Amount (In Rs.)
1	19.09.2019	50,00,000
2	20.09.2019	45,00,000
3	23.09.2019	95,00,000
4	23.09.2019	60,00,000
5	20.12.2019	25,00,000
6	02.01.2020	25,00,000
Total (Amount of Loan)		3,00,00,000

The aforesaid loan was granted by the Financial Creditor to Corporate Debtor for interest @ 8 % per annum.

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- 2.4 Out of the aforesaid sum of Rs. 3,00,00,000.00, the Corporate Debtor had repaid to Financial Creditor Rs. 50,00,000.00 on 30.05.2020, balance amount due Rs. 2,50,00,000.00 (Rupees Two Crore Fifty Lakh Only) (Principal) as on 30.10.2022 along with interest @8% till 31.10.2022 i.e., Rs. 60,32,904.00 (Rupees Sixty Lakh Thirty-Two Nine Hundred Four Only).
- 2.5 The Financial Creditor made the demand for repayment on debt through email 05.08.2022 and thereafter reminder email on 21.11.2022.
3. The Respondent has filed its Reply Affidavit dated 07.02.2023, stating that:
- 3.1 The Application has been filed in abuse of the process of law and is neither maintainable nor tenable in the eyes of law, it is a sheer attempt to extort money from the Respondent Company whereas it is trying to make IBC, a recovery forum, IBC is not a recovery law rather it is a revival law.
- 3.2 The Application is frivolous, vexatious and has been filed with ulterior motives and the applicants has used different arm-twisting techniques to prejudice Vaishno Devi Traders Private Limited and make unjustified gains by using different blackmailing techniques.
- 3.3 The Applicant have not approached this Tribunal with clean hands and has concealed material facts from adjudicating authorities with the intent to induce and to get favourable orders, this again amounts to fraud, and it is a well settled law that fraud and justice never dwell together, and that fraud vitiates every solemn act.
- 3.4 The alleged claims made in the Application are false and fabricated and there is no debt owed to the Applicants and there is no default.
- 3.5 The Application has been filed with a fraudulent and malicious intent for a purpose other than for resolution of insolvency. In such circumstances, the present proceedings are liable to be and should be dismissed as the petition is anything rather than *bonafide*.
- 3.6 The Respondent denies each and every allegation made by the Petitioners except for what have been categorically accepted and matter of record. Rest

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all the allegations are totally baseless, incorrect, irrelevant and devoid of any substance.

3.7 The Applicant have filed the Application by gross suppression of the true and correct facts that are stated as follows:

- i. With respect to paragraphs 1 and 2 of the said petition, it is a matter of record. With respect to paragraph 3, it is alleged that the Respondent Company approached the Petitioner Company for the purpose of obtaining financial loan for the participation in the e-auction held by Canara Bank for sale of land standing in the name of Prism Alloys Pvt. Ltd. which is false.

In fact, the petitioner approached the respondent with a proposal to jointly develop properties and to jointly buy new properties and develop therein combined and one such property was to be in auction soon. Towards the Land development after purchase, out of the total Rs. 6,11,00,000.00 the Petitioners were supposed to pay 50% in JV but only paid Rs. 2,50,00,000.00 till 23.09.2019 and only after repeated perusals paid an amount of another Rs. 50,00,000.00 post sale and balance Rs. 5,50,000.00 still remains outstanding of the said land purchase transaction which was to be jointly developed in new company.

- ii. It is also denied that the said sum was a loan advanced by the Petitioner Company to the Respondent. The Petitioner has falsely alleged that the amount of Rs. 3, 00, 00,000.00 (Three Crore Only) was an advance by way of a loan and that the same was repayable on demand along with interest at the rate of 8% per annum.
- iii. There is no document to show that any loan was given by the Petitioner Company to the Respondent Company. Furthermore, there is no agreement or basis which evidences that the transaction is a Loan Transaction.
- iv. With respect to Record of Default, issued by Information Utility and placed by the Petitioners on record annexed herewith and marked as

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Annexure-C. In the Statement by Information Utility, the Status of Authentication of Default is “Disputed”.

