

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 100 OF 2015
IN
COMPANY PETITION NO. 38 OF 2013***

NEELKANTH DEVANSH DEVELOPERS)

PRIVATE LIMITED,)

a private limited company incorporated)

under the Companies Act, 1956)

having its registered office at "Fine)

House", 5th floor, Anandji Lane,)

Opposite Dena Bank, M.G. Road,)

Ghatkopar (East), Mumbai - 400 077)

and registered with the Registrar of)

Companies under Registration No.CIN)

No.U45200MH2007PTC168264)...Appellant

(Orig. Respondent)

V/s

URBAN INFRASTRUCTURE VENTURE)

CAPITAL LIMITED,)

a company incorporated under the)

provisions of the Companies Act, 1956,)

having its registered office at 121-123,)

Free Press House, Free Press Journal)

Marg, Nariman Point, Mumbai-400021)...Respondents.

(Orig. Petitioners)

WITH
APPEAL NO. 102 OF 2015
IN
COMPANY PETITION NO. 31 OF 2013

NEELKANTH SOHAM DEVELOPERS)
PRIVATE LIMITED,)
a private limited company incorporated)
under the Companies Act, 1956)
having its registered office at “Fine)
House”, 5th floor, Anandji Lane,)
Opposite Dena Bank, M.G. Road,)
Ghatkopar (East), Mumbai - 400 077)
and registered with the Registrar of)
Companies under Registration No.CIN)
No.U45200MH2007PTC168264)...Appellant
(Orig. Respondent)

V/s

URBAN INFRASTRUCTURE VENTURE)
CAPITAL LIMITED,)
a company incorporated under the)
provisions of the Companies Act, 1956,)
having its registered office at 121-123,)
Free Press House, Free Press Journal)
Marg, Nariman Point, Mumbai-400021)...Respondents.
(Orig. Petitioners)

WITH
APPEAL NO. 109 OF 2015
IN
COMPANY PETITION NO. 33 OF 2013

NEELKANTH KALINDI REALTORS)
PRIVATE LIMITED,)
a private limited company incorporated)
under the Companies Act, 1956)
having its registered office at “Fine)
House”, 5th floor, Anandji Lane,)
Opposite Dena Bank, M.G. Road,)
Ghatkopar (East), Mumbai - 400 077)
and registered with the Registrar of)
Companies under Registration No.CIN)
No.U45200MH2007PTC168264)...Appellant
(Orig. Respondent)

V/s.

URBAN INFRASTRUCTURE VENTURE)
CAPITAL LIMITED,)
a company incorporated under the)
provisions of the Companies Act, 1956,)
having its registered office at 121-123,)
Free Press House, Free Press Journal)
Marg, Nariman Point, Mumbai-400021)...Respondents.
(Orig. Petitioners)

Mr. Janak Dwarkadas, Senior Counsel alongwith Mr. Parimal Shroff, Mr. D.V. Deokar, Mr. Sachin Pandey, Mr. Dhruvesh Parikh, Mr. Jehaan Mehta, Ms. Priyanka Rathore, Ms. Nidhi Chheda i/b M/s. Parimal K. Shroff & Co. for the Appellant in Appeal No.109 of 2015.

Mr. D.D. Madon, Senior Counsel alongwith Mr. Gaurav Joshi, Senior Counsel, Mr. Parimal K. Shroff, Mr. D.V. Deokar, Mr. Sachin Pandey, Mr. Dhruvesh Parikh, Mr. Jehaan Mehta, Ms. Priyanka Rathore, Ms. Nidhi Chheda i/b M/s Parimal K. Shroff & Co. for the Appellant in Appeal No.100/15.

Mr. S.U. Kamdar, Senior Counsel alongwith Mr. Riyaz Chagla, Mr. Chirag Balsara, Mr. Parimal Shroff, Mr. D.V. Deokar, Mr. Sachin Pandey, Mr. Dhruvesh Parikh, Mr. Jehaan Mehta Ms. Priyanka Rathore, Ms. Nidhi Chheda i/b M/s Parimal K. Shroff & Co. for the Appellant in Appeal No.102 of 2015.

