**(2024) 04 NCLAT CK 0004**

**National Company Law Appellate Tribunal New Delhi**

**Case No:** Company Appeal (AT) (Insolvency) No. 121 Of 2023 & I.A. No. 4828 Of 2023

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| Arunkumar Jayantilal Muchhala | | APPELLANT |
| | Vs | |
| Awaita Properties Pvt Ltd & Anr | | RESPONDENT |

**Date of Decision:** April 2, 2024

**Acts Referred:**

- Insolvency and Bankruptcy Code, 2016 - Section 3(12), 3(33), 5(8), 5(8)(f), 7, 7(1), 7(4), 7(5), 8, 9, 61

**Hon'ble Judges:** Ashok Bhushan, Chairperson; Barun Mitra, Member (T)

**Bench:** Division Bench

**Advocate:** Dhruba Mukherjee, Anando Mukherjee, Maulik Chokshi, Shwetank Singh, Krishnendu Datta, Shikhil Suri, Vidhi Kapor, Ishita Ahuja, Kunal Godhwani, Mithilesh Kumar Pandey

**Final Decision:** Disposed Of

**Judgement**

Barun Mitra, Member (Technical)]

1. The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('IBC' in short) by the Appellant arises out of the Order dated 06.12.2022 (hereinafter referred to as 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court-III) in C.P. No. 4076/IBC/MB/2018. By the impugned order, the Adjudicating Authority has admitted the Section 7 application filed by Awaita Properties Private Limited - Financial Creditor/Respondent No. 1 against Tarapur Textile Park Ltd. - Corporate Debtor for a default amount of Rs. 8,56,30,137/-. Aggrieved by this impugned order, the present appeal has been preferred by the ex-Director of the Corporate Debtor.

2. We have heard Shri Dhruba Mukherjee, Learned Sr. Counsel appearing for the Appellant, Shri Krishnendu Dutta, Learned Sr. Counsel for Respondent No. 1 and Shri Kunal Godhwani, Learned Counsel for the Resolution Professional.

3. Making his submissions, the Learned Sr. Counsel for the Appellant submitted that Mr. Nikhil Gandhi, Director of Respondent No. 1 Company who exercised control over some other associated companies also had shown interest in the development of a land project, namely, 'Boisar Project Land' in which the land was owned by the Appellant. Towards development of the said project on the land belonging to the Appellant, Shri Nikhil Gandhi decided to join as a joint venture partner through a company controlled by him, namely, SKIL Infrastructure Limited ('SKIL' in short) and agreed that SKIL would transfer Rs. 45 crore to the Corporate Debtor company as interest free security. However, due to financial difficulties faced by SKIL, an amount of Rs. 5 crore was transferred by Shri Nikhil Gandhi through Awaita Properties Private Limited, present Respondent No. 1, on 01.01.2014 as part payment of Rs. 45 crore to the account of Corporate Debtor. It was further submitted that due to persisting financial difficulties of SKIL, the balance amount of Rs. 40 crore was not paid and the joint venture could not proceed. Subsequently, due to estrangement of marital relations between daughter of Mr. Nikhil Gandhi and the son of the ex-Director of the Corporate Debtor company and consequential discord between them, it was stated that the Respondent No. 1, in retaliation, sent a Demand Notice on 20.02.2018 followed by a lawyer's notice on 30.05.2018 to the Corporate Debtor. The Demand Notice was replied to on 26.02.2018. Thereafter, Respondent No. 1 proceeded to file a Section 7 petition on 24.10.2018 which was wrongly admitted by the Adjudicating Authority on 06.03.2022.

4. It has been contended by the Appellant that Respondent No. 1 has falsely treated the amount of Rs. 5 crore as a loan carrying an alleged interest of 15% p.a. The Learned Counsel for the Appellant contended that there are no documents on record to either show that the amount of Rs. 5 crore given by Respondent No. 1 to the Corporate Debtor was a loan or that the said alleged loan was interest-bearing as has been claimed by Respondent No. 1. It was further submitted that Respondent No. 1 had on his own declared that Corporate Debtor had committed a default in payment on 15.03.2016 though there existed no schedule for repayment. It is also contended that Respondent No. 1 had produced self-created books of account of the Corporate Debtor to claim the outstanding amount of Rs. 8.56 crore and that such self-created Annual Reports and Balance Sheets could not have been relied upon by the Adjudicating Authority in admitting the Section 7 application. It was vehemently asserted that the disbursal of Rs. 5 crore was not in the nature of a loan but a part payment deposit for the purpose of developing the land project. Hence Respondent No. 1 did not fall in the category of 'financial creditor' and the outstanding amount claimed by Respondent No.