- v. The Petitioner Company has not produced document on record which would authenticate any undisputed debt on respondent or any debt at all. The Petitioner has not annexed any document in the said petition to verify its claim rather has tried to misguide the court on the basis of the petition and on the basis of projecting acknowledgement (Disputed) of debt to have been accepted by the Petitioner.

3.8 With Respect to Point 4 of the said petition, and going through the background of the case, Infact, the oral understanding was reduced to writing by way of an MOU entered into between the Petitioner and the Respondent Company. No question of repayment arises as there was no loan. Furthermore, Rs. 50 lakh was paid by the Respondent Company on 30.05.2020 as a fixed deposit to the Petitioner, which is an NBFC Company and committed the Respondent to pay interest @15% on the Fixed Deposit. The Petitioner has not yet issued the Fixed Deposit Receipt nor the interest on the amount for which the Petitioner is yet to make payment.

The MOU itself clarifies that:

The intent of parties was to enter into an understanding for the following purposes:

- *Participating in the e-auctions by any Bank or any other institution for sale of landed properties;*
- *Completing all purchase formalities; and*
- *Undertaking development thereof.*

Copy of the MOU has been annexed.

As per the Terms and Termination clause of MOU, it was agreed that the MOU will be valid and subsisting until the time the MOU gives effect to the transactions contemplated in the MOU, and except for the development work, the MOU has been executed. This very MOU had been concealed by the petitioner, which is the very basics of the Transaction in question.

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- 3.9 In support of the submissions and clarifications made on behalf of the Respondent Company, the following extracts from the submissions of petitioner are placed on record:
- i. Extract of the petition copy of Case No.: CP/16/GB/2021 wherein the point No. 2 of the said petition, the petitioners have stated that both the groups (Bhama and Goyal) have jointly bid for an e-auction of a piece of land by Canara Bank, situated Village. Kahikuchi, Mouza Dakshin Rani, Dist. Kamrup, Assam and even that has been undertaken in the same 50:50 ratio with an intention to create a holding company for developing new business ventures on the same land.
 - ii. Extract of the Rejoinder affidavit Filed by the Authorised Representative of the Petitioner Company/ Financial Creditor in the matter of CP 16/GB/2021 which will prove that amount was no Loan as claimed.
“Point 11 of the Rejoinder Affidavit wherein the Authorised Representative of the Petitioner Company/ Financial Creditor had themselves admitted that the amount of 3,00,00,000/- was towards the bid amount to purchase the land, Also the 50,00,000/- was adjusted between the Petitioners and the Respondents.”
This 50 Lakh was to be repaid along with Interest.
The Nominee Company of Chiragsala Sales Private Limited has paid a sum of Rs. 3 Crore towards the bid amount to purchase the land. Extract of the Petition Copy, Case No. CP 16GB/2021 and the Rejoinder Affidavit have been annexed.
- 3.10 In fact, as the Petitioner Company is an NBFC, and induced with 15% interest Rs. 50, 00,000 (Rupees Fifty Lakh only) was a deposit given by the Respondent Company to the Petitioner Company on which no interest has been paid till date and no amount has been repaid which was to be given @15% p.a. The Petitioner Company has arm twisted the entire facts of the case and has mislead the court by their false allegations on the Respondent Company.

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This evidences the fact that the amount of Rs. 50, 00,000.00 was not a payment of loan in any aspect on the other hand, it is a sum due from the Petitioners to be funded along with interest at the rate of 15% p.a.

3.11 With respect to point 5 of the said petition. The Copy of e-mail placed on record by the Petitioner Company themselves asking for refund of Rs 2,50,00,000.00 by the Respondent Company quoted herein as follows:

“Refund of Rs. 2,50,00,000 (Rupees two crore and fifty lakh only) on account of advance consideration paid to you with respect to undivided 50% share of land admeasuring 2(two) bighas, 4 (four) kattahs and 16 (Sixteen) Laches situated at Dag No. 802, Patta No. 78, Village-Kahikuchi, Mouza- Dakhin Rani, District-Kamrup, Assam, which was further paid to M/s. Canara Bank by you on our behalf.”