Dr. Virendra Tulzapurkar Senior Counsel alongwith Mr. Arif Doctor i/b Junnarkar & Associates for the Respondents.

**CORAM : V. M. KANADE &
REVATI MOHITE DERE, JJ.**

**RESERVED ON : 10/12/2015
PLACED FOR DIRECTIONS ON: 29/02/2016
PRONOUNCED ON: 09/03/2016**

JUDGMENT (Per V. M. Kanade, J.) :

1. Appellants are the original Respondents and are challenging the order passed by the learned Single Judge in the Company Petitions filed by the Respondents/original Petitioners. By the said impugned order, the learned Single Judge was pleased to pass an order of winding up of the

Appellants/Company subject to the Appellants depositing the amount which was due and payable under the Inter Corporate Deposits made by the Respondents/original Petitioners.

2. Few facts as are necessary to decide the aforesaid appeals are as under :

At the outset, it may be noted that the facts in the aforesaid three appeals are substantially similar and that only the amounts in each appeal differs. The learned Single Judge, in the impugned order, has referred to the facts in Company Petition No. 31 of 2013, which is appeal No. 102 of 2015.

3. The respondents/original petitioners' case as disclosed in the company petitions broadly is as under :

According to the respondents/original petitioners, the appellant companies were incorporated under the Companies Act, 1956 as Private Companies Ltd. by shares on 1st March, 2007, and that the main objects for which the said Companies were incorporated, were set out in the Memorandum of Association, in particular clauses (1) and (2) thereof. It is further stated that the said Companies were indebted to the respondents/original petitioners for various

amounts i.e. Rs. 14,84,00,000/-, Rs. 24,80,00,000/- and Rs. 19,80,00,000/-, together with interest at the rate of 15% per annum from the period mentioned in the company petitions. According to the respondents/petitioners, at the request of the said appellant companies, short term loans by way of inter corporate deposits (ICDs) of Rs. 14,84,00,000/-, Rs. 24,80,00,000/- and Rs. 19,80,00,000/- were granted to the said companies. The respondents/petitioners have relied on the demand promissory note dated 31st March, 2010 executed by the appellant companies, towards the grant and repayment of the loan and the Board resolution accepting the proposal of the said ICDs. According to the respondents/petitioners, the terms on which the short term loan by way of ICDs have been granted, have been set-out in the ICD agreement, executed between the appellant companies and them. It is stated that the agreement requires the appellant companies to pay the entire principal amount of the short term loan in one instalment before the stipulated date mentioned therein, and also provides for interest at the rate of 15% per annum and delayed rate of interest of 18% per annum.

According to them, as the appellant companies failed and neglected to pay the aforesaid amounts and interest despite several requests, the respondents/petitioners vide letter dated 14th March, 2012, recorded the appellant

companies' default and called upon the appellant companies to pay the aforesaid principal amounts along with interest.

Since the Appellants did not pay the amount, the respondents herein sent a statutory notice to the appellant companies at their registered offices and called upon the appellant companies to pay the respondents/petitioners the aforesaid amounts along with interest within three weeks, failing which, they would initiate winding up proceedings against the appellant companies.

The appellant companies replied to the said statutory notice but the said reply was not satisfactory and that, the repayment of the short term loan and payment of the accrued interest was wrongly disputed by them. A reply was sent by the respondents/petitioners to the reply sent by the appellant companies to the statutory notice. The respondents/petitioners in the said letter contended that the appellant companies were trying to confuse the matter with a view to avoid their liability, by referring to unconnected and unrelated transactions. The Respondents filed three Company Petitions.

4. The appellants case, in brief, is as under :

According to the appellants, Neelkanth Soham

Developers Private Limited (“Neelkanth Soham”) - appellant in Appeal No. 102 of 2015; Neelkanth Kalindi Realtors Private Limited (“Neelkanth Kalindi”) - appellant in Appeal No. 109 of 2015; and Neelkanth Devansh Developers Private Limited (“Neelkanth Devansh”) - appellant in Appeal No. 100 of 2015 are, companies of the Neelkanth Group. The said Neelkanth Group is stated to comprise of certain companies and entities, engaged in particular, in real estate development all over India. The said Neelkanth Group is stated to be controlled by Mohan V. Patel and his family.