1 is not in the nature of 'financial debt' in terms of the statutory construct of IBC, basis which Section 7 application could not have been admitted.

5. Submission was pressed that there is no agreement or document which established that the amount of Rs. 5 crore given by Respondent No. 1 to Corporate Debtor was towards a working capital loan. It was stressed that Respondent No. 1 had produced self-created books of account of the Corporate Debtor to claim the outstanding amount as financial debt. It was also contended that the onus clearly lay on the Respondent No. 1 to show that the Corporate Debtor had received a loan and had committed a default in the repayment of the above amount which fact the Respondent No. 1 has failed to effectively demonstrate. Assailing the impugned order, the Learned Counsel for the Appellant submitted that the Adjudicating Authority had wrongly shifted the onus on the Corporate Debtor to prove that said amount was not due. The Adjudicating Authority had erred in proceeding to admit the Section 7 application without proper adjudication as to whether the debt was due and payable.

6. Refuting the submissions made by the Appellant, the Learned Sr. Counsel for Respondent No. 1 contended that the sum of Rs. 5 crore was advanced by Respondent No. 1 to Corporate Debtor by way of a loan on an understanding that the loan would be re-payable on demand alongwith interest at the rate of 15% p.a. The said transaction was disbursed by RTGS transfer and the bank has certified the same. This clearly establishes the debt. It was pointed out that the Corporate Debtor by adverting reference to an unexecuted MOU was trying to mislead the Adjudicating Authority by linking this transaction with some other purported transaction proposed to be entered into between the Corporate Debtor and SKIL. It was asserted that Respondent No. 1 was not even a party to this draft MOU and hence it was not binding on them. This ploy was resorted to by the Corporate Debtor with the ulterior motive of denying the 'financial debt' so as to evade the liability of payment of outstanding dues and escape CIRP proceedings. Asserting that this loan transaction of Rs. 5 crore between Respondent No. 1 and Corporate Debtor was an independent transaction and unrelated with SKIL and SKIL was not in the picture at all. It has also been pointed out that the ledger of the Corporate Debtor maintained in the books of account of Respondent No. 1 clearly establishes that an amount of Rs. 5 crore was given to Corporate Debtor through RTGS transfer. It was also contended that Corporate Debtor has not denied admission of the receipt of Rs. 5 crore either. The said loan had been given on interest terms and hence the closing balance of the books of account reflected the outstanding amount to be Rs. 8.56 crores. Moreover, the fact that this amount was shown in the balance sheet under the head of 'Long Term Borrowings - Unsecured loan from Related Parties' clearly shows that the outstanding amount was in the nature of a financial debt. It was emphatically asserted that adequate opportunity was given by the Adjudicating Authority to the Corporate Debtor to produce their

books of accounts to controvert the contentions raised by Respondent No. 1. But they did not avail of this chance on their own volition and hence cannot now raise the plea that the Adjudicating Authority had wrongly shifted the onus of proof on them.

7. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

8. The primary issue before our consideration is whether in the backdrop of the statutory provisions of IBC, the outstanding amount of Rs. 5 crore disbursed by Respondent No. 1 to Corporate Debtor is in the nature of financial debt, and, whether in the facts of the present case, there has been a default in the re-payment of the said loan by the Corporate Debtor which entitled the Respondent No. 1 to file a Section 7 application in the capacity of a Financial Creditor qua the Corporate Debtor.

9. Before we proceed to answer the question as outlined above, it would be constructive for us to run our eyes through some of the relevant definition clauses which find place in Sections 3 and 5 under Part II Chapter I Preliminary of the IBC:

