2023 INSC 1023

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4929/2023

M/S. IFCI LIMITED ...APPELLANT(S)

VS.

SUTANU SINHA & ORS. ..RESPONDENT(S)

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. Commerce has evolved. The documents forming the base of commerce have also evolved and created a hybrid nature of documents. Thus, what was earlier labelled as a debenture, now has hybrid versions such as partly convertible debentures, optionally convertible debentures and Compulsorily Convertible Debentures (CCDs). We may note that traditionally debentures were treated as a floating security with a covenant for payment on a specified date.[1]

2. In the factual scenario of the present case, we are concerned with a Highway project in which the appellant has made investments through the CCDs. The National Highways Authority of India (NHAI) had awarded the project in question in terms of a

1 In re Crompton & Co. Ltd. [1914] 1 Ch. 954.

Concession Agreement dated 25.03.2010 executed between it and the IVRCL Chengapalli Tollways Ltd (ICTL). ICTL was in turn a subsidiary Company of IVRCL which was holding 100 per cent share capital of ICTL. A consortium of lenders had provided term loan facility to the ICTL to execute various documents including the company loan agreement dated 24.11.2010 and the balance project was to be financed by IVRCL through equity infusion. As a part of the equity component of the project, the financing was to be obtained through CCDs. It is not in dispute that what the appellant subscribed to was the CCDs, *albeit* with other debentures being executed simultaneously. The date of conversion into equity from the CCDs was December, 2017. The formal issuance of shares was however, not done after the said date. We may note that the appellant had agreed to subscribe to the CCDs at the request of ICTL and amount of Rs.125,00,00,000/- in terms of a Debenture Subscription Agreement dated 14.10.2011. In terms of the aforesaid agreement, there was a "put option" and thus, in the event of default on part of ICTL during the window period, these CCDs could be sold to a third party but the principal obligation of IVRCL continued to be in place. However, the factual scenario in respect thereof

never arose.

3. It appears that the project ran into financial difficulties and ICTL even suggested a one time settlement which had been agreed to but even terms thereof were not honoured. Corporate guarantees of IVRCL were invoked by the appellant. Corporate Insolvency Resolution Process was initiated both by the appellant and the State Bank of India and claims were filed. The process under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the said Code) was thereby triggered.

4. The appellant claimed that the amount owing to it had a status of a debt, and lodged a claim in that behalf. However, this was rejected by the Resolution Professional vide letter dated 09.08.2022.

5. The entire amount claimed was refused and the reasons for the non-admission were recorded after noting that various *inter se* correspondence and supporting documents had been supplied. It would be relevant to reproduce the grounds for rejection as under:-

> **"a. As per Debenture Subscription Agreement ("DSA") dated 14th October, 2011 entered between ICTL/Corporate Debtor, IVRCL Limited (erstwhile IVRCL. Assets & Holdings Limited) and IFCI, Compulsorily Convertible Debentures**

("CCDs") were to be treated as equity. The same is observed from the recording of the CCDs component as equity under Schedule III of the DSA. The CCDs are also approved as equity under the financial package for the Concession Agreement dated 25th March, 2010 executed between ICTL/Corporate Debtor and National Highways Authority of India ("NHAI").

b. The CCDs were part of equity in the project cost approved by NHAI and debt equity ratio is required to be maintained by IVRCL Limited. There was no recategorization of the CCDs from equity to debt and as stated in your email of 19th May, 2022, no approval was sought from NHAI in this respect. The DSA recognizes that any act in contravention of the Concession Agreement is void.

c. Lenders consortium had approved the treatment of CCDs as equity and no approval for conversion to debt was sought from NHAI.

d. All repayment obligations under the DSA are that of IVRCL Limited and not of ICTL/Corporate Debtor.

e. The notes to the balance sheets of ICTL/Corporate Debtor also clarify that the repayment obligations are that of IVRCL Limited and not ICTL/Corporate Debtor.

f. The CDs were mandatorily convertible to equity in December, 2017, and only corporate actions for the conversion was pending."