5. On the other hand, the Urban Infrastructure Venture Capital Limited (“UIVCL”), one of the several companies and entities, is described by the appellants as the “Urban Group”. We may note here, that the said description of the “Urban Group” is not accepted by the respondents. The said Urban Group is stated to be controlled by Anand J. Jain and his associates. Since the appellants have used the terms “Urban Group” and “Neelkanth Group” to propound their case and to show that the respondent company is part of the “Urban Group”, the same terms are being used in the present Judgment. As noted earlier, the reference to “Urban Group” are not accepted by the respondents and hence using the said terms in the Judgment will not, in any way, indicate that we have accepted the contention of the appellants with regard to the same.

6. According to the appellants, UIVCL was incorporated in the year 2005 and was providing estate management and financial advisory services. In March, 2006, the UIVCL was appointed as an Investment Manager to the Urban Infrastructure Opportunities Fund ("UIOF"). UIOF was a Scheme, which was established by the Urban Infrastructure Venture Capital Fund ("UIVCF"), a domestic venture capital fund and UIOF was to raise money for deployment in different real estate projects. In February, 2007, UIVCL was also appointed investment adviser to the investment manager of another fund, the Urban Infrastructure Real Estate Fund ("UIREF"), which was a foreign private equity firm.

7. On 31st January, 2006, an Indenture of Trust was executed between UIVCL and Urban Infrastructure Trustee Limited ("UITL"). According to the appellants, from 2006-2007, there were extensive financial dealings and commonality of business interests between one or more entities of the Urban Group and entities in the Neelkanth Group. According to the appellants, the Urban Group had agreed to invest in the Neelkanth Group's special purpose vehicles by subscribing to equity shares/debentures. Accordingly, the Urban Group is stated to have nominated UIVCL as a lead company with Parag Parekh as its

representative, while the Neelkanth Group was represented by Mohan Patel. According to the appellants, it is not in dispute that in 2007, a supplemental agreement was drawn up, and that the said document was never formally executed. Although the appellants have relied upon the supplemental agreement of 2007, the validity of the said document is denied by the respondents - UIVCL.

8. Appellants have further stated that in 2006-2007, four deposit agreements were executed between the entities of the said two groups i.e. Neelkanth Group and Urban Group. The Urban Group company named Dharti Investments and Holdings Limited, advanced a loan of Rs. 20.75 crores to NMIPL. In February, 2007, a further inter-corporate deposit ('ICD') of Rs. 50 crores was placed by Dharti with NMIPL and between September, 2007 and November, 2007, Rs. 84 crores were placed on ICDs with NMIPL by one Vinamra Universal Traders Private Limited ('Vinamra'), another Urban Group entity. The ICDs placed by Dharti were completely repaid by NMIPL. Out of the amount of Rs. 84 crores, NMIPL repaid Vinamra Rs. 20 crores in February, 2007 and the balance amount of Rs. 60 crores which was due to Vinamra was repaid in February/March, 2010. In February and March, 2010, respondents-UIVCL, placed two ICDs of Rs. 36 crores and Rs. 23.44 crores (totalling to Rs. 59.44 crores) with NMIPL.

9. The fact that in March, 2010, NMIPL had an ICD of Rs. 59.44 crores from UIVCL, is not disputed. However, the appellants and the respondents have given different interpretation to the events and circumstances that have led to giving of these ICDs. The appellants' contention is that the investments of the so-called Urban Group were being recycled through various joint ventures or Neelkanth Group companies to suit the Urban Group. Whereas, the Urban Group contended that the ICDs were completely independent and had nothing to do with the share subscription commitments or realty investments. According to the respondents, the ICDs were unrelated to any investments made by the Urban Group's domestic and foreign funds and that the inter-corporate deposit agreements ('ICDAs') were stand alone documents, having no nexus between the deposits and the investments of the two funds. The respondents have contended that with the execution of the ICDA, a promissory note in the same amount was also executed by each of the three appellant companies; and that each ICDA is stated to be only between the company in question and UIVCL; and the amount is described as a loan, which was repayable on 7th April, 2011 at an interest rate of 15% per annum, payable quarterly.