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

**5(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.**

**5(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-**

**(a) money borrowed against the payment of interest;**

**(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;**

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

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

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

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

**[Explanation. -For the purposes of this sub-clause,-**

**(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and**

**(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses**

**(d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]**

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

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

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

10. Now that we have perused the definition clauses, it will be useful for us to also take notice of the guiding principles laid down by the Hon'ble Apex Court as to when a debt is to be treated as a financial debt in the context of IBC. In **Pioneer Urban Land and Infrastructure Ltd. v. Union of India (2019) 8 SCC 416**, it has been held that any debt to be treated as financial debt, there must happen disbursal of money and the disbursal must be against consideration for time value of money. The concept of time value of money has been further explained to also include a transaction which does not necessarily culminate into money being returned to the lender or interest being paid in respect of money that has been borrowed. Holding Section 5(8) to be a residuary provision which has a catch-all nature, it held that it can include anything which is equivalent to the money that has been loaned as long as commercial effect of borrowing or profit as the aim is discernible. The relevant excerpts of this judgment are as extracted under:

**"70. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in Black's Law Dictionary (10th Edn.) to mean:**

**"1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose."**

**71. In the present context, it is clear that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money. Thus far, it is clear that an allottee "disburses" money in the form of advance payments made towards construction of the real estate project. We were shown the Dictionary of Banking Terms (2nd Edn.) by Thomas P. Fitch in which "time value for money" was defined thus:**

**"present value : today's value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the time value of money. Today's value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis."**

**That this is against consideration for the time value of money is also clear as the money that is "disbursed" is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).**

**75. And now to the precise language of Section 5(8)(f). First and foremost, the sub-clause does appear to be a residuary provision which is "catch all" in nature. This is clear from the words "any amount" and "any other transaction" which means that amounts that are "raised" under "transactions" not covered by any of the other clauses, would amount to a financial debt if they had the commercial effect of a borrowing. The expression "transaction" is defined by Section 3(33) of the Code as follows:**

**3. (33) "transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;**

**As correctly argued by the learned Additional Solicitor General, the expression "any other transaction" would include an arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay**

**instalments at various stages of construction, so that they themselves then fund the project either partially or completely.**

**76. Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing. We were referred to Collins English Dictionary & Thesaurus (2nd Edn., 2000) for the meaning of the expression "borrow" and the meaning of the expression "commercial". They are set out hereinbelow:**

**"borrow.-vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard. to lend. 4. (intr) Golf. To putt the ball uphill of the direct path to the hole : make sure you borrow enough."**

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**"commercial.-adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser : commercial television. 3. having profit as the main aim : commercial music. 4. (of chemicals, etc.) unrefined and produced in bulk for use in industry. 5. a commercially sponsored advertisement on radio or television."**

**77. A perusal of these definitions would show that even though the petitioners may be right in stating that a "borrowing" is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression "borrow" is wide enough to include an advance given by the homebuyers to a real estate developer for "temporary use" i.e. for use in the construction project so long as it is intended by the agreement to give "something equivalent" to money back to the homebuyers. The "something equivalent" in these matters is obviously the flat/apartment. Also of importance is the expression "commercial effect". "Commercial" would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is "raised" under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have "commercial" interests in the same-the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even**

**without adverting to the Explanation introduced by the Amendment Act.**

**(Emphasis supplied)**

11. The Hon'ble Supreme Court while dilating on this subject in the matter of **Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. v. Axis Bank Limited & Ors. (2020) 8 SCC 401** propounded that in terms of Section 5(8) of the IBC, the essential condition of financial debt is disbursement against the consideration for time value of money. The relevant portion of the said judgement is to the effect:

**"46. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become "financial debt" for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of "disbursement" against "the consideration for the time value of money" could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said clauses (a) to (i) of Section 5(8) would be falling within the ambit of "financial debt" only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as "financial debt" within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money."**
**(Emphasis supplied)**

12. Equally important to note is the judgment of Hon'ble Supreme Court in **Orator Marketing (P) Ltd. v. Samtex Desinz (P) Ltd. (2023) 3 SCC 753,** wherein it has been clearly held that financial debt does not expressly exclude an interest-free loan. The

Hon'ble Supreme Court in this judgment has observed:

**"21. The definition of "financial debt" in Section 5(8) IBC has been quoted above. Section 5(8) defines "financial debt" to mean "a debt along with interest if any which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest, as per Section 5(8)(a) IBC. The definition of "financial debt" in Section 5(8) includes the components of sub-clauses (a) to (i) of the said Section.**

**22. NCLT and NCLAT have overlooked the words "if any" which could not have been intended to be otiose. "Financial debt" means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLAT and NCLT have failed to notice clause (f) of Section 5(8), in terms whereof "financial debt" includes any amount raised under any other transaction, having the commercial effect of borrowing.**