Copy of E-mail has been annexed. This depicts that the sum was paid by the Petitioner Company to the Respondent Company, was anything other than loan. The amount was paid against the JV for development of Land and the Canara Bank letter evidencing the payment made has been annexed. Even the E-mails were dated 05.08.2022 and 23.11.2022 which is after the institution of Case No. CP 16/2021 against "Druk Fuels Ltd" another Group Company of the Directors of the Petitioner and Respondent Company under Section 241 and 242.

The Mail has been sent to provoke and to evoke money from the Respondent Company in either way which is a clear after thought from the petitioners.

3.12 The Financial Creditor has provided its own account which is contrary to the actual account. The Applicant never debited interest is its own account, they have produced false and fabricated accounts of its own and not depicted the true and accurate copy of ledger kept in its books of accounts. In fact, the sum of Rs. 50,00.000 (Fifty Lakh only) was not a payment by the Respondent. Account placed by the Petitioner Company has been annexed.

3.13 Furthermore, the accounts placed on record shows the Ledger account of the Respondent Company as a Land A/c in the books of the Petitioner Company

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which clearly contradicts the claims made by the Petitioner Company in this petition.

- 3.14 A financial creditor has been defined under Section 5(7) as a person to who financial debt owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money.
- 3.15 It is contended that there is no time value of money and the said amount was never received by the Company as a Loan but only as joint Capital which was to be used as per MOU towards joint land development there upon and cannot construed as a Debt in any manner. On contrary, the said MOU was executed with slightly different terms agreed upon between the parties, which can be clear only if the said petition is in case accepted heard with Druk Fuels Limited Case. Hence, there is no default on the part of the Respondents as no debt is or was due and the Petitioners do not even fall in the category of Financial Creditor, so the said case is absolutely baseless.
- 3.16 In view of the foretasted submissions, following reliefs prayed for-
- a. The present Petition filed by the Petitioners be dismissed by this Tribunal with exemplary costs;
 - b. Necessary costs be provided to the Respondent Company for the purposes of litigation and the court fees and for defaming the name of the Respondent Company in pursuit of frivolous petition filed against the Respondent Company;
 - c. Since, the insolvency process has been initiated against the Respondent Company with malicious intent other than for resolution of insolvency, penalty be imposed upon the Petitioner Company/ Authorised Representative of the Petitioner Company under Section 65 of the IBC Code, 2016 as the Applicants are guilty of making false submissions on oath and of using fabricated documents;
 - d. Since the Petitioner has viciously hidden the material facts from the Bench and hence has played fraud upon the Court which must be taken seriously as the Petitioners have hidden the MOU in the said Application;