10. No doubt, there is some inter-locking relationship

between the various entities in the Neelkanth Group, NMIPL is the lead or flagship company of the Neelkanth Group, having three subsidiaries; Neelkanth Somnath Private Limited ("Neelkanth Somnath"); Neelkanth Ricelands Private Limited ("Neelkanth Ricelands"); and Nilayami Realtors Private Limited ("Nilayami Realtors"). The inter-locking relationship is of some relevance because around the same time, when the respondents were asked to place the ICDs with three respondent companies, the Neelkanth Group restructured its internal holdings of the group companies i.e. NMIPL's investment in Neelkanth Somnath was transferred to Neelkanth Devansh; its investment in Neelkanth Ricelands was transferred to Neelkanth Kalindi; its investment in Nilayami Realtors was transferred to Neelkanth Soham. It is thus evident, that Neelkanth Devansh held the majority equity in Neelkanth Soham and Neelkanth Devansh was entirely held by the Neelkanth Group and so on. It may be noted that NMIPL had repaid the entire ICD of Rs. 59.44 crores to UIVCL, after which, UIVCL placed the three ICDs in question with Neelkanth Devansh (Rs.19.80 crores); Neelkanth Kalindi (Rs. 24.80 crores); and Neelkanth Soham (Rs. 14.34 crores). It may also be noted that corresponding to each of these three ICDs in the three appellant companies, separate ICDA's were executed and that these ICDA's deposits stated the principal amounts and their due dates. It may also be noted that these are the only contractual

documents between UIVCL and the aforesaid companies i.e. Neelkanth Soham, Neelkanth Devansh and Neelkanth Kalindi and that there is no supplemental agreement between these parties nor is there any joint venture.

11. The disputes between Mohan Patel, the Neelkanth Group and the Urban Group in relation to the investments made by the UIOF (the domestic fund) in NUDPL, Neelkanth Somnath, Neelkanth Ricelands, and Nilayami Realtors; and investments made by UIREF (the foreign fund) in Neelkanth Ricelands and Nilayami Realtors were going on simultaneously. However, according to the appellants, these disputes were related to the ICDAs, whereas, according to the respondents, the disputes were completely independent and unrelated in any way to the ICDAs.

12. The learned Single Judge by the impugned order held that the defence of the Appellants herein/original Respondents was neither bonafide nor substantial and came to the conclusion that the Company was under an obligation to pay its debts and ordered winding-up. He, however, gave a further opportunity to the Appellants to pay the amount due within fourteen weeks, failing which directed admission of Company Petitions.

13. . Following questions fall for consideration before

this Court:-

(i) Whether, ICD Agreement is a subject matter of Arbitration in view of the Order dated 25/08/2015 passed by the Apex Court and the procedural order passed by the learned Single Arbitrator in the arbitration proceedings?

(ii) Whether ICDs form part of the larger transaction of investment by the Urban Group in the joint venture business and therefore amounts under ICDs are payable only out of the profits earned by the joint venture business or whether it is a standalone transaction?

(iii) Whether the impugned order directing the Company to pay a sum of Rs 23,04,59,942/- amounts to a decree when the Company Court was not justified in passing the said Order?

(iv) Whether any interference is called for with the order passed by the learned Single Judge in an appeal filed under Clause 15 of

the Letters Patent Act?

REASONING:

14. The first question which falls for consideration before this Court is as under:-

(i) Whether, ICD Agreement is a subject matter of Arbitration in view of the Order dated 25/08/2015 passed by the Apex Court and the procedural order passed by the learned Single Arbitrator in the arbitration proceedings?

15. In our view, the contention of the Appellants that in view of the order of the Apex Court dated 25/08/2015 and the procedural order passed by the learned Single Arbitrator, ICD is a subject matter of arbitration is without any substance for the following reasons.