**23. Furthermore, sub-clauses (a) to (i) of sub-section (8) of Section 5 IBC are apparently illustrative and not exhaustive. Legislature has the power to define a word in a statute. Such definition may either be restrictive or be extensive. Where the word is defined to include something, the definition is prima facie extensive.**

**31. At the cost of repetition, it is reiterated that the trigger for initiation of the corporate insolvency resolution process by a financial creditor under Section 7 IBC is the occurrence of a default by the corporate debtor. "Default" means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of "debt" is also expansive and the same includes, inter alia, financial debt. The definition of "financial debt" in Section 5(8) IBC does not expressly exclude an interest free loan. "Financial debt" would have to be construed to include interest free loans advanced to finance the business operations of a corporate body."**

**(Emphasis supplied)**

13. Having taken cognizance of the statutory provisions of IBC as reproduced above and the reigning judgements of the Hon'ble Apex Court, we can safely conclude that it is settled law that for any debt to be treated as financial debt, the pre-requisite is disbursal of money to the borrower for utilization by the borrower and that the disbursal must be against consideration for time value of money even if it is not interest bearing.

14. This brings us to the next logical corollary as to when a Financial Creditor who has disbursed money to a Corporate Debtor against consideration for time value of money can trigger the insolvency resolution process against the Corporate Debtor. As per the scheme of IBC, that stage arises when a default takes place, in the sense that a debt which has become due, in fact and in law, but has not been paid. "Default" as defined in Section 3(12) of IBC means non-payment of a debt once it becomes due and payable, and non-payment could be of the whole amount or even part thereof. This has been elaborately discussed by the Hon'ble Supreme Court in the case of **Swiss Ribbons Private Limited and Anr. Versus Union of India and Ors. (2019) 4 SCC 17** as under:

**"23. A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.**

**24. A financial creditor may trigger the Code either by itself or jointly with other financial creditors or such persons as may be notified by the Central Government when a "default" occurs. The Explanation to Section 7(1) also makes it clear that the Code may be triggered by such persons in respect of a default made to any other financial creditor of the corporate debtor, making it clear that once triggered, the resolution process under the Code is a collective proceeding in rem which seeks, in the first instance, to rehabilitate the corporate debtor. Under Section 7(4), the adjudicating authority shall, within the prescribed period, ascertain the existence of a default on the basis of evidence furnished by the financial creditor; and under Section 7(5), the adjudicating authority has to be satisfied that a default has occurred, when it may, by order, admit the application, or dismiss the application if such default has not occurred. On the other hand, under Sections 8 and 9, an operational creditor may, on the occurrence of a default, deliver a demand notice which must then be replied to within the specified period. What is important is that at this stage, if an application is filed before the adjudicating authority for initiating the corporate insolvency resolution process, the corporate debtor can prove that the debt is disputed. When the debt is so disputed, such application would be rejected."**

15. Given this backdrop, we may now analyse the rival submissions made by both parties to find out whether a case of financial debt and default thereof has been effectively made out in the facts of the present case.

16. While admitting that a sum of Rs. 5 crore was disbursed to the Corporate Debtor, it has been emphatically asserted by the Appellant that a financial contract is a must between the Corporate Debtor and the Financial Creditor to establish that the disbursal made was in the form of a loan. The letter from the bank produced by Respondent No. 1 only shows that transfer of the sum of Rs. 5 crore took place but does not show it as a loan. It is contended that only a contract between the parties could have set out the terms of the financial debt including the tenure of the debt, the applicable rate of interest and date of repayment. In the absence of any document, mere assertion that it was a loan repayable on demand does not have any legs to stand on.

17. When we look at the facts of the present case, we find that it is an undisputed fact that a sum of Rs. 5 crore was transferred to the account of Corporate Debtor and the disbursal of this amount took place on 01.01.2014. Sufficient material has been placed on record by the Respondent No. 1 to prove that money was actually disbursed to the Corporate Debtor. The RTGS bank transfer details as well as a letter from the Bank authorities testifying that an amount of Rs. 5 crore was paid from the account of Respondent No. 1 to Corporate Debtor on 01.01.2014 has been placed at page 55-56 of the Appeal Paper Book ("APB" in short). That this money was received by the Corporate Debtor has also not been denied by the Corporate Debtor. Neither has any claim been made that any part of this sum was repaid by the Corporate Debtor. Respondent No. 1 has thus produced incontrovertible and unimpeachable evidence to prove the existence of debt liability on the part of the Corporate Debtor.

