

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT) (INS) NO.626/2021

(Arising out of Judgement and order dated 20th May, 2021 passed by the Adjudicating Authority, National Company Law Tribunal, Principal Bench at New Delhi in IA No.1261/2020 in CP(IB) No.654(PB)/2019)

In the matter of:

AVJ Heightss Apartment Owners Association,
C-602, AVJ Heightss,
GH-12/2, Zeta-1, Greater Noida,
Gautam Budh Nagar,
Uttar Pradesh 201306

Appellant

Vs

1. India Infoline Finance Ltd,
802, 8th Floor, Hubtown Solaris,
N.S. Phadke Marg,
Vijay Nagar,
Andheri East, Mumbai 400069

Branch:

501-514, 5th floor, Ashoka Estate,
24, Barakhamba Road,
Connaught Place,
New Delhi-110001.

2. Mr. Anil Tayal,
Resolution Professional,
For AVJ Developers (I) Pvt Ltd,
201, Sagar Plaza,
District Centre,
Laxmi Nagar,
New Delhi-110092.

For Appellant: Mr. Shashank Agarwal, Mr Aadil Khan, Mr Bharya Khatreja, Advocates.

For Respondent. Mr. Amit Singh Chadha, Sr. Advocate with Mr. Suresh Dobhal, Mr. Shikhar Kumar, Advocates for R1.

Ms Mani Gupta, Ms Sonali Jain, Ms Saumya UPadhyay, Mr Aman Choudhary, Advocates for R-2.

JUDGEMENT
2nd January, 2023

The Appeal has been preferred against the impugned order dated 20th May, 2021 passed by the Adjudicating Authority, National Company Law Tribunal, Principal Bench, New Delhi (hereinafter referred to as the 'Adjudicating Authority') in IA No.1261/2020 in CP(IB) No.654(PB)/2019

2. It is submitted that the IA 1261/2020 was disposed of by the Adjudicating Authority vide the Impugned Order thereby directing the Resolution Professional to admit IIFL's claim as 'financial debt' and, inter alia, holding that:

a) If guarantee is given over the money borrowed by the principal debtor from the creditor and the same is supported by guarantee agreement, it will suffice to admit the claim as 'financial debt'. Since IIFL has not only filed the documents reflecting transfer of money, creation of obligation by way of Corporate Guarantee, but also furnishing of security by way

of mortgage, therefore, the RP should have admitted IIFL's Claim as 'financial debt'.

b) With regard to the obligation of guarantee of the Corporate Debtor, there is a separate guarantee deed (Corporate Guarantee) which the Corporate Debtor has executed taking upon itself the obligation to pay the loan amount of Rs.85 crores availed by the Director, i.e. Mr. Vinay Jain, in the event the said Director defaults in repaying the said loan.

3. The learned counsel of the Appellant submitted that it is pertinent to mention that, in the impugned order, the Learned Adjudicating Authority has observed that the loan of Rs.85 crores that was availed by the Director was utilized towards the adjustment of the previous 3 loans (viz. CL 151, CL 152 and CL 252) which were availed by and defaulted by the Corporate Debtor. It has been further categorically observed by the Ld. Adjudicating Authority that the dues of the Corporate Debtor towards IIFL were paid off with the money that was availed by the Director (i.e. Mr. Vinay Jain).

4. The appellants accordingly are aggrieved with the order of the Adjudicating Authority.

5. The List of dates and Events of the case as stated by the Learned counsel of the Appellants are as follows:-

January 09 2015 January 13, 2015 April 29, 2016	Corporate Debtor had availed the following three terms loans from IIFL: - Term Loan No.CL151 of Rs.25 Crores (" CL 151 "); - Term Loan No.CL152 of Rs.75 Crores (" CL 152 "); - Term Loan No.C:252 of Rs.35 Crores (" CL 252 ");
August, 2017	The said three term loans had become " <i>highly irregular</i> " and the management of the Corporate Debtor had, purportedly, approached IIFL for sanction of the credit facility loan for regularizing the Corporate Debtor's distressed account.
September 28, 2017	Vide sanction letter, IIFL sanctioned loan of Rs. 85.00 crores in favour of the Director of the Corporate Debtor.
November 01, 2017	Deed of Guarantee was purportedly executed by the Corporate Debtor in respect of the said loan purportedly availed by the director (Mr. Vinay Jain)
March 05, 2018	IIFL had recalled the entire loan purportedly granted to the Director under CL 288 and had, purportedly, invoked the Corporate Guarantee given by the Corporate Debtor vide a purported notice/letter, but this letter was not presented to the Ld. Adjudicating Authority.
December 31, 2018	IIFL thereby, declared the Loan account of Rs. 85.00 crore was declared Non-Performing Account (" NPA ").
October 21, 2019	Adjudicating Authority passed an order towards application filed by one M/s Vishal Fabrics & Ors. Under section 7 of the Code for initiation of corporate insolvency resolution process (" CIRP "), the CIRP of the Corporate Debtor was commenced. Mr. Anil Tayal, was appointed as the Interim Resolution Professional (" IRP ") to conduct the CIRP of Corporate Debtor, who later