16. It is necessary to examine brief chronology of events in respect of arbitration proceedings:-

(A) After the impugned order was passed by the learned Single Judge, the Appellants alongwith NMIPL, Neelkanth Devansh Developers Pvt. Ltd., Neelkanth Kalindi Realtors Pvt. Ltd. issued notice for

Arbitration dated 08/09/2014.

(B) Thereafter, an application was filed in the Apex Court vide Arbitration Application No.12 of 2015 on 09/12/2015 under Section 11 of the Arbitration and Conciliation Act, 1996 seeking reference to arbitration.

(C) The prayers in the application under section 11 of the said Act, 1996 are as under:-

“(a) Appoint and confirm the appointment of Mr. Justice F.I. Rebello (Retd) as Arbitrator on behalf of the Applicants representing Neelkanth Group in accordance with Clause 19 of the Six Subscription cum Shareholders Agreements.

(b) Appoint the Arbitrator on behalf of the Respondents in accordance with Clause 19 of the Six Subscription cum Shareholders Agreements.

(c) In the alternative to Prayer (a) and

(b), appoint the said Mr. Justice F.I. Rebello (Retd) as sole Arbitrator in accordance with Clause 19 of the said Six Subscription cum Shareholders Agreements.

(d) Costs of this Application and the order to be made thereon be provided for; and

(e) Pass any such other or further orders and directions which this Hon'ble Court may deem just, fit and proper in the circumstances of the case and in the interests of justice and equity."

(D) In the said application, initially, Respondents were not parties. Three months after the application was filed, on 04/02/2015 an application was taken out for impleadment of Respondents as proposed Respondent No.7.

(E) Respondents filed affidavit-in-reply opposing the said impleadment on the

ground that there was no arbitration agreement between the Respondents/original Petitioners and any of the applicants and, secondly, that the ICD Agreement was a separate, distinct and independent Inter Corporate Deposit Agreement which does not have the arbitration clause. The contention that the Respondents/Petitioners are members of the Urban Group was denied.

(F) No order was passed on the impleadment application filed by the Appellants.

(G) Respondent Nos. 1 and 2 in Arbitration Application No.12 of 2015 gave their consent for appointing Mr. Justice R.M. Lodha, a former Chief Justice of India as a sole arbitrator in respect of all agreements and in view of that statement, the Applicants which included the Company, withdrew the application/petition filed under Section 11. The impleadment application was not pressed and, therefore did not survive.

17. In view of the said chronology of events in respect of arbitration application file under Section 11, it can be seen that the Respondents herein were not impleaded as party to the arbitration application and had not accepted that there was arbitration agreement between the Appellants herein and the Respondents and further had not accepted that the claim of the original Petitioners that the winding up Petition was required to be adjudicated upon by the Arbitrator. No decision was given by the Apex Court in the said application since it was withdrawn and, therefore, it cannot be said that the Apex Court had given any ruling on the basis of the judgment in *Chloro Controls (India) Pvt. Ltd. vs. Severn Trent Water Purification Incorporated and Others*¹. The contention of Mr. Dwarkadas, the learned Senior Counsel appearing on behalf of the Appellants therefore cannot be accepted. The question No.(i) is therefore answered in the negative.

18. The second question which falls for consideration before this Court is as under:-

(ii) Whether ICDs form part of the larger transaction of investment by the Urban Group in the joint venture business and therefore amounts under ICDs are payable only out of the profits earned by the joint venture business or whether it is a standalone transaction?

¹ (2013) 1 SCC 641

19. Taking into consideration the documents on which reliance was placed by both sides, we are of the view that the learned Single Judge has correctly held that ICDs do not form part of the larger transaction of investment or that ICD are payable only out of profits earned by the joint venture business. ICDs, in our view, are independent transactions, not governed by the supplemental agreement.