18. In the present case, the Respondent No. 1 has submitted a bank certificate to substantiate the disbursal of funds to the Corporate Debtor and validated the same with the Annual Reports and Balance Sheets of the Corporate Debtor to show that it was a loan. Respondent No. 1 has placed on record the Balance Sheet of the Corporate Debtor wherein this amount has been shown under the head of 'Long Term Borrowings - Unsecured loan from Related Parties'. This clearly evidences that the disbursal was a loan. Even the notice sent by the Respondent No. 1 on 20.02.2018 as placed at pages 58-59 of the APB clearly stated that they had extended a loan to the Corporate Debtor to meet its working capital requirements repayable on demand at an interest rate of 15% p.a. Keeping in mind that there was no document/agreement in respect of the loan amount, it is quite natural that there was no document/agreement which determined the payment of interest and the rate of interest but that cannot be a ground for assuming that the loan was not interest-bearing. It is an undisputed fact that the Respondent No. 1 has not placed on record any document which shows that the disbursal made was in the nature of loan wherein interest was specifically payable. Be that as it may, we are of the considered opinion that the IBC does not provide for any prescriptive requirement for the Financial Creditor to place on record formal written agreements/documents between the parties to establish that the disbursal

made was in the form of loan with interest. Given this background we therefore find that the Adjudicating Authority committed no error in holding that there was a financial debt owed by the Corporate Debtor to Respondent No. 1.

19. As long as there are clear acknowledgments of such debts in the statements of accounts of the Corporate Debtor, the Financial Creditor is not impeded in filing a Section 7 application and the Adjudicating Authority is required to look into the evidence of default as furnished in Part-V of Form-1 of the application filed by the Financial Creditor. Both these requirements have been met in the present case. In terms of Section 7 of IBC, a financial creditor is entitled to file an application for initiation of CIRP of the Corporate Debtor when a default is committed by the Corporate Debtor. The Financial Creditor is required to file the Section 7 application along with proof of default above the threshold limit.

20. We notice that in the interest of meeting the ends of justice and adhering to the precepts of natural justice, the Adjudicating Authority in the present matter gave a clear and specific opportunity to the Corporate Debtor to produce their books of accounts to defend their case as is recorded at para 31 of the impugned order. The Corporate Debtor however did not avail of this opportunity to place on record the ledger copies of the Respondent No. 1 in the books of the Corporate Debtor or filed any documents of their own to controvert the alleged self-created books of their accounts by the Corporate Debtor. That being so it does not behove of the Appellant to now cry hoarse that the Adjudicating Authority had wrongly shifted the onus on them to refute the claim of debt and default raised by the Financial Creditor.

21. This brings us for our consideration the tenability of the contention raised by the Appellant that the transaction was not in the nature of a loan but a part payment deposit for developing a land project. To substantiate their contention, it has been stated that this amount was transferred by the Corporate Debtor, since in terms of an MOU, SKIL had to transfer Rs. 45 crore to the Corporate Debtor, which it was unable to do, on account of financial difficulties which made the Corporate Debtor step in to make part payment deposit of Rs. 5 crore. Hence it was contended that the disbursal was not made against the consideration of time value of money.

22. When we look at the impugned order, we find that the Adjudicating Authority has painstakingly noted the contents of the email of 12.10.2013 basis which email the Appellant has premised his case of draft MOU between SKIL and the Corporate Debtor and the resultant linkage with the present transaction of Rs. 5 crore before arriving at its findings in the impugned order which is as extracted below:

**“28. …… It is observed by us that at the outset the MOU referred and relied upon by the Corporate Debtor was between the Corporate Debtor and SKIL who is not a party to this Company Petition and furthermore the parties had only exchanged a**

**draft which was yet to be executed between the parties.**

**29. The Corporate Debtor has relied upon a MOU which is not even executed between the parties. It is settled position of law that a party cannot be bound by such terms and conditions which is not executed between the parties and thus we fail to understand the veracity of the MOU relied upon by the Corporate Debtor…….**