6. It will be noticed from the aforesaid that the fundamental principal for rejecting the debt claim was that in view of the appellant having invested the amount as per the CCDs, the same was to be treated as equity. The CCDs had been approved as equity under the financial package for the Concession Agreement dated 25.03.2010 and were towards the part of equity of the project cost approved by the NHAI having a debt equity ratio. There was never any re-categorization of CCDs from equity to debt. The lenders' consortium had also approved the term of CCDs as equity. The endeavour of the appellant to challenge the position of the Resolution Professional vide IA No.1465/2022 did not succeed in terms of an order dated 14.03.2023, the said order relied upon the judgment of this Court in *Narendra Kumar Maheshwari v. Union of India & Ors.*[2] It would be useful to extract that part of the judgment which has also been extracted in the impugned order of National Company Law Appellate Tribunal (NCLAT) as under:

> **"A Compulsory Convertible Debenture does not postulate any repayment of the principle. The question of security becomes relevant for the purpose of payment of interest on these debentures and the payment of principle only in the unlikely event of winding up. Therefore,**

2 (1990) Suppl. SCC 440

> **it does not constitute a 'debenture' in its classic sense. Even a debenture, which is only convertible at option has been regarded as a 'hybrid' debenture. Any instrument which is compulsorily convertible into shares is regarded as an "equity" and not a loan or debt." (emphasis supplied)**

7. We may note that the aforesaid order of the National Company Law Tribunal was further assailed before the NCLAT which dismissed the appeal as per the impugned order dated 05.06.2023. In the meantime, the Committee of Creditors (CoC) granted its approval on 08.03.2023 which was followed by the Adjudicating Authority accepting the resolution plan on 01.05.2023. This has not been specifically assailed by the appellant.

8. The very substratum of the submissions of the learned counsel for the appellant is that the appellant has been left high and dry. If its investment is to be treated as equity, under the waterfall principle nothing will come its way. Thus, the other creditors benefit but not the appellant. It is learned senior counsel's say that even after the relevant date when the CCDs matured, it was really treated as a debt on account of the financial difficulty of ICTL.

9. He submits that the principle issue is whether the CCDs along with the other documents can be said to be really a debt and not an equity despite the wording of the CCDs which must be read along with the other documents and communications *inter se* the parties. The judgment in *Narendra Kumar Maheshwari's* case *(supra)* is sought to be distinguished on the ground that it was in the context of a public interest litigation, and has referred to the concept of the debentures which are intrinsically in the character of a debt. It is towards the objective of financing these infrastructure projects, it is submitted, that a set of documents have been devised, and the real objective was that the amount advanced was to be treated as a debt. The conversion of CCDs to equity actually became impossible due to the insolvency of the ICTL and thus, the entire principal amount along with the interest became due and payable.

10. Learned senior counsel contends that in effect the appellant is neither treated as shareholder nor as a financial creditor leaving the appellant remediless. He further sought to emphasise that ICTL was a subsidiary of IVRCL, which was really holding 100 per cent shareholding of ICTL.

11. We may note that it is not disputed by him that the put option was never exercised. In effect, his submission was that whether CCDs should be categorized as debt or equity would depend on the status of the maturity of the CCDs and the position of the investor at the inaugural time, and this would vary in the facts and circumstances of each case.

12. In order to appreciate this submission, we may note the submission of Mr.Shyam Divan, learned senior counsel for the respondent No.1 who has drawn our attention to the Concessionaire Agreement with the NHAI defining equity as under:-

> **"Equity" means the sum expressed in Indian Rupees representing the paid up equity share capital of the Concessionaire for meeting the equity component of the Total Project Cost, and shall for the purposes of this Agreement include convertible instruments or other similar forms of capital, which shall compulsorily convert into equity share capital of the company, and any interest free funds advanced by any shareholder of the Company for meeting such equity component, but does not include Equity Support."**

13. Thus, his submission is that the concept of convertible instruments including CCDs falls within the definition of equity. In order to support his

contention, he has also referred to the common loan agreement dated 24.11.2010 *inter alia* to the stipulation that prior written approval of lenders was required before the borrower could issue any debentures or raise any loans. We may also appreciate this aspect in the context of the submission of Mr. Ramji Srinivasan, learned senior counsel that the lenders had put certain restrictions to ensure that their pool is not expanded which had the potential of casting doubt on the full recoverability of their debt. Thus, while 70 per cent of the funding to the debt equity ratio was under the category of debt, 30 per cent was equity and it is this equity portion which was partly funded by the initial promoters and the remaining through the appellant. The financing plan itself envisaged CCDs as part of the equity portion of the funding. The aforesaid submissions have to be appreciated in context of the said Code where section 3 is the definition Clause, and as per Clause 11, debt as been defined as under:-

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

14. The definition of debt under Section 3(11) of the Code would be the liability or obligation in respect of a claim which is due from any person. ICTL does not have a liability or obligation *qua* the appellant because the appellant is actually an equity participant and does not have a debt to be repaid. The success of a commercial venture pays benefit to the equity participants but with income, which would not inhere in case of the the failure of the venture.

