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Page 1 Monday, May 18, 2026
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2023 SCC OnLine NCLAT 641

In the National Company Law Appellate Tribunal[*]

(BEFORE ASHOK BHUSHAN, CHAIRPERSON AND BARUN MITRA, MEMBER (TECHNICAL))

Company Appeal (AT) (Insolvency) No. 379 of 2021

&

I.A. No. 2204 of 2021

Nitin Pannalal Shah ... Appellant;

Versus

Vipul H Raja and Others ... Respondents.

With

Company Appeal (AT) (Insolvency) No. 749 of 2022

In the Matter of:

National Stock Exchange of India Limited ... Appellant;

Versus

Hemant Kumar Gupta and Another ... Respondents.

Company Appeal (AT) (Insolvency) No. 379 of 2021, I.A. No. 2204 of 2021[†] and Company Appeal (AT) (Insolvency) No. 749 of 2022[‡]

Decided on September 11, 2023

Company Appeal (AT) (Insolvency) No. 379 of 2021

I.A. No. 2204 of 2021

Mr. Hemant Sethi, Mr. Gaurav H. Sethi, Mr. Deepatanshu Chandra, Advocates for Appellant;

Mr. Arun Kathpalia, Sr. Advocate, Mr. Aubert Sebastian, Mr. Ribhu Garg, Mr. Vedant Kumar, Advocates for NSE

Mr. Rahul Chitnis, Mr. Abhishek Swaroop, Ms. Mumtaz Bhalla, Mr. Palash Agarwal, Mr. Neeraj Malik, Mr. Karan Chopra, Mr. Anush Joshi, Advocates and Mr. Kiran Shah, PCA for R-1.

Mr. Saurabh Kalia and Mr. Madhav Goel, Advocates for RP/R-3 for Respondents.

Company Appeal (AT) (Insolvency) No. 749 of 2022

Mr. Arun Kathpalia, Sr. Advocate, Mr. Aubert Sebastian, Mr. Ribhu Garg, d Mr. Vedant Kumar, Mr. Aditya Dhupar, Advocates for Appellant;

Mr. Krishan Kumar, Mr. Shivam Bedi, Advocates for R-1.

Mr. Gaurav Srivastava, Ms. Namrata Parashar, Advocates for R-2.

Mr. Akshit Sachdeva a & Mr. Varun Gupta, Advocates for Intervenor

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Page 2 Monday, May 18, 2026
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in I.A. No. 3409, 3410 of 2023 for Respondent.

The Order of the Court was delivered by

ASHOK BHUSHAN, CHAIRPERSON:— These two Appeal(s) raising common questions of law being heard together and are being decided by this common order.

Company Appeal (AT) (Insolvency) No. 379 of 2021

2. This Appeal has been filed against the order dated 06.04.2021 passed by National Company Law Tribunal ("NCLT"), Ahmedabad Bench, Ahmedabad in CP (IB) No. 510/7/NCLT/AHM/2019, by which order the Application filed by Respondent No. 1 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code") has been admitted against the Corporate Debtor-M/s Simandhar Broking Limited. The Appellant, who is a suspended Director of the Corporate Debtor, aggrieved by the order has come up in this Appeal.

3. Brief facts of the case are:

(i) The Corporate Debtor-Simandhar Broking Ltd. Is a Broking Company involved in the business of Stock Broking and is a Registered Stock Broker with Securities and Exchange Board of India ("SEBI") and is a Trading Member with National Stock Exchange of India Limited ("NSE"). Respondent No. 1-Vipul H Raja opened a trading account with the Corporate Debtor and an agreement dated 21.12.2017 was entered with the Corporate Debtor for Cash Segment and Future Options Segment trading. With effect from 01.01.2018, Respondent No. 1 started trading with the Corporate Debtor.

(ii) Respondent No. 1 incurred huge losses particularly in the stock of Jaypee Associates Ltd. and carry forward his position for months, against the carry forward charges and interest. Due to the default and inability to pay the outstanding dues of the Corporate Debtor, Respondent No. 1-Corporate Debtor sold the margin provided by Respondent No. 1 and made subsequent adjustments in its books against the ledger of Respondent No. 1 Upon adjusting the amount, Respondent No. 1 was still liable to pay Rs. 23,48,095/- to the Corporate Debtor as on 30.06.2019.

(iii) Respondent No. 1 filed a complaint against the Corporate Debtor before Investor Grievance Resolution Panel ("IGRP") and claimed *inter-alia* "*the non-issuance of document, non-receipt of funds and securities and unauthorized trade claiming an amount of' Rs. 1,01,74,985/- and several securities*".

(iv) Respondent No. 1 also filed an Application under Section 7 of the Code, raising the same claim. The IGRP on 16.08.2019 rejected the claim of Respondent No. 1 and held that no claim is

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Page 3 Monday, May 18, 2026
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due towards Respondent No. 1 by the Corporate Debtor. The Adjudicating Authority proceeded with the Section 7 Application and by an order dated 06.04.2021 admitted Section 7 Application, holding that Applicant has established the financial debt and there is default on the part of the Corporate Debtor. The Appellant aggrieved by the said order has filed the Appeal.