**30. Further, we observe that the disputes raised by the Corporate Debtor pertaining to SKIL are not relevant to be considered while adjudicating this present Company Petition, since the said company SKIL, is an entirely separate legal entity and involving the same in the present Company Petition, is of no relevance. In addition the MOU which is being referred by the Corporate Debtor remains as a mere draft and the parties cannot be held accountable for the same. In these circumstances we are not inclined to consider the disputes raised by the Corporate Debtor, since the same do not hold goodon our view due to the reasons elaborated hereinabove….”**

23. We have perused the material on record placed before us. From the said material placed on record, it is clear that the alleged MOU entered between SKIL and the Corporate Debtor was merely a draft MOU and there is nothing to evidence that the same was signed, executed or acted upon between them. In any case, prima facie, there is nothing to show that the Respondent No. 1 was a party or signatory to the said MOU or remotely connected to this MOU. We also cannot choose to ignore that at no point of time has Respondent No. 1 admitted any knowledge of the MOU, leave alone being an active participant therein. Furthermore, the Respondent No. 1 and SKIL being clearly separate legal entities, any MOU purportedly signed between SKIL and Corporate Debtor cannot be held to be binding in any manner on Respondent No. 1. Thus, a draft MOU which does not hold the field cannot be relied upon to substantiate that the relationship between the Appellant and the Respondent No. 1 was that of a joint venture collaborator and not that of a Corporate Debtor and financial creditor. Thus, to link the transfer of Rs. 5 crore by Respondent No. 1 to the Corporate Debtor as an outcome of a draft MOU, which at best was a lame duck document, is neither convincing nor does it appeal to sound reason. We therefore find no cogent grounds to find any error in the above finding of the Adjudicating Authority in the preceding paragraph.

24. The essential ingredients of financial debt in the context of IBC consists of disbursal accompanied by consideration for time value of money. We now proceed to examine whether in the present case, disbursement of money took place against the consideration for time value of money and whether commercial effect of borrowing is found to underpin the transaction. The concept of time value of money has nowhere

been defined in the IBC. Time value of money is not only a regular or timely return received for the duration for which the amount is disbursed as an amount in addition to the principal, but also covers any other form of benefit or value accruing to the creditor as a return for providing money for a long duration. We find merit in the argument canvassed by Respondent No. 1 that money advanced was towards meeting working capital needs of the Corporate Debtor and for boosting its economic prospects and hence it was a disbursal against the consideration for the time value of money. As long as the lender visualizes an element of profit and enhancement of economic prospect in return for the money advanced for certain time period, the loan in question entails time value of money and acquires the colour of commercial borrowing which is clearly borne out from the facts of the present case. It has all the trappings of a financial debt and squarely falls within the purview of Section 5(8) of IBC. It is trite law that under the IBC once a debt which becomes due or payable, in law and in fact, and if there is incidence of non-payment of the said debt in full or even part thereof, CIRP may be triggered by the financial creditor as long as the amount in default is above the threshold limit. Once the Adjudicating Authority is subjectively satisfied that there is a debt and a default has been committed by the Corporate Debtor and the Section 7 application is complete in all respects, the Adjudicating Authority in the exercise of summary jurisdiction has to admit the Section 7 application. In our considered view, this is a case where all the pre-requisites for filing a Section 7 stood fulfilled and the Adjudicating Authority cannot be held to have committed an error in admitting the Corporate Debtor into CIRP for having defaulted in repaying a financial debt which was above the threshold limit.

25. The Learned Counsel for the Resolution Professional submitted that due to non-cooperation from the Appellant, difficulties and challenges are being faced with respect to verification of claims. It is further submitted that though the Adjudicating Authority had directed the Appellant to extend sufficient co-operation, the same has not been complied to in the right spirit especially with respect to recovery of licence fees in respect of certain properties belonging to the Corporate Debtor.

26. An intervention application vide I.A. No. 4828 of 2023 has also been filed by Learned Counsel appearing on behalf of Punjab National Bank seeking vacation of the stay granted by this Tribunal with regard to approval of the resolution plan.

27. For the reasons discussed, we are of the view that the Adjudicating Authority has rightly come to the conclusion that the Respondent No.1 has successfully proved the financial debt and default on part of the Corporate Debtor in admitting the Section 7 application and initiating the CIRP process. We see no reason to interfere in the impugned order passed by the Adjudicating Authority. The appeal is accordingly dismissed. The Resolution Professional may continue to proceed with the CIRP process in accordance with law. I.A. No. 4828 of 2023 is disposed of with the above

observations. No costs.