	was confirmed as Resolution Professional (" RP ") by the COC of Corporate Debtor.
November 05, 2019	IIFL duly submitted Claim Form in Form-C to the IRP for an amount of Rs.134,15,62,129/- claiming the said debt arising out of a certain 'Deed of Guarantee' to be part of committee of creditor (" Coc ") being a financial debtor.
November 20, 2019	On the claim getting rejected by the RP, IIFL filed the IA 1261 before the Adjudicating Authority, <i>inter alia</i> , seeking directions to the RP to admit IIFL's entire Claim, to treat IIFL as the Financial Creditor and to include IIFL in the COC of the Corporate Debtor.
November 2020	Appellant had filed Intervention Application seeking permission to intervene in IA 1261 so that Appellant's objections to the Claim submitted by IIFL could also be brought on record.
May 20, 2021	Adjudicating Authority passed an order (" Impugned Order ") in I.A. No. 1261 of 2020 (" IA 1261 ") in C.P. (IB) No. 654 (PB)/2019 filed by IIFL.
July 15, 2021	The present appeal was filed assailing the impugned order.

6. The Learned Counsel of the Appellant stated that the Corporate Guarantee given by CD for the loan taken by Director is prohibited b Section 185 of the Companies Act, 2013 and hence invalid under law.

7. The 'Deed of Guarantee' dated November 01, 2017 was executed by the Corporate Debtor in respect of a loan of Rs. 85 Crores availed by its Director, Mr. Vinay Jain. [see page(s): 73-

74A, 103A-104A, 151-156 of the Appeal; pages 5-6 of the Reply of Respondent No.1/IIFL

8. The Corporate Debtor could not have given any such 'Corporate Guarantee' for the loan availed by its director as the same is barred by Section 185 of the Companies Act, 2013.

9. Section 185 provides that no company shall, directly or indirectly, advance any loan to any director or give any guarantee or provide any security in connection to the loan availed by the said director or any such other person. The said section 185 is reproduced hereunder for ready reference:

"185. Loans to Directors, etc.

(1) *Save as otherwise provided in this Act, **no company shall, directly or directly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person:***

Provided that nothing contained in this sub-section shall apply to:

(a) the giving of any loan to a managing or whole-time director:

(b) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the bank rate declared by the Reserve Bank of India.

(c) any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company; or

(d) any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company:

Provided that the loans made under clauses (c) and (d) are utilised by the subsidiary company for its principal business activities.

....

(2) If any loan is advanced or a guarantee or security is given or provided in contravention of the provisions of sub-section (1), the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with Imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, or with both."

- i. Moreover, the Corporate Debtor could not have given any Corporate Guarantee for securing any loan, let alone for securing the loan of its director(s), as the Corporate Debtor was itself an NPA and a distressed company. [see pages 150-151 of the Appeal and page 264 of Reply by IIFL)
- ii. Furthermore, had the Corporate Debtor had, in fact, given such a Corporate Guarantee in respect of the loan availed by its Director, the same must have been reported to the Registrar of Companies ("ROC"). However, there is no record/return/financial statement available with the ROC or filed by the Corporate Debtor with the ROC that would remotely suggest that the Corporate Debtor had even intended to give any such Corporate Guarantee. [See page 3 of Reply filed by the Respondent No.2/RP]
- iii. The Hon'ble Supreme Court has, in the matter of *Municipal Corporation of Greater Mumbai vs. Abhilash Lal 2020 (13) SCC 234*, while following the principle laid down in *Nazir Ahmad v. King Emperor, 1936 SCC Online PC 41*, has stated as follows:

39. The principle that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all"

However, in light of the submissions made hereinabove, it is clear that the transaction of issuance of the Corporate Guarantee in favour of the Respondent no. 1 had been carried out in complete contravention of the law which has a direct bearing on such a transaction.

- iv. The Respondent no.1, being a financial/ lending institution was responsible to conduct a proper and detailed due diligence to check the background of the borrower and the guarantor to the repayment capacity of such parties. However, the Respondent No.1 has clearly failed to conduct proper due diligence miserably lacked in performing

its duties as required under the rules and regulations framed by the financial sector regulator, Reserve Bank of India ("RBI").

10. The RP had submitted that the Claim submitted by IIFL could not be verified as per the books of account and records of the Corporate Debtor. Further the RP submitted that it also checked the records of the ROC and the only charge created in favour of IIFL was with respect to the loan taken by the Corporate Debtor in the year 2015 to the tune of Rs. 135 crores. *[See page 320 of the Appeal and page 3 of the Reply of the Respondent No.2/RP]*

11. On the other hand, the Appellant has established that irrespective of the genuineness of the documents and whether the same were executed or not, the Corporate Debtor could not have given its Corporate Guarantee in favour of the Respondent No.1 for the loan availed by its Director in view of the prohibition imposed under Section 185 of the Companies Act, 2013.

12. In this regard, reference is had to the judgment dated July 28, 2005 passed by Kerala High Court in "J. Daniel vs. State of Kerala & Anr, 2005 SCC Online Ker 366 whereby it was held that any agreement opposed to law or forbidden by law is not

enforceable, and accordingly every debt or liability upon which a cheque is issued is not enforceable.

13. Neither the DRT nor the Adjudicating Authority were apprised of the said true and correct position of law which is applicable to the Corporate Debtor and to the transaction that is currently disputed by the Appellant.