(v) This Tribunal by order dated 31.05.2021 has issued Notice and passed an interim order that if the CoC has not been constituted it be put on hold till next date of hearing.

4. In this Appeal an application being IA No. 2204 of 2021 was been filed by National Stock Exchange of India Limited praying for intervention. The Applicant in the Application has prayed for clarification that a Trading Member of the Applicant registered as a Stock Broker with the SEBI being a Financial Service Provider is not a 'corporate person' and is not amenable to proceedings under the Code. IA No. 2204 of 2021 filed by the National Stock Exchange was allowed by order dated 03.08.2022.

5. In this Appeal, reply has been filed by Respondent No. 1 as well as by IRP, to which rejoinder has also been filed by the Appellant. Both the parties have filed their written submissions.

Company Appeal (AT) (Insolvency) No. 749 of 2022

6. This Appeal has been filed by National Stock Exchange of India Limited challenging the order dated 25.11.2021 passed by NCLT, New Delhi in CP(IB) No. 397 of 2021, by which order, the Application under Section 7 filed by Respondent No. 1-Hemant Kumar Gupta, erstwhile Director of the Corporate Debtor-M/s. Astitva Capital Market Pvt. Ltd., has been admitted initiating Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor-M/s. Astitva Capital Market Pvt. Ltd. The Appellant, who was not the party to the proceedings, has filed this Appeal, claiming to be an aggrieved person by the order dated 25.11.2021.

7. The brief facts giving rise to the Appeal are:

(i) The Appellant-National Stock Exchange of India Ltd. ("NSE") by an email dated 15.03.2021 sought certain information/data from Astitva Capital for the purpose of inspection of its business operations, books and records. The relevant records were not submitted, hence, a Show Cause Notice under Chapter IV of the Rules of National Stock Exchange of India Ltd. dated 07.07.2021 was issued to Astitva Capital Market Pvt. Ltd. for the violation observed during the inspection.

(ii) When the Corporate Debtor did not respond to the Show Cause Notice a letter dated 27.10.2021 was sent to Respondent No. 1, Director of the Corporate Debtor, informing him that NSE is

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Page 4 Monday, May 18, 2026
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placing the matter before its Member and Core Settlement Guarantee Fund Committee ('MCSGFC') on 03.11.2021 for decision.

(iii) On 25.11.2021, the Application filed by erstwhile Director, Hemant Kumar Gupta (Respondent No. 1 herein) under Section 7 was admitted by the Adjudicating Authority against the Corporate Debtor.

(iv) Aggrieved by the order, the NSE has come up in this Appeal.

8. The Appellant contention is that the Corporate Debtor is a Stock Broker, registered with the SEBI and is a Trading Member of the NSE and Section 7 Application against the Corporate Debtor was not maintainable, since the Corporate Debtor is not a 'corporate person' within the meaning of the Code. In Company Appeal (AT) (Insolvency) No. 749 of 2022, notices were issued by the Tribunal on 13.07.2022 and on which date, following order was passed:

"13.07.2022 Heard Mr. Arun Kathpalia, learned Sr. Advocate for the Appellant. Learned Counsel for the Appellant submits that M/s Astiva Capital Market Private Limited, the Corporate Debtor, is the Financial Service Provider and excluded from the definition of 'Corporate Person' under Section 3(7) of IBC. It is submitted that this Appeal has been filed by National Stock Exchange of India Limited who had issued a Show Cause Notice on 7th July, 2021 to the Corporate Debtor. Further the Notice indicates that it was Mr. Hemant Kumar Gupta, the Director to whom Notice was sent.

It appears that after the Notice, an Application under Section 7 of IBC has been filed by the Director against alleged dues, which has been filed for some ulterior motive and not for the purposes of any resolution.

Issue Notices to the Respondent Nos. 1 & 2 by Speed Post. Requisites along with process fee, if not filed, be filed within three days. If the Appellant provides the e-mail address of Respondents, let Notices be also issued through e-mail.

Reply Affidavit by the Respondents be filed within three weeks and Rejoinder, if any, may be filed by Appellant within two weeks thereafter.

List this Appeal on 22nd August, 2022.

In the meantime, no further steps shall be taken in pursuance to the order dated 25.11.2021."

9. In Company Appeal (AT) (Insolvency) No. 749 of 2022 an Application for Intervention being IA No. 3409 of 2023 has been filed on behalf of Smt. Prem Kumari praying intervention in the proceeding and seeking a direction to Interim Resolution Professional ("IRP") to vacate intervenor/applicant's premises in his occupation, i.e., property

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Page 5 Monday, May 18, 2026
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bearing Flat No. 307, 3rd Floor, New Delhi House, 27, Barakhamba Road, New Delhi-110001.