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- e. In the event of the said Petition is accepted, the said case be heard with Rishi Prasad Agarwal Vs Druk Fuels Limited, Case No. CP/16/GB/2021;
- f. Permission to adjust the 50 lakhs advanced to the Petitioner Company by the Respondent Company with 62 Lakhs demanded by the Petitioners in the Rejoinder Affidavit filed by the Authorised Representative of the Petitioner, In the matter of *Rishi Prasad Agarwal Vs Druk Fuels Limited*, Case No. CP/16/GB/2021, since the said and the instant case are connected to each other, and the same parties are involved.
4. The Petitioner *vide* its Rejoinder dated 22.02.2023, while addressing the issues raised by the Respondent, submits the following:
- 4.1 Rejoinder Reply to the issue raised that there was no loan advanced/loan Transaction/Debt Owed:** Memorandum of Understanding (MOU) was entered into with the Respondent Company on 23rd Day of September 2019 wherein the objective of transaction entered into, can be acknowledged. In the said MOU, para 2 “Consideration/Commercial terms” it is clearly stated in clause (i) that *“The first party participated in the e-auction held by Canara Bank, Fancy Bazar, Guwahati September 2019 for sale of land estimating 2 (two) Bighas 4 (four) kathas 14 (Sixteen) lachas covered by Dag no. 802, Patta No. 78 situated at Village Kahikuchi, Mouza- Dakhin Rani, Dist Kamrup, Assam, standing in the name of M/s Prism Alloys Pvt. Ltd.(Subject Land) and was successful obtaining the Subject Land in the said e-auction held by Canara Bank.”* Further, in clause (ii) it is stated that *“The First Party remitted 25.36% of the bid amount prior to 10th September 2019 to Canara Bank.”* Now, considering above facts it is submitted that-
- a. An e-auction for sale of land estimating 2 (two) Bighas 4 (four) Kathas 16 (Sixteen) Lachas covered by Dag no. 802, Patta No. 78 situated at Village Kahikuchi, Mouza-Dakhin Rani, Dist- Kamrup (M), Assam, in the name of M/s Prism Alloys Pvt. Ltd was conducted prior to 10th of

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September 2019 (Copy of Letter dated 10/09/2019 issued by Canara Bank has been annexed.)

- b. The Respondent Company was successful in obtaining the bid and remitted 25.36% of the bid amount prior to 10th September 2019.

The above condition can be elaborated with respect to SARFAESI Rules, 2002. The Rule 9 stipulates "*Time of sale, issues of sale certificate and delivery of possession*" and is produced as under;

"9. Time of sale, issues of sale certificate and delivery of possession, etc.-

(1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower.

(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor: Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9: Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

(3) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty-five per cent. of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit, the property shall forthwith be sold again.

(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.

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(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited, and the property shall be resold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.”

- c. In the instant matter the date of e-auction was prior to 10th of September 2019 and on successfully obtaining the bid, the Respondent was obliged to deposit minimum of 25% of the bid value as per sub- rule 3 of rule 9 and accordingly 25.36% of the bid value i.e., Rs. 1,55,00,000.00 was paid by the Respondent to Canara Bank.
- d. As per sub-rule (4) of Rule 9, the Respondent was bound to pay the balance amount of approx. 74.64% of the bid amount by on or before 24th Day of September, 2019, otherwise his 25.36% of deposit Money would have forfeited and defaulting purchaser shall have no claim on the property (subject land), and such property shall be resold as per stipulation in sub rule (5) of Rule 9 of SARFAESI. Now, in dearth of fund, the Respondent Company approached the Applicant NBFC Company and requested for providing fund, which is evident from the date of transaction in the bank statement of Applicant Company.
- e. The Debt amount of Rs.2,50,00,000.00 (Rs. Two Crore Fifty Lakh) was borrowed by the Respondent Company in between 19th September 2019 to 23rd September 2019 within a period of 5 days and the end use of such fund was utilised to acquire the subject land, e-auctioned by the Canara Bank. Further, a debt amount of Rs. 50 lakh have been borrowed by the Respondent from the Applicant Company from the period 20.12.2019 to 02.01.2020.
- f. Section 5(7) of Insolvency and Bankruptcy Code, 2016, defines Financial Creditor as:

“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.”

Section 5(8) clause (1) defines Financial Debt as:

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“Financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing.”

Section 3 (33) of IBC, 2016 defines transaction as:

“Transaction includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor.”

In the instant matter, the total financial debt borrowed by the Respondent Company from the Applicant Company to the tune of Rs. 3,00,00,000.00 till 02.01.2020, for the purchase of land from Canara Bank. Hence, it is a financial debt wherein the Respondent have repaid a sum of Rs. 50,00,000.00 to the Applicant on 30th May 2020. The definition financial debt more particularly Section 5(8)(f) of the code is a Residuary Provision which is catch in all nature and it involves all such transactions having commercial effect of borrowing. In the instant matter the Respondent have borrowed money from the Applicant has utilized it for obtaining sell letter of land in its own name.