14. Moreover, the Respondent No 1 has failed to address how the transaction of the Corporate Guarantee is legal and has failed to bring on even a single document on record to show that the Corporate Guarantee given by the Corporate Debtor was a legal document.

15. Besides, it is submitted that the Respondent no. 1 has resorted to "ever greening" of the distressed account of the Corporate Debtor which had been declared as NPA by IIFL, by granting loan to its Director against the Corporate Guarantee of the Corporate Debtor itself:

16. Such grant of loan by IIFL to the Director of the Corporate Debtor without conducting due diligence to ascertain the financial

viability or the cash flows of the borrower or even the reasonable certainty of repayment by either the borrower or even the Corporate Debtor, goes in the teeth of Master Circular- Prudential Norms on Income Recognition, Asset Classification and Provisioning Pertaining to Advances' dated July 01, 2015 ("Master Circular") issued by the Reserve Bank of India. As per the said Master Circular, no account could be taken up for restructuring by a bank/ financial Institution unless the financial viability is established and there is a reasonable certainty of repayment from the borrower, as per the terms of the restructuring package. Pertinently, the said Master Circular further provides that any restructuring done without looking into cash flows of the borrower and assessing the viability of the projects/ activity financed by banks would be treated as an attempt at "ever greening a weak credit facility."

17. As such, the Respondent no. 1 cannot claim to be a creditor much less, financial creditor' for its Claim of Rs. 134,15,62,129/- (Rupees One Hundred and Thirty- Four Crores Fifteen Lakhs Sixty-Two Thousand One Hundred and Twenty-Nine only)

submitted in Form-C dated November 05, 2019 with the RP during the CIRP of the Corporate Debtor.

18. The present Appeal has been filed under Section 61 of the Code which allows "any person aggrieved by the order of the Adjudicating Authority" to file an Appeal. As such, the Appellant, being a "person" aggrieved by the order of the Adjudicating Authority, has sufficient locus to file the present Appeal and, as such, the present Appeal is very much maintainable with this Hon'ble Appellate Tribunal, as against the contention of the Respondents that "appellant has no locus to file the present appeal".

19. Moreover, as submitted in the Appeal, Appellant is the 'Association of Homebuyers' and is registered as a 'society duly established and registered with the Registrar of Firms, Societies and Chits, Meerut ("Registrar") under the provisions, of the Societies Registration Act, 1860 ("Societies Registration Act"). The Appellant has placed on record an 'Additional Affidavit explaining in detail how the registration of the Appellant as a 'Society' is valid and the same fact has been admitted by the RP. [Refer para 12 of the Additional Affidavit with respect to locus of the Appellant].

20. Since the Appellant is an association of home-buyers who are part of the Committee of Creditors ("COC"), any decision of the Adjudicating Authority shall directly have a direct bearing and strong impact on the rights of the home buyers. In various judgments, the Hon'ble Supreme has upheld the rights and interests of the home buyers as "Aggrieved Persons".

21. The Learned counsel for the appellant also brought on record through IA No.1772/2022 filed on 19th May, 2022 vide Dy No.55756 a copy of the order dated February 10, 2022 passed by the Hon'ble High Court of Allahabad in Writ C No.2032 of 2022 and also dated March 03, 2022 passed by the Hon'ble High Court. This judgement of Hon'ble High Court is in respect of renewal of Registration Application of AVJ Heightss Apartment Owners Association, Appellants, and some direction has been given.

22. This Tribunal also while hearing the appeal on 26th July, 2022 desired to know the status of FIR No.143/2019 registered with PS EOW, New Delhi. The same is reproduced below:-

“26.07.2022: *In this Appeal on last date we heard Mr. Sunil Fernandes, learned counsel for the Appellant. Since alongwith this Appeal another connected Appeal i.e. 626/2021 was also on the Board we had partly heard Mr. Shashank Agarwal*

learned counsel for the Appellant in CA(AT) No.626/2021. Hearing in the Appeal was deferred.

At the time when the Appeal was taken up, the Tribunal wanted to know regarding the status of FIR No.143/2019 registered with PS EOW, New Delhi, in which the Appellant of the present case is informant. The case was registered for offence under Section 420, 465, 468, 471 read with 120B of IPC. Since the said FIR has direct bearing for final adjudication in the present appeal, it is necessary to know about the stage/status of the case. However the learned counsel for the Appellant was not in a position to intimate the Court regarding the result of the investigation and the stage of investigation of the case. In view of this situation the Court is left with no option but to call for report from the Commissioner of Police, New Delhi regarding the status of FIR No.143/2019.

The Commissioner of Police, New Delhi is requested to submit a detail report in respect of stage of investigation in FIR No.143/2019, within a period of three weeks from the date of receipt of this order. The Registry is directed to communicate this order forthwith to the Commissioner of Police, New Delhi.