10. In Company Appeal (AT) (Insolvency) No. 749 of 2022, the Respondents have appeared and also filed their replies, to which rejoinder has also been filed. Written submissions have also been filed by the parties.

11. We have heard Shri Hemant Sethi, learned Counsel for the Appellant in Company Appeal (AT) (Insolvency) No. 379 of 2021, Shri Arun Kathpalia, learned Senior Counsel appearing for the Appellant in Company Appeal (AT) (Insolvency) No. 749 of 2022. Shri Rahul Chitnis has appeared on behalf of Respondent No. 1 in Company Appeal (AT) (Insolvency) No. 379 of 2021. Shri Saurabh Kalia with Madhav Goel has appeared for RP/Respondent No. 3 in Company Appeal (AT) (Insolvency) No. 379 of 2021. Shri Krishan Kumar and Shri Shivam Bedi, learned Counsel appeared for Respondent No. 1 in Company Appeal (AT) (Insolvency) No. 749 of 2022. We have heard learned Counsel for the Resolution Professional ("RP"), Shri Gaurav Srivastava and Shri Akshit Sachdeva, Advocate for Intervenor in IA No. 3409 of 2023.

12. The learned Counsel for the Appellant(s) in support of both the Appeal(s) submit that the Corporate Debtor being a Financial Service Provider, Application under Section 7 filed before the Adjudicating Authority was not maintainable. It is submitted that the Corporate Debtor in both the Appeal(s) is not a 'corporate person' within the meaning of Section 3(7) of the Code, which specifically exclude any Financial Service Provider. When the Financial Service Provider is not a 'corporate person' within the meaning of the Code, no Application under Section 7 can be filed against a 'corporate person' and the same is not maintainable. It is submitted that against the Financial Service Provider, it is the Central Government, which is empowered to notify a Financial Service Provider for purposes of their insolvency and their liquidation, which will be conducted under the Code. It is submitted that under Section 227 only one Notification till date has been issued by the Central Government, i.e., Notification dated 18.11.2019, under which only the non-banking finance companies with asset size of Rs. 500 crores or more are covered. The learned Counsel for the Appellant (s) also submit that Adjudicating Authority without adverting to the relevant provisions of the Code, proceeded to admit Section 7 Application against the Corporate Debtors, who are Stock Brokers registered under the SEBI Act, 1992 and are Trading Member of the NSE. The learned Counsel for the Appellant(s) have referred to the Memorandum of Association of the Corporate Debtor, i.e., Simandhar Broking Ltd. as well as Astitva Capital Market Private Limited, which indicate that thev are Financial Service Providers. The learned Counsel

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Page 6 Monday, May 18, 2026
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for the Appellant(s) has also referred to the SEBI (Stock-Brokers and Sub-Brokers) Regulations, 1992 and submit that the services provided by the Stock Brokers are Financial Services. The learned Counsel for the Appellant has also referred to Report of the Sub-Committee of the Insolvency Law Committee for Notification of Financial Service Provider under Section 227 of the Code dated October 04, 2019.

13. Shri Rahul Chitnis, learned Counsel appearing for Respondent No. 1 submits that Application filed under Section 7 was very well maintainable. It is submitted that Section 3(7) read with Section 3(16)(e) of the Code seeks to create a narrow exception for entities who are engaged in rendering or agreeing to render advice or soliciting for the financial products or services., which cannot be extended to entities, which are directly engaging in buying or selling financial products or services. The Corporate Debtor Simandhar Broking Ltd. was directly buying and selling securities on behalf of Respondent No. 1 and it is not covered within the definition of 'Financial Service Provider'. The Adjudicating Authority has considered all aspects of the matter and has rightly come to the conclusion that Section 7 Application was maintainable. It is submitted that IGRP is a remedy, which is available to the Investor. The role of the IGRP is limited in nature and restricted to verification of the documents. However, the IBC is available to a particular class of creditors against the Corporate Debtor in respect of the default committed in respect of the financial debt. Respondent No. 1 being the Financial Creditor of the Corporate Debtor and default having been admitted, the Application under Section 7 was maintainable. The learned Counsel has also referred to Section 238 of the Code, which has overriding effect. It is submitted that Intervention Application filed by National Stock Exchange is not maintainable. The Intervenor has no *locus* to file the Application, which is not a necessary or proper party.

14. Shri Krishan Kumar, learned Counsel appearing for Respondent No. 1 in Company Appeal (AT) (Insolvency) No. 749 of 2022 submits that Respondent No. 1 is a Financial Creditor, who has advanced loan to the Corporate Debtor for an amount of Rs. 1,28,00,000/- from 23.09.2019 to 18.11.2020. Respondent No. 1 was a Financial Creditor, who claimed principal amount along with interest in Part-IV. It is submitted that the National Stock Exchange has no *locus* to maintain the Appeal. The National Stock Exchange is neither shareholder nor Suspended Director of the Corporate Debtor. The National Stock Exchange is also not Financial Service Provider. It is submitted that the Corporate Debtor was not a Financial Service Provider. The Corporate Debtor was a Share Trading Company, which facilitates its clients by connecting to the platform of NSE for trading. Sale and purchase of shares happen at the instructions of Client, for which service providers

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Page 7 Monday, May 18, 2026
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charge brokerage. There is neither any management of assets nor offering of any financial product. No advisory service involved on the part of brokering company and service is confined to connecting to platform of NSE. It is submitted that the Corporate Debtor is not a Financial Service Provider.

