2024 INSC 340

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1143 OF 2022

GLOBAL CREDIT CAPITAL LIMITED & ANR. ... APPELLANTS

versus

SACH MARKETING PVT. LTD. & ANR. ... RESPONDENTS

with
CIVIL APPEAL NOS.6991-6994 OF 2022

J U D G M E N T

ABHAY S. OKA, J.

1. These appeals take exception to the separate impugned judgments and orders dated 7th October 2021 and 29th October 2021 passed by the National Company Law Appellate Tribunal (for short, 'the NCLAT'). In Civil Appeal no.1143 of 2022, the issue involved is whether the first respondent is a financial creditor within the meaning of sub-section (7) of Section 5 of the Insolvency and Bankruptcy Code, 2016 (for short, 'the IBC'). The corporate debtor, in this case, is M/s. Mount Shivalik Industries Limited. The impugned judgment and order dated 7th October 2021 holds that the first respondent is a financial creditor. As far as Civil Appeal nos.6991-6994 of 2022 are concerned, the issue is whether

the 1st to 4th respondents therein are financial creditors of the same corporate debtor - M/s. Mount Shivalik Industries Limited. The impugned judgment dated 29th October 2021 follows the impugned judgment in Civil Appeal no.1143 of 2022.

FACTUAL ASPECTS

2. A brief reference to the factual aspects of Civil Appeal no.1143 of 2022 must be made to understand the controversy. There were two agreements of 1st April 2014 and 1st April 2015 between the corporate debtor and the first respondent. The agreements were in the form of letters addressed by the corporate debtor to the first respondent. By the agreement/letter dated 1st April 2014, the corporate debtor appointed the first respondent as a 'Sales Promoter' to promote beer manufactured by the corporate debtor at Ranchi (Jharkhand) for twelve months. One of the conditions incorporated by the corporate debtor in the said letter/agreement was that the first respondent should deposit a minimum security of Rs.53,15,000/- with the corporate debtor, which will carry interest @21% per annum. The letter provided that the corporate debtor will pay the interest on Rs.7,85,850/- @21% per annum. The terms of the agreement/letter dated 1st April 2015 are identical. The only difference is that under the second agreement/letter, the corporate debtor was to pay the interest on Rs.32,85,850/- @21% per annum.

3. The Oriental Bank of Commerce invoked the provisions of Section 7 of the IBC against the corporate debtor. The National Company Law Tribunal (for short, 'the NCLT') admitted the application under Section 7 of the IBC by the order dated 12th June 2018. It imposed a moratorium under Section 14 of the IBC. The second respondent was appointed as the Interim Resolution Professional. Initially, the first respondent filed a claim with the second respondent as an operational creditor. The claim was withdrawn, and on 19th September 2018, the first respondent filed a claim with the second respondent as a financial creditor. By a communication dated 7th October 2018, the second respondent informed the first respondent that the first respondent's claim was accepted partly as an operational debt and partly as a financial debt. After the first respondent submitted Form-B, the second respondent rejected the claim on the ground that the first respondent could not be considered a financial creditor. Therefore, an application was moved before the NCLT under sub-section (5) of Section 60 of the IBC by the first respondent seeking a direction to the second respondent to admit the first respondent's claim as a financial creditor. During the pendency of the said application before the NCLT, the Committee of Creditors approved a resolution plan submitted by M/s. Kals Distilleries Pvt. Ltd. The second respondent applied to the NCLT to approve the resolution plan based on the approval. On 18th January 2021, the NCLT rejected the application made by the first respondent. Aggrieved by the said order, the first respondent preferred an appeal before the NCLAT. By the

impugned judgment and order dated 7th October 2021, the NCLAT held that the first respondent was a financial creditor and not an operational creditor. The NCLT, on 13th October 2021 approved the resolution plan of M/s. Kals Distilleries Pvt. Ltd. (Respondent no.6 in Civil Appeal nos.6991-6994 of 2022) in the CIRP of the corporate debtor.