20. For deciding this question, it will be necessary to consider the rival contentions. On the one hand Mr. Dwarkadas, the learned Senior Counsel for the Appellants has contended that Appellants are the part of the Neelkanth Group of Companies viz (1) Neelkanth Mansion Infrastructure Pvt. Ltd. (NMIPL), (2) Neelkanth Soham Developers Pvt. Ltd. (NSDPL), (3) Neelkanth Kalindi Realtors Pvt. Ltd. (NKRPL) and (4) Neelkanth Devansh Developers Private Limited (NDDPL). The contention of the learned Senior Counsel for the Appellants is that the Respondents viz Urban Infrastructure Ventures Capital Ltd. (UIVCL) is a lead Company of the group which is known as Urban Group. According to him Respondents are part of the following Companies, Trusts, Funds and Entities viz.

- 1) Urban Infrastructure Real Estate Fund (“UIREF”)
- 2) Urban Infrastructure Trustees Ltd. (“UITL”)

- 3) Urban Infrastructure Venture Capital Fund (“UIVCF”)
- 4) Urban Infrastructure Ventures Capital Ltd (“UIVCL”) i.e. the Respondents herein.
- 5) Jai Corp. Ltd., (“Jai Corp”)
- 6) Sharanya Trading Pvt. Ltd. (“Sharanya”)
- 7) Dharti Investments and Holdings Pvt. Ltd. (“Dharti Investments”)
- 8) Vinamra Universal Traders Pvt. Ltd. (“Vinamra Universal”)

21. The case of the Appellants is that the Urban Group and Neelkanth Group are associated with one another since 2006-2007 for the purpose of carrying on the Real Estate Business through Special Purpose Vehicles (SPVs)/Joint Vehicles (JVs). According to the Appellants, Neelkanth Group was to bring the know-how at no cost and properties without revaluation and the Urban Group was to bring the capital. Secondly, according to the Appellants, Neelkanth Group was to set up projects for development through SPVs/JVs and the Urban Group would invest in such SPVs/JVs by subscribing the equity shares and the profit sharing ratio between the two would be 60% by the Neelkanth Group and 40% by the Urban Group. According to the Appellants, SPVs/JVs of Neelkanth Group were as under:-

- (i) Asim Realty Pvt. Ltd., a Group Company floated into SPV/JV and upon becoming an SPV/JV was called Neelkanth Urban Developers Pvt. Ltd. (“NUDPL”)
- (ii) Nilayami Realtors Pvt. Ltd.
- (iii) Neelkanth Riceland Pvt. Ltd.
- (iv) Neelkanth Somnath Realtors Pvt. Ltd.

22. Mr. Dwarkadas, the learned Senior Counsel for the Appellants submitted that the understanding between the Groups was that the UG would invest funds in excess of their profit sharing ratio which excess amount would command interest at the rate of 12% per annum which would be borne by NG and this excess capital investment by UG would be repayable from such surplus capital of SPV/JV which was not required for Joint Venture business. It is the case of the Appellants that the understanding was recorded in the Supplemental Agreement to the Shareholders Agreement of the Joint Venture Companies though it was not executed but was implemented and acted upon by both the parties.

23. Mr. Dwarkadas, the learned Senior Counsel for the Appellants submitted that on the basis of the said understanding, the Urban Group through its various Companies made investments by way of Inter Corporate Deposits (“ICDs”) and although these Agreements were

purported to be deposit agreements with NMIPL, the UG was given credit for the same as and by way of investment in SPV/JVs. He submitted that ICDs form part of an integral part of the web of transactions between the two Groups.

24. Reliance was placed by the learned Senior Counsel appearing on behalf of the Appellants on number of judgments of the Apex Court and High Courts and reliance was also placed on compilation of documents in respect of conduct of parties through E-mail, which, according to him, showed that they acted as a Group. Reliance was also placed on the proceedings of mediation of Mr. K.G. Kirshnamurthy. He also submitted that there was a gross suppression of facts by the original Petitioners in the Petition. In support of the said submission, he relied on E-mails dated 24/03/2010, 25/03/2010, 26/03/2010 and 27/03/2010. He also relied on various additional affidavits filed by the Appellants, which showed that Respondents/Petitioners had knowledge of the said facts and had admitted the same. He took us through synopsis-cum-note which he tendered. He also showed various documents resulting in final appoint of Mr. Justice R.M. Lodha, a former Chief Justice of India as a sole arbitrator.