15. The learned Counsel appearing for the Intervenor submits that Intervenor is co-owner of the property bearing Flat No. 307, 3rd Floor, New Delhi House, 27, Barakhamba Road, New Delhi-110001. The Applicant has already filed a suit for possession and for permanent injunction against Astitva Capital Market Private Limited. The Commercial Court is ceased of the proceedings, but on account of initiation of CIRP, the proceedings have been got deferred. The RP has also taken possession of the asset. The RP need to be directed to vacate the Applicant premises.

16. We have heard learned Counsel for the parties and perused the records.

17. We need to first notice the nature of functions, which are performed by the Corporate Debtor in these two Appeal(s). The Corporate Debtor in Company Appeal (AT) (Insolvency) No. 379 of 2021, i.e., Simandhar Broking Ltd. is an entity, which is registered with SEBI vide registration dated 30.06.2010. Respondent No. 1 has himself filed additional document regarding status of Simandhar Broking Ltd. as per National Stock Exchange of India Limited. The document further indicates that NSE has withdrawn the trading right of Simandhar Broking Ltd. by order dated 18.09.2021.

18. The Memorandum of Association of Simandhar Broking Ltd. is on record, which is filed along with the written submissions of NSE-Intervenor. Clause 3 of Memorandum of Association “A” deals with main objects of the Company, which are as follows:

> *“To Carry on the business of purchasing, acquiring, holding, trading, buying, selling, broking, transferring, disposing of or dealing in any shares, stocks, debentures, stocks, bonds, obligations, units, securities including government securities, options, produces, Policies, book debts, claims, certificates and as broker of shares, stocks, deposits and securities as managers, advisors and consultants in relation to Securities and registrars to the capital issue, guarantors, advisors and consultants in relation to securities and to take over running stock broking business of any person or firm or company and so long as the company is engaged in stock broking as a member of any recognized stock exchange in India, it will engage itself in only such business as a member of a recognized stock exchange as is permitted to engage in under the Securities and Contracts (Regulation) Rules, 1957 and the Rules, Bye-laws,*

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Page 8 Monday, May 18, 2026
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Memorandum of Articles of Association of the Stock Exchange."

19. Similarly, the Corporate Debtor in Company Appeal (AT) (Insolvency) No. 749 of 2022, i.e., M/s Astitva Capital Market Private Limited is also a registered Member of the SEBI and is a Trading Member of NSE. The learned Counsel for NSE has submitted that when NSE issued Show Cause Notice dated 07.07.2021 to Ex-Director, Hemant Kumar Gupta-Respondent No. 1, instead of replying to Show Cause Notice, he filed Section 7 Application to initiate insolvency against the Corporate Debtor, so that all proceedings are stopped. The Memorandum of Association of M/s. Astitva Capital Market Private Limited is also on record, which provides following:

"III. The objects for which the Company is established are —

A. The main objects to be pursued by the Company on its incorporation are:—

1. *To carry on its business of trading and as investors by way of acquiring, holding, selling, buying, transferring and subscribing any shares, bonds, stocks, debentures. Debenture stocks and such other obligations and securities issue or guaranteed by any government, Public Body or authority whether in India or elsewhere and to act as under writer, guarantors and to lend or deal with money either with or without interest or securities to such individuals, firms, bodies, corporate and institutions and upon such terms and conditions as the company may think fit but not amounting to banking business as defined under the Banking Regulation Act, 1949.*
2. *To carry on and undertake the business of financing, loan advancing and advancing, with or without security to any person whether individual, firms, H.U.F., body corporate financing on hire, purchase operation and on secured/unsecured at mutual terms and conditions assisting or subsidizing or financing the sale/Purchase of any goods or commodities financing or deferred payments all and every types of commodities, movables or immovable properties, irrespective of new and/or old viz. land, building, properties, all types of automobile, motor vehicle, plant and machinery, consumers products electronic goods, ships and air crafts."*

20. Section 3, sub-section (37) of the Code provides that words and expression used but not defined in this Code but defined in its own Act etc. including the Securities Contact (Regulation) Act, 1956 and the Securities Exchange Board of India Act, 1992 shall have the meanings respectively assigned to them in those Acts. The 'security' has been defined in Securities Contact (Regulation) Act, 1956 in Section 2(h), which is as follows:

"2(h) "securities" include—

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Page 9 Monday, May 18, 2026
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(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ia) derivative;

(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;

[(ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

[(id) units or any other such instrument issued to the investors under any mutual fund scheme;

(ii) Government securities;