4.2 Rejoinder Reply to the issue raised that there is no default: Under section 7 of the Code there is no requirement of sending any demand notice to the Respondent despite of that the Applicant *vide* its e-mail dated: 5th August 2022, 6th August 2022, 16th August 2022, 29th August 2022 and 21st November 2022 have made a demand for refund of Rs. 2,50,00,000.00 with interest but the Respondent were least bothered to reply any of such e-mails. (Copy of the above said emails have been annexed.)

Section 3(12) of Insolvency & Bankruptcy Code, 2016, Default is defined as

“Default means non- payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.”

Debt is defined as

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“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.”

Again, Claim is defined U/s 3(6) as

“(6) Claim means

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;”

In the instant matter the Respondent had breached the conditions stipulated in the MOU dated 23.09.2019 more particularly formation of new Company, transfer of subject land to the new holding Company and other terms of MOU, the Respondent have not given effect to any major terms of MOU, which gives Right to Remedy on the part of Applicant. Both the parties have not entered any of the joint venture agreement. Accordingly, *vide* e-mails demand for refund of Rs. 2,50,00,000.00 was sought for and non-compliance to the said demand implies default on the part of Respondent.

4.3 Rejoinder Reply to the issue raised that the status of Authentication of Default is Disputed on Information Utility, and no document were produced to substantiate Undisputed Debt: The disputed remark has been maliciously submitted by the Respondent on IU after filing of debt details by the Applicant at Information Utility, hence, merely submission of remark of Disputed by the Respondent on the Information Utility cannot be construed as debt is disputed.

Section 5(6) of Insolvency & Bankruptcy Code, 2016 defines dispute as

“(6) dispute includes a suit or arbitration proceedings relating to-

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

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(c) the breach of a representation or warranty;”

The Respondent had not disputed the debt borrowed till date except putting their remarks on NESL on 22.11.2022.

Further, existence of dispute is necessary/required/pre-requisite for the purpose of Section 8 of the Code, i.e., initiation of Corporate Insolvency Resolution Process (CIRP) by Operational Creditor, rather than initiation of CIRP by Financial Creditor under Section 7 of the Code.

Section 7(3) of the Insolvency & Bankruptcy Code, 2016 does not stipulate/restrict/put any bar on debt to be disputed.

“Sec. 7(3) The financial creditor shall, along with the application furnish-

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified:

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.”

Thus, the stipulation to the section requires to furnish record of the default recorded with the information utility and not as to the debt to be disputed or undisputed etc. is necessitated.

- 4.4 Rejoinder Reply to the issue raised that proposal was made towards Land Development and 50% of purchase consideration was to be made by the petitioner in the "Joint Venture:** The Applicant is the NBFC Company having principal business of lending loans and advances, both the parties have never entered any joint venture agreement or formed any holding company having 50% stake of each, and as mentioned above the MOU dated 23.09.2019 which have never been given effect and or complied by the Respondent, hence question of any joint venture does not arise at all.
- 4.5 Rejoinder Reply to the issue raised that the respondent company had paid a sum of Rs. 50.00 lakhs as fixed deposit to the petitioner company at a rate of 15%:** The Applicant Company is Non-Acceptance of Public Deposit NBFC Company (Copy of RBI registration Certificate of the Applicant

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Company has been annexed) and it has never accepted any money from the Respondent on account of FDR. Further, the Respondent have not furnished any valid documents which can substantiate their submission that it has paid the amount of Rs. 50 lakhs on 30.05.2020 to the Applicant for the FDR @15% interest. This is the afterthought story cooked by the Respondent with the intent to avoid non-payment of legitimate due of the Applicant in the instant matter.