*Put up both the Appeals again on **12th October, 2022 as 1st case under the heading for hearing since it is part heard matter.***

22. In this context also the Deputy Commissioner of Police, EOW, New Delhi submitted the Status Report with the approval of Commissioner of Police, New Delhi, which is depicted hereinbelow:-

“The brief facts of the case are that the present case was registered on the complaint of Vinay Jain, S/o Sh. Bal Mukund Jain, R/o B-230, Vivek Vihar, Delhi against M/s India Infoline Finance Ltd (now named IIFL Finance Ltd), an NBFC & its directors/officials. The core allegation of Vinay Jain in the complaint is that the accused entity (NBFC) fraudulently sanctioned a loan of Rs. 85 Crore to him in his individual capacity while he had never applied for any such loan. To support his allegation he relies upon the fact that the loan of **Rs. 85 Crore** was sanctioned to him vide Sanction Letter dated **28.09.2017** duly acknowledged by him. However, on the given date i.e. 28.09.2017, he was in judicial custody at Kasna District Jail, UP. The said sanction letter dated 28.09.2017 also doesn't bear the endorsement of the concerned Jail authorities which is mandatory provision according to the applicable rules & regulations as per the Jail Manual. He claims to have come across the purported forged Sanction Letter of loan of Rs. 85 Crore only in June 2018 during the proceedings on the application U/s 14 SARFAESI Act filed before the Hon'ble Court of Ld. CMM/Shahdara Distt. in connection with the three loan accounts of Rs. 135 Crore sanctioned & disbursed to M/s AVJ Developers (India) Pvt. Ltd. In the said photocopy of the Sanction Letter of Rs. 85 Crore filed before the court of Ld. CMM, the

designated spaces for "Date" and "Reference No." were left blank and was having his forged signatures. The loan amount of Rs. 85 Crore was shown to be secured by equitable mortgage of the below mentioned properties:-

1. Under Construction Project **AVJ Heights** at Plot No. GH-12/2, Sector-Zeta-1, Greater Noida, UP developed by M/s AVJ Developers (India) Pvt Ltd spread over 42,600 Sq. Meters.
2. Under construction Commercial project namely **AVJ Business Heights** situated at Property Bearing No. C, Community Centre, Anand Vihar Delhi spread over 2,674 Sq. Meters area.

During the course of investigation, the replies and documents were collected from the accused entity M/s IIFL Finance Ltd. The concerned officials of the accused entity who had dealt with the documentation of loan of Rs. 85 Crore sanctioned & disbursed to Vinay Jain were also examined. M/s IIFL Finance Ltd. replied that it had sanctioned three Term Loans to M/s AVJ Developers (India) Pvt Ltd, the company controlled & managed by Vinay Jain, in January 2015 and had disbursed total amount of Rs. 123 Crore. These three loan accounts had become irregular in August 2017. Ms Asha Jain W/o Vinay Jain, who was officiating as director of M/s AVJ Developers (India) Pvt. Ltd. had approached the officials of M/s IIFL Finance Ltd (the then M/s India Infoline Finance Ltd.) for sanctioning loan to Vinay Jain and the said loan amount was to be used for regularization of three loan accounts by utilizing for making the loan repayments. At the request of Ms. Asha Jain,

the Cash Credit Facility of Rs. 85 Crore was sanctioned and disbursed in the name of Vinay Jain. It is replied that the said loan amount of Rs. 85 Crore was utilized/adjusted against the loan dues of M/s AVJ Developers (India) Pvt Ltd.

In respect of the Sanction Letter dated 28.09.2017, it is replied that the Sanction Letter was handed over to Ms Asha Jain for perusal and acknowledgement by Vinay Jain. The requisite documents for processing of loan of Rs. 85 Crore were made available by Asha Jain. The other financial records & documents pertaining to the projects of M/s AVJ Developers (India) Pvt. Ltd. & M/s Best View Properties Pvt. Ltd. were retrieved from the loan file of previous loans. The same was returned by Asha Jain to M/s IIFL Finance Ltd. after getting the signatures thereon from Vinay Jain. After release from Jail, Vinay Jain had signed the other loan documents.

On being queried about the blank spaces in Sanction Letter filed before the Hon'ble Courts of Ld. CMM/Shahdara during the proceedings U/s 14 SARPAESI Act, it was replied that the draft of the Sanction Letter was prepared at Mumbai office of M/s IIFL Finance Ltd. and the same draft of the Sanction Letter having the blank spaces was shared with Delhi Team, dealing with Vinay Jain, for perusal & opinion/consent of Vinay Jain to the terms & conditions of said Sanction Letter. However, the signed Sanction Letter having the signatures of Vinay Jain was returned by Delhi Office to Mumbai Office. The Loan Account number is generated only at the time of disbursement and the date is also mentioned at the

time of disbursement. The Delhi team may have scanned the undated & unsigned sanction letter for its record. The same draft sanction letter may have been filed before the Hon'ble Court of Ld. CMM/Shahdara, Delhi.

During the course of investigation, it is found that complainant Sh Vinay Jain is Director & Shareholder of the company namely (1) M/s AVJ Developer Pvt. Ltd.. (2) M/s AVJ Developer (India) Pvt. Ltd. and (3) M/s. Best View Properties Pvt. Ltd. M/s AVJ Developers (India) Pvt Ltd was developing Group Housing project namely AVJ Heights at Sector-Zeta-1, Greater Noida. M/s Best View Properties Pvt. Ltd. was developing commercial project namely AVJ Business Heights at Community Centre, Anand Vihar, Delhi. For meeting the financial requirements for developing the project, M/s AVJ Developers (India) Pvt. Ltd. had got sanctioned loan of Rs. 135 Crore from the alleged NBFC namely M/s India Infoline Finance Ltd. **vide Loan A/c No. C-151 for Rs. 25 Crore, Loan A/c No. C-152 for Rs. 75 Crore and Loan A/c No. CL-252 for Rs. 35 Crore to M/s AVJ Developers Pvt. Ltd.**, the company of Vinay Jain. However, the alleged company disbursed loan amount of **Rs. 23,62,50,000/- on 20.03.2015 and Rs. 74,23,23,000/- only on 10.04.2015 against the actual loan amounts of Rs. 25 Cr. & 75 Cr** deducting the balance amount on account of processing fees, etc. Thereafter, in **May 2016**, an amount of **Rs. 23 Cr.** was disbursed.