(iia) such other instruments as may be declared by the Central Government to be securities; and

(iii) rights or interest in securities;"

21. The Code defines expression "financial product" in Section 3, subsection (15), which is to the following effect:

"3(15) "financial product" means securities, contracts of insurance, deposits, credit arrangements including loans and advances by banks and financial institutions, retirement benefit plans, small savings instruments, foreign currency contracts other than contracts to exchange one currency (whether Indian or not) for another which are to be settled immediately, or any other instrument as may be prescribed;

22. "Financial service" and "financial service provider" are defined in Section 3, sub-sections (16) and (17), which are as follows:

"3(16) "financial service" includes any of the following services, namely:—

(a) accepting of deposits;

(b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;

(c) effecting contracts of insurance;

(d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person;

(e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of—

(i) buying, selling, or subscribing to, a financial product;

(ii) availing a financial service; or

(iii) exercising any right associated with financial product or financial service;

(f) establishing or operating an investment scheme;

(g) maintaining or transferring records of ownership of a financial

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Page 10 Monday, May 18, 2026
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product;

(h) underwriting the issuance or subscription of a financial product; or

(i) selling, providing, or issuing stored value or payment instruments or providing payment services;

(17) "financial service provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator;"

23. The Application under Section 7 of the Code can be filed against a Corporate Debtor. The 'Corporate Debtor' is defined in Section 3, subsection (8), which is to the following effect:

"3(8) "corporate debtor" means a corporate person who owes a debt to any person;"

24. Expression 'Corporate Debtor' means a 'corporate person', which is defined in Section 3, sub-section (7), which is to the following effect:

"3(7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;"

25. The last words in the definition of Section 3(7) are "*but shall not include any financial service provider*". Thus, any Financial Service Provider are expressly excluded from the definition of 'corporate person', which clearly mean that they are not the Corporate Debtor against whom Section 7 Application can be initiated.

26. Section 227 of the Code empowers the Central Government to notify Financial Service Provider against whom insolvency resolution process can be conducted under the Code. Section 227 of the Code is as follows:

"227. Power of Central Government to notify financial sector providers etc.- Notwithstanding anything to the contrary 1 [contained in this Code] or any other law for the time being in force, the Central Government may, if it considers necessary, in consultation with the appropriate financial sector regulators, notify financial service providers or categories of financial service providers for the purpose of their insolvency and liquidation proceedings, which may be conducted under this Code, in such manner as may be prescribed.

Explanation.- For the removal of doubts, it is hereby clarified that the insolvency and liquidation proceedings for financial service providers or categories of financial service providers may be

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Page 11 Monday, May 18, 2026
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conducted with such modifications and in such manner as may be prescribed."

27. The Central Government issued Notification dated 18th November, 2019, which Notification is as follows:

"MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

New Delhi, the 18th November, 2019

S.O. 4139(E).—In exercise of the powers conferred by section 227 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government in consultation with the Reserve Bank of India hereby notifies as under:

The insolvency resolution and liquidation proceedings of the following categories of financial service providers shall be undertaken in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 read with the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (in this notification referred to as the 'Rules') and the applicable Regulations:

Sl. No.	*Category of Financial Service Provider (rule 2 of the Rules*	*Appropriate Regulator [clause (a) of sub-rule (1) of rule 3 of the Rules]*	*Dealing with third-party assets (rule 10 of the Rules)*
(1)	*(2)*	*(3)*	*(5)*
1	*Non-banking finance companies (which include housing finance companies) with asset size of Rs. 500 crore or more, as per last audited balance sheet*	*Reserve Bank of India*	*To be notified separately"*

28. The learned Counsel for the Appellant-NSE has also referred to the Report of Sub-Committee of the Insolvency Law Committee. The said Committee was constituted for insolvency of Financial Service Provider under Section 227, by order dated 16th August, 2019 of the Central Government, Govt. of India, Ministry of Corporate Affairs. In the Report, the Sub-Committee noted the rationale of different procedure for Financial Service Provider. In the Introduction of the Report, following has been stated:

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Page 12 Monday, May 18, 2026
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"The Insolvency and Bankruptcy Code, 2016 (IBC/Code) provides a consolidated framework for the reorganisation, insolvency resolution and liquidation of corporate persons, limited liability partnerships, partnership firms and individuals n a time-bound manner. The definition of 'corporate person' under the IBC does not include any financial service provider (FSP). However, section 227 of the IBC empowers the Central Government in consultation with the appropriate financial sector regulators to notify FSPs or categories of FSPs for the purpose of their insolvency and liquidation proceedings which may be conducted under the IBC. The definition of an FSP under the IBC means a person engaged in the business of providing financial services in terms of an authorisation issued or registration granted by a financial sector regulator. Therefore, only a regulated entity is an FSP. The definition of financial services includes services such as accepting deposits, safeguarding and administering assets consisting of financial products belonging to another person, effecting contracts of insurance and offering, managing or agreeing to manage assets consisting of financial products belonging to another person (amongst other financial services). The rationale behind the exclusion of FSPs from the purview of the IBC is that financial firms are different from other firms. Compared to other firms which mostly rely on equity and debt, many FSPs handle large amounts of consumers' money. Moreover, some of them are systemically important as their failure might disrupt the financial system and have an adverse effect on the economy. The Committee to Draft Code on Resolution of Financial Firms (2016) had noted as follows:

"Standard insolvency and bankruptcy processes are usually not considered suitable for financial firms, particularly for those that handle consumer funds and those considered to be of systemic significance. Further, such processes, even if they are efficient, tend to drag on for longer periods of time than are acceptable for instances of financial firm failure, exacerbating the threats to consumer funds and systemic stability. Also, the fear of a financial firm going into a long-winded process may trigger "runs" on these firms even when they have not really failed. Hence, it is important to have a credible resolution regime under an expert statutory institution that is able to ensure efficient, orderly and fair resolution of financial firms."

The Committee, in addition to recommending a specialised resolution framework for certain FSPs, had also recommended that certain other FSPs could be covered under the IBC. In this regard, it had noted the following:

"Only certain financial firms that do not handle consumers' money

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Page 13 Monday, May 18, 2026
Printed For: Mr. Rajeeve Mehra
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and do not pose systemic risk may be covered under the Insolvency and Bankruptcy Code, as the rationale for covering under a specialised resolution regime does not apply to such firms"

29. It is also relevant to notice that Sub-Committee Report contains- Part-I-Introduction, Part-II-Key Issues and Conclusions in Relation to Formulating a Framework for the Resolution of FSPs under the IBC and there were seven annexures along with Report. Annexure-6 of the Report contains a heading "*An overview of the entities engaged in the business of providing financial services in India"*. Under the heading "B", i.e., "*Securities and Exchange Board of India (SEBI)"* details of 'Category of Financial Services Provider (FSP)' are mentioned. It is useful to extract heading "B" of Annexure-6, which is as follows:

"B. Securities and Exchange Board of India (SEBI)

Sl. No.	Category of Financial Service Provider (FSP)	As on	Total
1	Stock Exchanges	Sep 15, 2019	6
2	Commodity Derivative Exchanges	Sep 15, 2019	3
3	Depositories	Sep 15, 2019	2
4	Clearing Corporations	Sep 15, 2019	7
5	Registered Alternative Investment Fund	Sep 15, 2019	608
6	Registered Stockbrokers in equity segment	Sep 15, 2019	3,357
7	Registered Stockbrokers in Equity Derivative Segment	Sep 15, 2019	2,797
8	Registered Stockbrokers in Currency Derivative Segment	Sep 15, 2019	2,723
9	Registered Stockbrokers in interest Rate Derivative Segment	Sep 15, 2019	1,351
10	Registered Stockbrokers in	Sep 15, 2019	239

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Page 14 Monday, May 18, 2026
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	Interest Rate Derivative Segment		
11	Registered Stockbrokers in Commodity Derivative Segment	Sep 15, 2019	2,318
12	Banker to an Issue	Sep 15, 2019	65
13	Credit Rating Agency-CRA	Sep 15, 2019	7
14	Registered Collective Investment Management Company	Sep 15, 2019	1
15	Registered Custodians of Securities	Sep 15, 2019	19
16	Debentures Trustee	Sep 15, 2019	32
17	Designates Depository Participants	Jan 10, 2019	16
18	Qualified Depository Participants	Apr 17, 2017	62
19	Registered Depository Participants-CDSL	Sep 15, 2019	617
20	Registered Depository Participants-NDSL	Sep 15, 2019	287
21	FPIs/Deemed FPIs (Erstwhile FIIs/QFIs)	Sep 15, 2019	9,850
22	Registered Foreign Venture Capital Investors	Sep 15, 2019	251
23	Investment Adviser	Sep 15, 2019	1,239
24	Registered Infrastructure Investment Trusts	Sep 15, 2019	10
25	KYC (Know Your Client) Registration	Apr 17, 2017	5

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Page 15 Monday, May 18, 2026
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	Agency		
26	Merchant Bankers	Sep 15, 2019	214
27	Registered Mutual Funds	Sep 15, 2019	45
28	Registered Portfolio Managers	Sep 15, 2019	352
29	Registrars to an issue and share Transfer Agents	Sep 15, 2019	79
30	Research Analyst	Sep 15, 2019	664"

30. What is relevant from the above Report is that Sub-Committee also accepted that Registered Stockbrokers in different segments are Financial Service Providers. On the basis of the Sub-Committee Report, Rules have been notified being Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019, which Rules governs insolvency proceedings against the Financial Service Provider.