4.6 Rejoinder Reply to the issue related to the CP 16/GB/2021: CP 16/GB/2021 has been filed by Rishi Prasad Agarwal & others against Druk Fuels Limited & others under sections 241, 242, 244, 58 & 59 of the Companies Act, and is related to the oppression and mismanagement, having no *locus standi* in the instant matter on following grounds:

- i. CP 16/GB/2021 relates with the provision of Companies Act, 2013 whereas the instant matter is filed under IBC, 2016.
- ii. Applicant and Respondent of the instant matter have separate independent legal entity.
- iii. Applicant of instant matter is not the Party of CP 16/GB/2021.
- iv. Any submission or counter submission in CP16/GB/2021 have no relevance in the instant matter.

The Respondent with malicious intention to escape its obligation for repayment of legitimate due debt claim of the Applicant is trying to mislead the Bench bringing up irrelevant submission before this Bench.

5. The Petitioner in accordance with our order dated 20.10.2023, filed written notes stating that:

- 5.1 The Petitioner is a Non-Banking Finance Company (without accepting Public Deposits) [Ref. Certificate of Regd. reply/rejoinder, Page-34-36, Annexure-C].
- 5.2 A debt amount of Rs. 3,00,00,000.00 (Rupees Three Crore only) to the Respondent, in six trances from 19th September, 2019 to 20th January, 2021 through NEFT/RTGS payable on demand.

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- 5.3 The Respondent/CD had repaid Rs. 50 Lakhs (Rupees Fifty Lakh Only) on 30th May 2020 and balance debt amount Rs. 2,50,00,000.00 (Rupees Two Crore and Fifty Lakh Only) remains due and payable.
- 5.4 The Applicant/ Financial Creditor made the demand for repayment of outstanding debt through various emails.
- 5.5 It is admitted by the Respondent/CD *vide* Para no. 4.1 Pg. no. 2 of Reply affidavit, that it has accepted the net debt amount of Rs. 2.50 Crore from the Applicant. But falsely claimed that the aforesaid debt was availed for joint venture development of land, on the contrary CD has referred about false MoU Para no. 5 Pg. no.3 of Reply Affidavit. Neither any J.V was executed nor and MoU was ever been complied by the Respondent/CD for the reason that as per the alleged MoU several terms to have been complied whereas the CD have not complied any terms of the MoU, more particularly the terms related to the E-auction of land by the Canara Bank Ref Pg. no. 7, Pg. no. 15, Pg. no. 23 of Rejoinder Reply. Hence, since the alleged MoU have not given any effect and none of its terms and conditions complied, hence have no relevance in the instant matter. The Respondent/CD have participated in the E-auction in their name only and done all the transaction with Canara Bank in their own name only, hence if the alleged MoU dated 23.09.2019 ever been complied the parties should have to form new company and subject land should have been transferred to the new company, since it is not complied hence have no relevance in the instant matter. The Respondent/CD has admitted during the course of hearing on 02.03.2023 that it has taken money from the applicant and gave the same to the Canara Bank, the Bench directed the CD to discuss the matter with Canara Bank, may get the money and return the same to the Petitioner. (Copy of order dated 02.03.2023 has been annexed). The Applicant is neither the party in any of the transaction with Canara Bank nor the applicant have any legal right over the land purchased by the CD from the Canara Bank, hence the applicant is only the financial creditor which has given debt to the CD payable on demand. Out of total debt of Rs. 3 Crore the CD has repaid Rs. 50 Lakhs to the Applicant hence

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question of validity of any MoU does not arise since as per MoU both parties have to contribute equally to make payment to Canara Bank which is admitted by the CD in its reply affidavit. Moreover, the Applicant is not party in C.P. no. 16/GB/2022, this C.P. was filed by the Directors and other group Co. of the Petitioner in which the Director of CD namely Yudhister Bhama, son of B.Bhama A/R of the CD submitted in its Reply Affidavit Pg. no. 24 of C.P. 16/2022 filed by Y. Bhama, (Copy attached herewith Marked as Annexure-B) denied the MoU on the ground that it was not signed by the CD similarly another Director of the Mr. Balwan Bhama A/R of CD also denied on similar ground in its Reply Affidavit Pg. no.16 of C.P.16/2022.