15. Thus, if it was a simpliciter debenture, it would have fallen under the category of a financial debt along with bonds etc. However, we are not concerned with a debenture *per se*.

16. The debenture subscription agreement clearly defines ICTL as the special purpose vehicle while IVRCL is the sponsor company and IFCI is the lender. In terms of Clause 2.4, the rate of interest/coupon rate of 11 per cent per annum, payable quarterly, is applicable till either the buy back of all the CCDs (an option available to the borrowers) or conversion of CCDs into equity. The liability is of the sponsor company for making coupon payments and not of the SPV/ICTL. Further, under Clause 2.8, the buy back is also an arrangement *inter se* the Sponsor company and IFCI. The conversion into equity takes place as per Clause 2.9 and the put option as per Clause 2.11. It

would suffice to reproduce Clause 2.9 which reads as under:-

> **"2.9 <u>Conversion into equity</u>**
>
> **In the event of default of payment of return or buy back of 12.50 Crore CCDs in two tranches anytime between the end of the 3rd year and 6th year from the date of issue of CCDs giving an effective transaction IRR (including processing charges payable by the sponsor company) of 15,50 % p.a. If it is exercised anytime between 3rd and 5th year, else, a rate of 15% p.a., would be applicable between the 5th and 6th year from the date of subscription/first disbursement (including upfront interest payable by the Sponsor Company), the outstanding CCDs, along with the differential interest, defaulted amount, etc. would automatically get converted into equity shares of the ICTL at a price on par with the promoters of ICTL i.e. at a premium of Rs.90/- per share at the end of 6 years from the date of issue (i.e. in case both the Call and the Pul Options are not exercised by the Sponsor and the IFCI respectively or, at an earlier date as per other terms of this Agreement.)"**

17. The aforesaid clause thus provides for automatic conversion into equity shares of ICTL on the relevant date for which there is no dispute i.e. 09.11.2017.

18. In order to secure the appellant, it has been pointed out to us, that Clause 3.1 provides for security for the debentures. Clause 3.1 reads as

under:-

> **"3.1 <u>Security for the Debentures</u>**
>
> **The Debentures together with interest, costs, charges, expenses and other charges payable to IFCI in respect of the said Debentures under this Agreement shall be secured by the following:**
>
> **a) An unconditional and irrevocable Corporate Guarantee of IVRCL Assets & Holdings Limited i.e., Sponsor Company,**
>
> **b) Pledge of shares in Demat form of ICTL held by the Sponsor Company amounting to not less than 49% of the paid up equity capital of the SPV company, to be maintained throughout the tenure of the funding. However, pledge shall be invoked only after IVRCL Assets & Holdings Ltd., the Sponsor Company, fails to honour its guarantee obligation.**
>
> **c) Give an undertaking that in case of enforcement of securely by senior lenders of the project, IFCI would have a charge on the residuals available with the Sponsor Company after meeting all the requirements as per Escrow Agreement, and ICTL will route the final proceeds received by it, through a separate account suggested by IFCI Ltd."**

19. We may also note the clause 3.3 which provides for an overriding effect of the Concessionaire Agreement and Clause (b) of the same reads as under:-

> **"3.3 Overriding effect of the Concession Agreement:**
>
> **b) Notwithstanding anything to the contrary**

contained in this Agreement, and subject always to the overall supremacy of the Concessional Agreement, the Parties herein agree not to enforce the Put Option and/or otherwise take only direct/indirect action; without the prior written approval of NHAI when any such single and/or multiple act(s) taken simultaneously or otherwise under and/or in pursuance of this Agreement and/or the Pledge Agreement, read with the Power of Attorney jointly or severally constitute Change in Ownership per Clause 5.3 of the Concession Agreement. Any such act(s) if taken without prior written approval of the NHAI shall be treated as having been carried out in contravention of the Concessional Agreement and thus *void ab initio* as per sub-clause (a) above. It is hereby specifically clarified that for purposes 'Change in Ownership' under the Concession Agreement and all stipulations thereto including inter alia as provided in clause 5.3, the lender (the IFCI) shall at all times to be treated as the 'acquirer' of Equity and/or the person directly/indirectly acquiring control of the Board of Directors of the Borrower (the Concessionaire)."