The above mentioned loan amounts were also secured by way of equitable mortgage of abovementioned under construction projects of AVJ Heights & AVJ Business Heights. The said loan accounts were declared **NPA on 05.03.2018** with the following outstanding balances.

Loan Account Number	Outstanding Amount
CL-151	Rs. 17,21,24,405/-
CL-152	Rs. 20,75,11,882/-
CL-252	Rs. 55,69,46,727/-
TOTAL	Rs. 93, 65, 83, 014/-

During the course of investigation, the original loan documents pertaining to Loan Amount of Rs. 85 Crore sanctioned and disbursed on 28.09.2017 to Vinay Jain were collected from the accused entity M/s India Infoline Finance Ltd (now named IIFL Finance Ltd.). The loan amount of Rs. 85 Crore to Vinay Jain was sanctioned vide loan reference No **CL-288** vide Sanction Letter **Dated 28.09.2017**. The loan amount of Rs. 85 Crore sanctioned to Vinay Jain was disbursed in the **Escrow A/c No 01930350000089 opened with HDFC Bank, Manak Vihar, Delhi**, opened and operated as mandated in the Escrow Account Agreement Dated 14.02.2015 executed between (1) M/s AVJ Developers (India) Pvt. Ltd, (2) M/s India Infoline Finance Ltd. and HDFC Bank.

On the perusal of the Sanction Letter dated 28.09.2017, it is found that the designated spaces for Date and Reference No, Prospect Number are filled with ball pen while the rest of the entire sanction letter is printed one. It was having 08 signatures of complainant Vinay Jain. It is pertinent to mention that the figure of Term Loan of INR Rs. 85 Crore is in printed form in the said sanction letter. The places where signatures of Vinay Jain are present, are also carrying scanned/printed cross marks indicating the designated places where the signatures have to be made.

Further, the statement of Axis Bank account number 055010100250283 of Vinay Jain which is part & parcel of loan documents of loan of Rs. 85 Crore, was also provided the accused entity. On the perusal it is found that the said statement of account was printed on 29.09.2017. However as per the investigation conducted, Vinay Jain was in Judicial Custody on the given date. The statement of account is also having the stamp of Axis Bank, Vivek Vihar Branch, Delhi and initial of signatures of Axis Bank official. Ms. Shashi Bala, the then Deputy Manager at Vivek Vihar Branch confirmed her initial signatures on the said statement of account. She stated that the printout of the said statement was not generated at the branch since the statements generated at the branch carries employee ID who have generated the said statement of account by login into the banking software using his login credentials. She further added that either Vinay Jain or someone else authorized by him must have visited the branch with the printouts of the statement of account for authentication and she after confirming the correctness of the statement must have ratified the same.

The certified copy of the statement of account number 055010100250283 of Vinay Jain of the subject period since 1.11.2016 to 29.09.2017 was also collected from Axis Bank, Vivek Vihar Branch, Delhi.

The comparison of transaction entries reflected in the statement provided by M/s IIFL Finance Ltd. with the statement collected from Vivek Vihar Branch confirmed the correctness of statement provided by accused entity M/s IIFL Finance Ltd. From the statement of Shashi Bala, the then Deputy Manager, Axis Bank, Vivek Vihar Branch, it is confirmed that the statement was not generated at the bank branch and was brought to branch by someone on behalf of Vinay Jain for ratification. It means that the statement of account was generated either by any of family members of Vinay Jain or any other trustworthy person with whom Vinay Jain had shared his banking credentials.

During the course of investigation, the admitted signatures of Vinay Jain of the contemporary period were collected. The original loan documents and the admitted signatures of complainant Vinay Jain were submitted in FSL for GEOD opinion about the veracity of the allegations of forgery of signatures of Vinay Jain.

During investigation, the GEQD opinion regarding the signatures of complainant Vinay Jain was received from FSL, Madhuban Chowk, Rohini, Delhi. Ms. Smita Sinha, Junior Forensic/ Assistant Chemical Examiner (documents) has opined :-

1. The person who wrote the red enclosed signatures stamped and marked A1 to A59 (admitted signatures of Vinay Jain) also

wrote the red enclosed signatures similarly stamped and marked Q1 to Q7, Q9 to Q37 & Q84 to Q86 (questioned signatures of Vinay Jain).

2. It has not been possible to express any opinion on red enclosed signatures stamped and marked Q8 & Q38 to Q83 (questioned signatures of Vinay Jain) in comparison with the red enclosed signatures similarly stamped and marked A1 to A59 (admitted signatures of Vinay Jain).

From the GEQD opinion, it is confirmed that complainant Vinay Jain has signed the sanction letter dated 28.09.2017 and other loan documents. In this manner, the allegations of forgery of his signatures leveled by complainant Vinay Jain could not be substantiated.