5.6 The details facts in the original application as well as the Rejoinder Reply filed by the applicant establish the fact that the applicant is the financial creditor and there is debt due and default.

5.7 Substantial Point of law:

5.7.1 Applicant is very well within the definition of Financial Creditor as defined in the Code and has granted "Financial debt" to the CD u/s 5(8)(1) of the Code.

5.7.2 Applicant has granted the total financial debt of Rs. 3 Crores to the CD and on its demand the CD has repaid a sum of Rs. 50 Lakh to the applicant. Thereafter the applicant has demanded for the balance financial debt amount of Rs. 2.50 Crore through emails from the CD along with Interest.

5.7.3 "Claim" u/s 3(6)(b) include right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgement, fixed, matured, unmatured, disputed, undisputed, secured or unsecured. In the instant matter the MoU dated 23.09.2019 has been totally breached and not a single term of the MoU has been complied, hence, the applicant being a financial creditor has all valid right to claim its due from the CD.

5.7.4 The Applicant has complied all the requirements as required u/s 7(3) of the Code as required for filing of application u/s 7 of the Code like record

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of default, proposed name of RP, any other information. Hence, the instant application has been legally filed well within the ambit of the Code.

6. Heard Mr. Arun Kumar, PCS appearing for the Financial Creditor and Mr. Aditya Jain, Ld. Counsel appearing for the Corporate Debtor and perused the records.
7. The Ld. Counsel appearing for the Financial Creditor submits that the Financial Creditor has disbursed an amount of Rs. 3 Crore to the Corporate Debtor under five tranches covering from 19th September 2019 to 2nd January 2020 for paying the balance sale consideration to Canara Bank for purchasing immovable property by the Corporate Debtor in the e-auction conducted by Canara Bank under the provisions of SARFAESI Act, 2002. It is his further submissions that the Corporate Debtor having repaid an amount of Rs. 50 lakh on 30th May 2020 failed to clear the balance amount of Rs. 2 Crore and 50 lakh as the principal amount and interest thereon. He submits that the Financial Creditor had sent emails dated 5th August 2022 and 21st November 2022 but to no effect. He further submits that having no other alternative, they have filed the present Company Petition. However, the Ld. Counsel appearing for the Financial Creditor fairly conceded that the Financial Creditor Company is doing business in financing and investments, and they have lent the above amount to the Corporate Debtor without any security or execution of any documents by the Corporate Debtor. He further conceded that there was no record of debt or default registered with NESL Authorities and prayed for admission of the above Company Petition basing on the disbursement entries shown in their bank statements.
8. The Ld. Counsel appearing for the Corporate Debtor Mr. Aditya Jain, vehemently opposed the above submissions made by the Counsel appearing for the Financial Creditor contending that the above amount was given to CD by them for development of the auctioned property under Joint Venture between both the parties and the said Joint Venture Arrangement between the parties was reduced into writing by way of a Memorandum of Understanding dated 23.09.2019 and the said MoU was purposefully concealed by the Financial Creditor in the present proceedings,

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though they have admitted about the said MoU in the other Company Petition bearing No.16 of 2021- *Rishi Prasad Agarwal Vs Druk Fuels Limited*, pending before this bench. Thus, it is the submission of the ld. counsel for the Corporate Debtor that the above amount lent by the Financial Creditor is by way of a business investment for a Joint Venture and does not fall within the definition of Financial Debt under the Code.

9. Therefore in the light of the above submissions on the both sides, the issue that falls for consideration is

“Whether the above amount claimed by the Financial Creditor is a Financial Debt within the meaning of the Code and whether the above Company Petition is maintainable under sec. 7 of the Code?”

10. In order to decide the above issue, it is important to read the definition of financial debt as defined under sec. 5 (8) of the Code that read as under:

“(8) financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes:

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

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

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”

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11. Apart from reading the above section, it is also relevant to examine the terms and conditions of the Memorandum of Understanding dated 23.09.2019 that witnesseth as under:

“ ...