31. Now we come to the definition of 'Financial Service' as contained in Section 3(16) of the Code. Section 3(16), sub-clause (e) provides:

"3(16)(e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of—

(i) buying, selling, or subscribing to, a financial product;

(ii) availing a financial service; or

(iii) exercising any right associated with financial product or financial service;"

32. When we look into the Memorandum of Association of both the Corporate Debtors against whom Section 7 Applications have been admitted, their services are fully covered by Section 3(16)(e), which is an inclusive definition. The Stock Brokers are also regulated by SEBI (Stock-Brokers and Sub-Brokers) Regulations, 1992. The Stock Brokers are required to be registered with SEBI. The 'Financial Service Provider' and 'Financial Sector Regulator' are defined in Sections 3(17) and 3 (18), which are to the following effect:

"3(17) "financial service provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator;"

(18) "financial sector regulator" means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government;"

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Page 16 Monday, May 18, 2026
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33. The SEBI is Financial Sector Regulator. The Stock Brokers and Sub-Brokers under the SEBI (Stock-Brokers and Sub-Brokers) Regulations, 1992 are required to be compulsorily registered under Section 3. Regulation contains details of obligation and responsibilities of the Stock Brokers. Schedule-II Regulation, 1992 provides for 'Code of Conduct for Stock Brokers'. The Stock Brokers under heading "B" - Duty to the Investor includes-Investment Advice in publicly accessible media. The Stock Brokers, who are covered by the Regulation 1992 are subject to various obligation and duties towards Investors and from the nature of activities as contained in the Memorandum of Association of both the Corporate Debtors, they clearly fall within the definition of 'Financial Service Provider'.

34. We may also notice that SEBI and NSE have a mechanism for disposal of complaints by Investor. As noted above in Company Appeal (AT) (Insolvency) No. 379 of 2021, the Financial Creditor-Respondent No. 1 filed a complaint on 11.07.2019 against the Corporate Debtor, which complaint was examined and rejected on 16.08.2019, holding that no claim is due towards Respondent No. 1 by the Corporate Debtor. The complaint filed by Respondent No. 1 was for the same amount, i.e., Rs. 1,01,74,985/- for which debt Section 7 Application was filed. NSE also has By-laws for dealing with the complaints of Investors and Financial Service Providers, which are covered by specific legislature and are regulated by Financial Regulator, which has its own statutory provisions, mode and manner of regulation. Legislature was well aware of the intricate nature of the financial services and have purposely kept Financial Service Providers out of the procedure prescribed under the Code with exception of Notification on Financial Service Provider under Section 227 by the Central Government.

35. The learned Counsel for the Appellant has also referred to judgments of this Tribunal, where this Tribunal held that Financial Service Providers are not amenable to proceedings under Section 7 of the Code. We may refer to the judgment of this Tribunal in Company Appeal (AT) (Insolvency) Nos. 32 and 50 of 2018 - *Randhiraj Thakur* v. *Jindal Saxena Financial Service Private Limited* In paragraph 10 and 11, this Tribunal held following:

> *"10. If the entire scheme of the I&B Code is seen, it will be evident that the Code is to consolidate and amend the laws relating to reorganisation and insolvency resolution of 'corporate persons', 'partnership firms' and 'individual' in a time bound manner. It is a self-contained Code which is exhaustive in nature when it comes to reorganisation and insolvency resolution. However, an exception had been carved out while enacting the Code that the 'financial service providers' have been kept outside the purview of the Code. Being a consolidating legislation only those acts are permitted which are*

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mentioned in the Code and it cannot be made applicable to 'financial service providers' including 'non-banking financial institutions' and MFI's banks, which have been kept outside the purview of the Code.

11. The Adjudicating Authority has failed to notice the aforesaid provisions and passed the impugned order dated 8th January, 2018 initiating 'insolvency corporate resolution process' against 'M/s. Mayfair Capital Pvt. Ltd.', a 'financial service provider' (non-banking financial company)."

36. This Tribunal in Company Appeal (AT) (Insolvency) No. 26 of 2019 - *Housing Development Finance Corporation Ltd.* v. *RHC Holding Private Ltd.* has again noticed the relevant provisions of the Code and held that non-banking financial institution, carrying on business of financial institution is a financial service provider and do not come within the meaning of Corporate Person/Corporate Debtor.

37. The NSE has also brought on record the Circulars issued by Securities and Exchange Board of India dated November 6, 2020 on the subject Investor Grievance Redressal Mechanism, which indicates that SEBI has its own mechanism for redressal of grievances, which arose regarding service-related complaint. In fact, a complaint was filed by Vipul H Raja against the Corporate Debtor as noted above for the very same amount, which was considered and rejected by complaint mechanism. The Financial Creditor-Respondent No. 1 without being deterred by the said rejection has filed Section 7 Application, which was wholly incompatible.