Vinay Jain has challenged the authenticity of the **Sanction Letter dated 28.09.2017 and disbursement of loan amount of Rs. 85 Crore on 04.10.2017** on the ground that at the given date he was in Jail and the sanction letter having his signatures to the effect of acknowledgment/acceptance of loan of Rs. 85 Crore doesn't have endorsement of Jail Authorities. Interestingly, complainant Vinay Jain was appointed Director of company M/s AVJ Developers (India) Pvt. Ltd. w.e.f. 11.08.2017. He had also signed the Form DIR-2 on 11.08.2017 consenting to his appointment to the Board of Directors of M/s AVJ Developers (India) Pvt. Ltd. He had also

accepted the Resignation Letter dated 13.08.2017 of Pardeep Singhal from the Directorship of Company M/s AVJ Developers (India) Pvt. Ltd, and also signed the Certified True Copy of Board Resolution passed at the meeting of the Board of Directors of M/s AVJ Developers (India) Pvt. Ltd. on 14.08.2017 to the effect of acceptance of resignation of Pardeep Singhal. Both these documents were uploaded to ROC website on 14.08.2017. However, admittedly during this period i.e. since 11.08.2017 to 14.08.2017, Vinay Jain was lodged in Sub- Jail at Kishangarh Bas, Alwar, Rajasthan. Even these documents does not carry the endorsements of Jail Authorities but Vinay Jain has not challenged these documents and has not disputed his appointment to the Board of Directors of M/s AVJ Developers (India) Pvt. Ltd. since 11.08.2017.

From the above discussed facts in the aforesaid para, it is established that someone who used to visit Vinay Jain at the jail used to get the documents signed from Vinay Jain. This fact totally corroborates with the contentions of M/s IIFL Finance Ltd. that the Sanction Letter Dated 28.09.2017 was handed over to Ms. Asha Jain, wife of Vinay Jain, for acknowledgement from him and the acknowledged copy returned by Asha Jain was having signatures of Vinay Jain. The GEQD opinion has confirmed that Vinay Jain is the author of his signatures on the Sanction Letter dated 28.09.2017 & other loan documents.

Further, Vinay Jain has himself taken contradictory stands in his complaint itself. As per the Demand Notices dated 5.03.2018 raised by M/s IIFL Finance Ltd. against the loan accounts CL-151, CL-152 & CL 252 of M/s AVJ Developers (India) Pvt. Ltd., the outstanding loan liability was approx. Rs. 93.66 Crore whereas he admittedly offered Rs. 100 Crore for One Time Settlement (OTS). It is a well settled practice in the financial sector that OTS is always done at a much lower amount than the outstanding loan dues. Vinay Jain could not provide any plausible explanation regarding offering 100 Crore for OTS against the lesser amount of outstanding dues. **It indicates that he was well aware about the additional loan liability of Rs. 85 Crore.**

From the investigation conducted it has been found that the loan of Rs. 85 Crore was utilized only for settling the liabilities of M/s AVJ Developers (India) Pvt. Ltd. against the Loan Accounts No. CL-151, CL-152 and CL-252 in the following manner on 30.09.2017:-

Loan A/c No.	Outstanding before adjustment (Rs.)	Adjustment amount out of Rs. 85 Crore (Rs.)	Outstanding Loan Amount after Adjustment (Rs.)
CL-151	35,52,47,012/-	18,38,85,621/-	14,13,61,391/-
CL-152	102,81,72,456/-	56,83,34,016/-	45,98,38,44/-
CL-252	28,33,80,761/-	9,77,80,363/-	18,56,00,399/-

From the investigation conducted, it is understood that the accused entity M/s India Infoline Finance Ltd. had nothing to gain from this alleged act of fraud & forgery except the interest income on the said loan amount of Rs. 85 Crore. The properties in question mortgaged against this loan of Rs. 85 Crore were already mortgaged with the accused NBFC M/s India Infoline Finance Ltd. against the loan dues of Rs. 135 Crore of M/s AVJ Developers (India) Pvt Ltd in Loan A/c No. and no additional security was offered. Moreover, the amount of Rs. 85 Crore was utilized only for repayment of loan dues against the loan A/c No. CL-151, CL-152 & CL- 252 as explained above reducing the loan liability of M/s AVJ Developers (India) Pvt. Ltd. In this scenario, the loan of Rs. 85 Crore had not been disbursed & adjusted against the existing loan liabilities, the original Loan Dues would have stood at the pre-adjustment levels.

From the study of the circumstances that have emerged during the course of investigation, the only reason found for the disbursement of loan of Rs. 85 Crore which can be understood, is that the original loan accounts of M/s AVJ Developers (India) Pvt. Ltd. were irregular and would have turned NPA in the year 2017 itself leading to wiping out of credit ratings of the company. In these circumstances it would not have been able to raise further funding. Therefore, with between the complainant and alleged entity, the loan of Rs. 85 Crore was

disbursed to Vinay Jain and was appropriated towards the payment of outstanding loan dues of M/s AVJ Developers (India) Pvt. Ltd. with the idea of maintaining the status of loan accounts as regular.