1. Intention and business arrangement of the Parties:

The Parties believe that entering into this MOU and by establishing a new company as stated herein, shall be mutually beneficial to the Parties from the commercial point of view and otherwise.

2. Consideration / Commercial Terms:

- (i) The First Party participated in the e-auction held by CANARA BANK, Fancy Bazar Branch, Guwahati September 2019 for sale of land estimating 2 (two) Bighas 4 (four) Kathas 16 (sixteen) Lachas covered by Dag No. 802, Patta No. 78 situated at Vill-Kahikuchi, Mouza-Dakhin Rani, Dist.- Kamrup Assam, standing in the name of M/S Prism Alloys Pvt. Ltd. (hereinafter, "Subject Land") and was successful obtaining the Subject Land in the said e-auction held by CANARA BANK.*
- (ii) The First Party remitted 25.36% of the bid amount on 10 September 2019 to CANARA BANK followed by the remaining 74.64% of the bid amount to CANARA BANK on 24 September 2019; totalling Rs.6,11,00,000/= out of which an amount of Rs.2,50,00,000/= was paid by the Second Party. Therefore the Second Party has invested in a total amount of Rs. 2,50,00,000/- in the total land value of the Subject Land. (Ledger account of the second party is attached)*
- (iii) The Parties will establish a new company (hereinafter, "New Holding Co.") with 50/50 share holding between the First Party and the Second Party and hereby agree to execute all necessary and incidental documents to establish the New Holding. Co.*
- (iv) The Parties will transfer the Subject Land to the New Holding Co. and hereby agree to execute all necessary and incidental documents for the transfer.*
- (v) New Holding Co. shall undertake development of the Subject Land acquired for business ventures.*
- (vi) The workings and governance of the New Holding Co. shall be as outlined in the Articles of Association of the New Holding Co.*

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*(vii) Nothing in this MOU shall prevent the New Holding Co. from acquiring and developing plots of land other than the Subject Land.
....”*

12. Therefore, it is very clear from the plain reading of the above definition of financial debt as well as the business arrangement between the parties under the above MoU that the above amount of Rs. 3 Crore given by the Financial Creditor to the Corporate Debtor by way of an investment and not towards any loan as rightly argued by the Counsel appearing for the Corporate Debtor and the above amount shall not be considered as a financial debt.
13. It is also very difficult to believe that the above Financial Creditor being a Company doing business in financing and investments would disburse amounts to general public without taking any security documents, loan documents etc. In addition to above, the nature of the business of the Financial Creditor is not only financing but also doing investments and therefore the defence of the Corporate Debtor coupled with the above MoU strengthens the pleas of the Corporate Debtor. As rightly contented by the Corporate Debtor, the Financial Creditor has conveniently suppressed the above MoU in order to use the present IBC proceeding as recovery mechanism and therefore the present CP has to be dismissed by imposing costs. It is also appropriate to mention here that the Hon'ble NCLAT in *M/s Jagbasera Infratech Private Ltd. v. Rawal Variety Construction Ltd. CA (AT)(Ins) No. 150 of 2019* held that the amounts invested in partnership business or joint venture does not fall within the definition of financial debt.
14. Therefore, for the aforesaid reasons, this bench is of the considered opinion that there is no merit in the above CP and the same is liable to be rejected by imposing cost of Rs. 1 Lakh payable by the Financial Creditor to ROC, Guwahati NER by way of Bharat Kosh within 2 weeks from the date of uploading the order on e-portal, failing which ROC is entitled to recover the cost of Rs. 1 Lakh from the Financial Creditor as if it is a revenue due and payable to the government on notice of such failure.

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15. Accordingly, with the above observations and direction, CP (IB) No. 33/GB/2022 is dismissed.
16. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
17. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.
18. File be consigned to records.

Sd/-

Satya Ranjan Prasad
Member (Technical)

Sd/-

H.V. Subba Rao
Member (Judicial)

Signed this on 30th day of November 2023.