25. On the other hand, Dr. Tulzapurkar, the learned Counsel for the Respondents submitted that the contention

of the Appellants that the ICDs form part of an integral part of the web of transactions is not borne out by any document. He submitted that this agreement of understanding was supposedly oral. He pointed out the entire history as to how ICDs came to be executed from paragraph 15 of the affidavit-in-rejoinder which is found at pages 391 to 394 of Vol-III of Appeal No.102/2015. He submitted that no reliance could be placed on the supplemental agreement since it was unexecuted and bears the endorsement “draft for discussion purposes only”. Though it was stated that it was executed on 14/01/2012, in fact, it was not executed between the alleged Neelkanth Group and Urban Group. He submitted that the original Petitioners i.e. Respondents herein in all three appeals acted in its individual capacity in placing the ICD with the Appellant Company and other two Appellants Companies. He submitted that its role as Investment Manager to the domestic Fund Urban Infrastructure Venture Capital Fund (UIVCF) and as Indian Investment Advisor to the Investment Manager of the foreign Fund Urban Infrastructure Real Estate Fund (UIREF) is entirely distinct and separate. He submitted that UIVCF has separate set of domestic beneficiaries/investors and UIREF has separate set of foreign beneficiaries/investors and both are separate and distinct. He submitted that if ICDs were to be part of the investment in the joint venture business, then there would have been a proper agreement recording the same. Secondly, there was

no need to repay ICDs by accepting fresh ICDs and the original ICDs would have continued to remain in operation. Lastly, he submitted that mediation proceedings started only in respect of disputes pertaining to the investments made in the joint venture business of the two Funds and therefore ICDs were never part of the mediation proceedings. He submitted that the original Petitioners were not parties to any of the Shareholders Agreement/Subscription-cum-Shareholders Agreement to which UITL and UIREF are party and which contain independent provisions of arbitration (Vol-III pages 391 to 394 of Appeal No.102/2015).

26. Dr. Tulzapurkar, the learned Senior Counsel appearing on behalf of the Respondents/original Petitioners took us through the Inter Corporate Deposit Agreement and the Promissory Note executed by the Company in favour of the Respondents/Petitioners. He submitted that the execution of documents was admitted by the Company but the liabilities were denied. He also relied on various Judgments of the Apex Court and High Courts.

CONCLUSION:

27. In our view, the learned Single Judge has rightly not accepted the contention of the Appellants that ICDs form an integral part of web of transactions between the two groups. The Inter Corporate Deposits by the

Respondents/original Petitioners are independent transactions unrelated to five Subscription/Share Holders Agreements and one Shareholder Agreement which were executed on 24/08/2007 and 18/10/2008 though in these Shareholders Agreements there is a reference to parties, which, in turn, includes the definition of the term 'Affiliate'. It is obvious that the term 'Affiliate' is a defined term in relevant Shareholders Agreement and it cannot be read in isolation and, secondly, it has to be noted that Shareholders Agreement is not signed by the original Petitioners. In our view, therefore, there is no material on record to indicate that the ICDs were part of the larger web of transactions between the parties. Thirdly, the supplemental agreement is admittedly not executed. The agreement itself shows that it is only a draft for approval. There is no material on record to show that Respondents/original Petitioners were accepted as part of the Urban Group or as part of dispute resolution process. No reliance therefore can ever be placed on the supplemental agreement since it was not executed and signed by the Respondents/original Petitioners. The mediation proceedings before the Mediator do not make any reference to the ICDs.

28. Dr. Tulzapurkar, the learned Senior Counsel appearing on behalf of the Respondents/original Petitioners has relied upon two judgments of this Court; one in *J.K.*

*Corporation Ltd. vs. Ensource Finance Ltd.*¹ and the other in *Marine Container Services (India) Pvt. Ltd. vs. Shaheel Bearings Pvt. Ltd.*² In the said two cases also, a defence was set up that the ICDs in both the cases were part of a larger interconnected transactions. In both these cases, the learned Single Judges of this Court came to the conclusion that the contention of the Company that they were part of the complex web of interconnected transactions could not be accepted and defence could not be set up that would have an effect of allowing them to lead evidence in variance of the terms of the written contract.