Complainant Vinay Jain is a habitual offender and involved in 09 FIRS registered at Delhi and 35 FIRS registered in UP. In 05 cases, Chargesheet has been filed by EOW, Delhi Police against Vinay Jain and 04 cases are pending investigation. Most of the cases registered against him are in respect of Real Estate Projects developed by his companies namely (1) M/s AVJ Developers (India) Pvt. Ltd. and (2) M/s Best View Pvt. Ltd. The allegations of forgery of his signatures leveled by Vinay Jain have been disproved by the GEQD Opinion substantiating that he himself is the author of the questioned signatures. His claim that the Sanction Letter Dated 28.09.2017 is also not bearing the endorsement of Jail Authorities is demolished by the fact that he had also signed documents dated 11.08.2017 and 13.08.2017 to the effect his appointment and resignation of Pardeep Singhal from the board of Directors of M/s AVJ Developers (India) Pvt. Ltd. also does not have endorsement of Jail Authorities. These documents are not discarded by Vinay Jain while even on both these dates he was lodged in Kasna District Jail. He only disowns the documents i.e. Sanction Letter and Loan documents which hurts his interests and puts the

liability of repayment of loan of Rs. 85 Crore upon him. His previous other loans of Rs. 135 Crore were also declared NPA.

In this case the Final Report as Cancellation had been prepared and was put in court on 18.05.2022. Now, the present case is under consideration with Hon'ble Court of Ms. Preeti Parewa, Ld. CMM, Shahdara and next date of hearing is fixed for 24.08.2022.

This status report is submitted with the approval of Worthy Commissioner of Police, Delhi.”

23. the Learned Counsel for the Respondent No.2/RP has submitted that the Adjudicating Authority disposed off vide impugned order in question the following applications:

a) CA No.1261(PB) of 2020.

b) IA No.2205(PB) of 2020

c) IA No. 3125 of 2020.

24. The Learned counsel for R2/RP also submitted that the claim of the R1 could not be verified as per books of accounts and documents available with the CD. The amount so claimed is neither reflected in the financial statement nor there exists any proof of the same in record of the CD. R1 has filed a claim of

Rs.134,15,62,129/- for a loan of Rs.85 crores given to the suspended director Mr. Vinay Jain on 1.11.2017 and it is alleged that the CD was guarantor in such loan agreement. Various emails have been exchanged between the RP and R1 and nothing could be verified from the books of accounts of CD regarding the exact claim made by the R1.

25. It was also stated by the RP that in the FIR and through enquiry Mr. Vinay Jain, suspended director stated that the documents so executed for alleged loan of Rs.85 crores was never executed by him and he has not signed any document with respect to the said loan amount. It was also stated by the Learned counsel for the RP/R2 that there exists no record showing loan of Rs.85 crores nor there was any charge created or recorded with the ROC. It was also stated by the R2/RP that in view of the judgment of this Appellate Tribunal in para in Avil Menezes, Resolution Professional of AMW Auto Component Ltd Vs Shah Coal Pvt Ltd, Company Appeal (AT) (Ins) No.63/2021 this Tribunal has categorically held that the Resolution Professional would not have any locus to challenge the decision of Adjudicating Authority to admit the claim. Accordingly, the RP has not challenged the decision of the Adjudicating Authority for admission of claim.

26. The learned senior counsel for the R1/IIFL has stated that the appeal is not maintainable as the appellant has no locus to challenge the order of Adjudicating Authority. Learned senior counsel also stated that the verification of claim of the financial creditor in CIRP proceeding is a duty cast upon the RP who is incharge of CD to take any action with the approval of the COC.

27. The learned senior counsel further stated that during the year 2014-2016 the R1 has granted loan of Rs.85 crores to Mr. Vinay Jain, suspended director and to secure the repayment of loan of Rs.85 crores alongwith interest and other charges, the CD/AVJ executed a Corporate Guarantee in favour of IIFL thereby guaranteeing and undertaking to repay the outstanding amount of the above loan to IIFL. It was also stated by the learned senior counsel that to secure the loan of IIFL, the CD/AVJ also mortgaged the immovable property owned by CD/AVJ being AVJ Heights, situated at Plot No.GH, 12/2, admeasuring 42600 sq. mtrs Sector Zeta 01, Greater Noida, Gautam Budh Nagar, Uttar Pradesh. It was also stated that when the suspended director defaulted in repayment of outstanding dues then IIFL/RI issued Notice dated 3rd December, 2018 on both the suspended director of CD for repayment of the loan alongwith interest and cost etc. To support

his stand he took shelter of the Board Resolution dated 06.05.2021 and mortgaged documents including the financial statement of IIFL that the debt has not been paid. The learned senior counsel stated that the order of Adjudicatory forum under SARFAESI Act, 2002 for upholding the right and claim of the IIFL. It was also stated by the learned senior counsel that the RP is taking the stand against the view/order of DRT, Delhi.

28. The learned senior counsel also stated that the appellant in connivance with the suspended director is unnecessarily harassing the Respondent/IIFL and thereby finally made a prayer for dismissal of the appeal filed by the appellant with exemplary cost.

29. We have carefully gone through the pleading of the parties and perused the material available on record and submissions made by the learned counsel for the parties.

30. The available record reflects that Board Resolution has been passed guaranteeing/mortgaging the property. No doubt it is contrary to the provisions of Section 185 of the Companies Act, 2013.