20. A reading of all the aforesaid leads to a conclusion that the appellant was provided security under the Debentures Subscription Agreement but the obligations are of the sponsor company. That being the position, it is difficult for us to appreciate how the obligation is of the SPV i.e. ICTL. Unless

the debt is of the ICTL, the appellant cannot seek a recovery of the amount on the basis of being a creditor of the SPV ICTL.

21. We must note that the complexities of commercial documents depending on the nature of business. These are not layman's agreements but agreements vetted by experts and thus each of the parties knows its obligations and the benefits which can arise from the agreement. We thus find it difficult to read into or add to what the document says about a CCD.

22. Suffice for us to say that the aspect of interpretation of commercial documents was *in extenso* analyzed in *Nabha Private Limited Vs. Punjab State Power Corporation Limited*[3]. In respect of the factual scenario before us, it would suffice to extract para 72 as under:

> **"72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contract is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept,**

3 **(2018) 11 SCC 508**

which is necessitated only when the Penta test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any "implied term" but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract."

23. The effect of the aforesaid is that a contract means as it reads. It is not advisable for a Court to supplement it or add to it. It is an unfortunate scenario where the appellant is being left high and dry as there is nothing which it can recover from the sponsor company, there being no assets and funds. While in the ICTL it is being treated as a shareholder and thus, does not benefit as none of the shareholders i.e. original investors and the appellant get any benefit under the scheme which has been approved. The debt assigned was of a lower rate, repurchased by a third party. However, these are commercial decisions of the respective parties. The obligations were of the sponsoring company and IVRCL in terms of Clause 2.4.

24. A reading of the impugned judgment, specifically the rationale from para 19 onwards shows that the issue has been correctly crystallized as to whether CCDs could be treated as a debt instead of an equity instrument. In that sense, it was observed that treating them as a debt would tantamount to breach of the concessional agreement and the common loan agreement. The investment was clearly in the nature of debentures which were compulsorily convertible into equity and nowhere is it stipulated that these CCDs would partake the character of financial debt on the happening of a particular event.

25. The appellant has invoked the guarantees and sought remedy against the sponsor company. The fact that it is not serving any fruitful purpose is not something which can weigh with us.

26. A significant aspect taken note of in the impugned order is that the terms of the various agreements prohibited the corporate debtor from taking further debt without the consent of the assignees. No such approval was sought or taken. The amount was treated as an equity alone and not as a debt.

27. The NCLAT has also touched on the issue of the remedy which was available to the appellant which, in its view, was not availed within time a time bound

process being of the essence in the Code. The claim of the appellant was rejected on 09.08.2022 and the appellant only sought to again raise the issue which could not extend the period of time.

28. The challenge to the rejection was laid only on 30.11.2022, after a period of three months from the rejection of the claim.

29. Last but not the least, we must also note that our jurisdiction comes from Section 62 of the Code. The said section reads as under:

> **"62. (1) Any person aggrieved by an order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within forty-five days from the date of receipt of such order"**

30. The jurisdiction is restricted to a question of law akin to a second appeal. The law does not envisage unlimited tiers of scrutiny and every tier of scrutiny has its own parameters. Thus, the *lis inter se* the parties has to be analyzed within the four corners of the ambit of the statutory jurisdiction conferred on this Court.

31. We are thus of the view that the appeal does not raise any such question of law and that the findings of the Courts below are in accordance with settled principles.

32. We thus dismiss the appeal leaving parties to bear their own costs.

……...……..J.
[SANJAY KISHAN KAUL]

……...……...J.
[SUDHANSHU DHULIA]

……...……..J.
[AHSANUDDIN AMANULLAH]

NEW DELHI,
NOVEMBER 09,2023.