29. In the present case also, ICDs were distinct written agreements which indicated that it was a loan simpliciter which was given by the Respondents/original Petitioners to the Appellants and there was no other written material/agreement/contract to show that it was supposed to be part of the arrangement which was specifically averred by the Appellants in their affidavit-in-reply. It is well settled that if there is a written contract, reliance will have to be placed on the written contract and no oral evidence could be led which is in variance of the written contract.

30. At no point of time, the contention of the Appellants that this was a part of the larger transaction was

1 [2001] 33 SCL 143 (BOM)

2 1999(4) Bom. C.R. 453

accepted by the Respondents/original Petitioners and was promptly denied after reply to the show cause notice was given by the Appellants, alleging the said fact. The fact, that supplemental agreement which contained all these clauses of there being a web of transactions which was delivered by the Appellants to the Respondents was, in fact, not signed, which fact indicates that from the beginning understanding between the parties was that the ICDs were to be treated as separate and distinct transaction. Moreover, if the contention of the Appellants was to be accepted then there was no need to enter into new ICDs. The flow chart and the correspondence between the parties does not establish the case of the Appellants.

31. We therefore confirm the finding of the learned Single Judge and are of the view that defence of the Appellants is neither bonafide nor substantial defence. We are of the view that finding given by the learned Single Judge on this issue is neither perverse nor unreasonable and, therefore, we do not propose to interfere with the said finding while exercising our appellate jurisdiction under Clause 15 of the Letters Patent Act. In our view, there was no suppression of fact by the Respondents/original Petitioners since the ICDs were separate and independent agreements. There was no occasion the Respondents/original Petitioners to mention the facts which,

according to the Appellants, were allegedly suppressed. The question No.(ii) is therefore answered in the negative.

32. The third question which falls for consideration before this Court is as under:-

(iii) Whether the impugned order directing the Company to pay a sum of Rs 23,04,59,942/- amounts to a decree when the Company Court was not justified in passing the said Order?

33. The said submission of the Appellants is without any substance. The learned Single Judge in his order has clearly observed that he is not deciding the case on merits but having held that the defence of the Company is sham and bogus has given an opportunity to the Company to pay the amount, failing which the Company Petition would stand admitted. The learned Single Judge therefore has not passed any decree in favour of the Respondents/original Petitioners. It is now well settled that such an order could be passed by the Company Court directing the Company to make payment of money to the petitioning creditor. This Court in *Enarai Finance Ltd.*¹ and also in *Videocon Industries Ltd. vs. Itesa Sanpaolo S.P.A* in Appeal (L) No.29 of 2014 in Company Petition No.528 of 2012 has also upheld the similar order passed by the Company Judge. The question No.(iii) is

1 2002(1) ALL MR 443

therefore answered in the negative.

34. The last question which falls for consideration before this Court is as under:-

(iv) Whether any interference is called for with the order passed by the learned Single Judge in an appeal filed under Clause 15 of the Letters Patent Act?

35. The Apex Court in *Wander Ltd and Another vs. Antox India P. Ltd.*¹ has observed in para 14 as under:-

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with

¹ 1990(Supp) SCC 727

the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd vs. Pothan Joseph* (1960) 3 SCR 713 : AIR 1960 SC 1156 : (SCR 721).

“..... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton* [1942 AC 130] '....the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.”

The appellate judgment does not seem to defer to this principle.”

36. This Court therefore while exercising its appellate jurisdiction under Clause 15 of the Letters Patent Act is not expected to interfere with the order passed by the learned Single Judge, unless it comes to the conclusion that the finding is perverse or is based on material which is not part of the record. As mentioned hereinabove we are of the view

that finding of the learned Single Judge is neither perverse nor is based on the material which is not there on record. The question No.(iv) is therefore answered in the negative.

37. Consequently, appeals are dismissed. Time to make payment is extended by six weeks.

(REVATI MOHITE DERE, J.)

(V.M. KANADE, J.)