38. Now we come to the impugned orders passed in both the Appeal (s). In order dated 06.04.2021, the Adjudicating Authority has observed that if a company engaged in the business of Stock Broking or derivative transactions was to be considered as a Financial Service Provider and was to be excluded from the CIRP proceedings, then provisions of Section 5(8)(g) would have not been in existence. In paragraph 31 of the judgment, following observations have been made:

"31. It is to be mentioned herein that, if a company engaged in the business of Stock Broking or derivative transactions was to be considered as a Financial Service Provider (FSP) and was to be excluded from the CIRP proceedings, then the provisions of Section 5 (8)(g) of the Code would have not been in existence and that the object of the law is not to have contradictions amongst the provisions of Section 3(16)(e) and Section 5(8)(g) of the Code. That apart, the provisions of Section 5(8)(g) of the Code are well incorporated with an intention to include the companies engaged in Stock Broking business and derivative transactions, since no companies other than those registered with SEBI can enter into such transactions. Hence, the Respondent is not covered under the

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Page 18 Monday, May 18, 2026
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definition of Financial Service Provider rather it is well covered under the definition of the Corporate Person and thus, it falls under the category of Corporate Debtor."

39. Section 5(8)(g), which has been relied by the Adjudicating Authority cannot be read dehors from other definitions given in Section 5(7) and 5(8). Section 5(8)(g), on which Adjudicating Authority relied is as follows:

"5(8)(g). any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;"

40. Section 5(8)(g) has to be read harmoniously with Section 7 and Section 5(7) and 5(8). Section 5(8)(g) cannot be read in any manner that financial service providers are also covered under Section 5(8)(g). The Adjudicating Authority misconstrued the provisions of the Code and on finding that debt is payable by the Corporate Debtor, admitted Section 7 Application. The order of the Adjudicating Authority against the Corporate Debtor namely-Simandhar Broking Ltd., who being the Financial Service Provider was an entity against whom no proceedings under Section 7 could have been initiated. Initiation of Section 7 proceedings was itself non-maintainable and Adjudicating Authority ought to have rejected the Application.

41. Now, coming to the order dated 25.11.2021, it is seen that the Applicant was none-less than the Ex-Director of the Corporate Debtor, who filed the Application claiming to have advanced the loan to the Corporate Debtor. The learned Counsel for the NSE has brought on record the Show Cause Notice dated 07.07.2021, which was issued to Corporate Debtor through Hemant Kumar Gupta, the Applicant (Respondent No. 1 herein). The proceedings initiated by Respondent No. 1 were clearly intended to stall the proceedings initiated by NSE by taking the benefit of moratorium and was not initiated with any object of insolvency resolution of Corporate Debtor. The Adjudicating Authority in the impugned order dated 25.11.2021 has not noticed the relevant provisions pertaining to Financial Service Provider. The Corporate Debtor, who was Stock Broker was not keen to raise any objection that Application under Section 7 is not maintainable against the Financial Service Provider. The intent of the proceeding was to save the Applicant from proceedings initiated by NSE. Hence, the Corporate Debtor neither shown to have genuinely contested the proceedings, nor Adjudicating Authority has adverted to the relevant provisions and facts of the case. The order dated 25.11.2021, admitting Section 7 Application is, thus, clearly untenable. The submission of Respondent that NSE has no *locus* to file Appeal against the order dated 25.11.2021, suffice it to say that NSE being Market Regulator with whom Corporate Debtor was

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registered, has sufficient *locus* to challenge the order.

42. In view of the foregoing discussions, we are of the considered opinion that both the Corporate Debtors, i.e. Simandhar Broking Ltd. and M/s. Astitva Capital Market Private Limited being registered Broker with SEBI and Trading Member of the NSE are providing services, which are 'financial services' within the meaning of definition of Section 3(16) of the Code and by virtue of Section 3(7) read with Section 3(8) and Section 227 of the Code, Section 7 Application filed by Corporate Debtors were not maintainable. The orders passed by Adjudicating Authority in both the Appeal(s) deserve to be set-aside.

43. Now coming to the Intervention Application No. 3409 of 2023 filed by Smt. Prem Kumari, we have already found that initiation of CIRP itself was unsustainable. The CIRP against the Corporate Debtor comes to an end and it shall be open to the Applicant to proceed before the Commercial Court as mentioned in the Intervention Application.

44. The RPs/IRPs in both the Appeal(s) are discharged. It shall be open to the RPs/IRPs to make an appropriate Application for their fee and expenses, if not paid in the CIRP against the Applicants, who filed Section 7 Application. The Adjudicating Authority may consider the Application and pass an appropriate order on the Application for fee and expenses.

45. In result, both the Appeal(s) are allowed in following terms:

(I) Company Appeal (AT) (Ins.) No. 379 of 2021 is allowed. The order dated 06.04.2021 is set-aside. The CIRP against the Corporate Debtor is closed. The RP/IRP stands discharged.

(II) Company Appeal (AT) (Ins.) No. 749 of 2022 is allowed. The order dated 25.11.2021 is set-aside. The RP/IRP stands discharged.

46. Parties shall bear their own costs.

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[*] Principal Bench New Delhi

[†] Arising out of Order dated 06.04.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad in CP (IB) No. 510/7/NCLT/AHM/2019

[‡] Arising out of Order dated 25.11.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-IV in (IB) 397 (ND)/2021

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