31. We are also in agreement that the registration of charges is not reflecting on the ROC portal as pointed out by the parties.

32. What is not in dispute is that Mr. Vinay Jain, is a director and shareholder of the Company, AVJ Developer Pvt Ltd and other group companies. The group companies/CD was developing group projects so alleged by the appellant. Loan were sanctioned for an amount of Rs.135 crores to the CD and there was disbursement of those loan amount during March/April, 2015 and May, 2016. The said loan became NPA on 5th March, 2018. The loan of Rs.85 crore was sanctioned and disbursed on 28th September, 2017 to suspended director Mr. Vinay Jain and the amount was put in a separate escrow account.....0089 opened with HDFC Bank, Manak Vihar, Delhi. FIR report reveals that the suspended director Mr. Vinay Jain is a habitual offender and is involved in 9 FIR in Delhi and 35 FIR registered in UP.

33. In this context it is also revealed that there is a separate guarantee deed given by CD although not appearing in ROC website.

34. The Adjudicating Authority in the impugned order vide para 24 to 29 has elaborately explained that he is admitting the claim of IIFL for the specified amount and why IIFL be considered as CoC Member. Para 24 to 29 is depicted herein below:-

*“24. If Regulation 8 of the Insolvency and Bankruptcy Board of India (CIRP Regulations, 2016) examined, he shall be obliged to look into the financial contracts supported by financial statements, the record evidencing disbursement of monies. It is not said anywhere in **Swiss Ribbons supra** that claimants records shall not be taken into consideration, it is not said anywhere that verification of the claimant’s records will not tantamount to verification of records and it is not said anywhere in Regulation 8 of CIRP Regulations that the corporate debtor records alone shall be examined and verified for admission of claim.*

25. The applicant can only file documents that are present in its custody, the applicant cannot ensure that record is maintained by the corporate debtor. The Resolution Professional has not denied paying off dues of earlier three loans with the money taken through the loan amount claimed here and by sale of another property mortgaged by another company.

26. Since the record showing that Mr. Vinay Jain was released on bail on 24.10.2017, the documents executed by Vinay Jain on 01.11.2017 cannot be ignored on the ground Vinay Jain remained in judicial custody.

27. Here, the applicant has filed the financial contract disclosing that the Suspended director Mr. Vinay Jain executing a loan agreement in favour of the Applicant herein, the Applicant disbursing the loan amount to the ESCROW Account,

thereafter appropriating the said amount towards the earlier loan accounts which became irregular and also documents reflecting sale of the property mortgaged by Best View Properties Ltd. Moreover, the suspended directors of the Corporate Debtor have not denied anywhere about taking amounts through three loan amounts prior to availing this loan by the Suspended Director of the Corporate Debtor and depositing this loan amount of Rs.85 crores in the ESCROW Account, thereafter adjusting the same against the previous three loan accounts. All these transactions having remained apparent on record, we wonder how this RP has ignored all this material establishing financial contract, disbursement of the amount, thereafter signing memo of deposit of title deeds for creation of equitable mortgage.

28. With regard to obligation of guarantee, there is a separate guarantee deed the corporate debtor taking obligation upon itself to pay the loan amount of Rs.85 crores along with the interest in the event Vinay Jain defaulted in repaying the loan amount. In addition to it, the corporate debtor has also given its property as security by deposit of title deeds. These are two separate agreements binding the corporate debtor. To proceed against the corporate debtor to place claim upon it as financial debt, IIFL need not rely upon the mortgage charge because section 5(8)(i) of the Code says that when any guarantee is

given over the money borrowed by the borrower with a promise that he would repay the money borrowed along with interest, such obligation of guarantee will fall within the ambit of the clause (i) of section 5(8) of the Code. For the present claim will fit into clause (i) of definition of financial debt, to admit the claim, the RP need not look into as to whether any charge created and whether such charge has been properly recorded. Of course, all documentary proof is evident on record to prove that money is availed, security is given towards the consideration received.

29. What all we say is, if guarantee is given over the money borrowed by the principal debtor from the creditor and the same is supported by guarantee agreement, it will suffice to admit the claim as financial debt. Here the applicant has not only filed documents reflecting transfer of money, creation of obligation by way of guarantee, but also furnishing of security by way of mortgage, therefore, the RP should have admitted the claim of the applicant as financial debt, in view thereof, we hereby direct the RP to admit IIFL claim of Rs.134,15,62,129 and treat IIFL as COC member according to its voting share.”

35. The only point remains for consideration other than on factual ground that whether the mortgaged agreement approved by the Board of the Company which is not in accordance with the

provisions of Section 185 of the Companies Act, 2013 be considered by the other parties or not. The question is normally the other parties is not privy of the internal document of the company and he has relied on the Board Resolution provided by the other side. However, Section 185 of the Companies Act, 2013 itself provides for punitive action vide Section 185 sub-section (4) which is depicted hereunder provides clarity on the issue:-

“(4) If any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section,--

(i) the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees;

(ii) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees; and

(iii) the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, or with both.”

36. Hence there is no need to elaborate further.

37 In view of the facts and circumstances including the law available on the subject we do not find any inconformity in the order and accordingly the appeal is **dismissed**.

(Dr. Ashok Kumar Mishra)
Member (Technical)

(Justice Rakesh Kumar)
(Member (Judicial))

bm