4. In Civil Appeal nos.6991-6994 of 2022, the second respondent is the resolution professional. The corporate debtor is the same as in the other appeal. The fifth respondent had provided financial assistance to the corporate debtor of Rs.75,00,000/-. The fourth respondent provided financial assistance to the corporate debtor of Rs.1,62,00,000/-. The first respondent advanced a sum of Rs.25,00,000/- to the corporate debtor. The third respondent advanced a sum of Rs.1,00,000/- to the corporate debtor. The Resolution Professional rejected the claims of the four creditors as financial creditors. Therefore, they filed separate applications before the NCLT by invoking sub-section (5) of Section 60 of the IBC. The NCLT rejected the applications. In the appeals preferred by them before the NCLAT, the NCLAT allowed the appeals by relying upon its judgment, which is the subject matter of challenge in Civil Appeal no.1143 of 2022.

SUBMISSIONS

5. The learned senior counsel appearing for the appellants in support of Civil Appeal no. 1143 of 2022 submitted that the first respondent is an operational creditor going by the

agreements dated 1st April 2014 and 1st April 2015. The reason is that the agreements indicate that the corporate debtor appointed the first respondent to render services to promote the beer manufactured by the corporate debtor. He relied upon the definition of "operational debt" under sub-section (21) of Section 5 of the IBC. He submitted that both the agreements provided for paying a minimum security deposit by the first respondent as a condition for being appointed as Sales Promoter of the corporate debtor. He submitted that there was no intention on the part of the corporate debtor to avail any financial facility from the first respondent. He submitted that the amount paid towards the security deposit is not the money disbursed to the corporate debtor towards financial facilities availed by the corporate debtor. He submitted that the security deposit paid by the first respondent would not qualify as a financial debt defined under sub-section (8) of Section 5 of the IBC. The learned senior counsel relied upon a decision of this Court in the case of ***Swiss Ribbons Private Limited and Anr. v. Union of India & Ors.***[1]. He also relied upon a decision of this Court in the case of ***Pioneer Urban Land and Infrastructure Ltd. & Anr. v. Union of India & Ors.***[2]. He submitted that the NCLAT was unnecessarily impressed by the acknowledgement of liability and booking of interest component towards the security deposit, despite the fact that it cannot be given the overriding effect over the law. He relied upon the decisions of this Court in the cases of ***Tuticorin Alkali Chemicals &***

[1] (2019) 4 SCC 17
[2] (2019) 8 SCC 416

Fertilisers Ltd., Madras v. Commissioner of Income Tax, Madras[3] and ***Consolidated Construction Consortium Limited v. Hitro Energy Solutions Private Limited***[4]. He submitted that booking or payment of interest is not the only criterion for ascertaining whether the debt is a financial debt. The learned senior counsel, therefore, urged that the view taken by the NCLAT in the impugned judgment is entirely fallacious. He submitted that the NCLAT has virtually rewritten the concepts of financial and operational debts incorporated in the IBC.

6. On facts, the learned senior counsel submitted that the payment of the security deposit by the first respondent is a condition precedent for being appointed as a Sales Promoter of the corporate debtor. The intent of the agreements is to appoint the first respondent as the Sales Promoter and not to avail any financial facilities from the first respondent. The amount paid by the first respondent does not constitute financial facilities extended to the corporate debtor. There was no intention to raise finance from the first respondent, who was appointed as a Sales Promoter. The learned senior counsel also relied upon the decisions of this court in the cases of ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited & Ors.***[5], ***Phoenix ARC Private Limited v. Spade Financial Services Limited & Ors.***[6] and ***New Okhla Industrial Development***

[3] (1997) 6 SCC 117
[4] (2022) 7 SCC 164
[5] (2020) 8 SCC 401
[6] (2021) 3 SCC 475

***Authority v. Anand Sonbhadra*[7].** Lastly, it is submitted that in the case of an invoice involving any transaction, the delay in payment attracts interest liability. Therefore, the payment of interest is not the sole criterion for ascertaining whether a debt is a financial debt. He would, thus, submit that the appeals deserve to be allowed.

7. The learned senior counsel appearing for the first respondent submitted that the true nature of the agreements will have to be examined for deciding the nature of the debt. He pointed out several factual aspects, including the corporate debtor's acknowledgement of the liability of payment of interest on security deposit for the Financial Years 2014-2015, 2015-2016, 2016-2017 and 2017-2018. The corporate debtor deducted TDS on the interest payable to the first respondent for three financial years. He submitted that the three criteria, namely, disbursal, time value of money and commercial effect of borrowing, are satisfied in the case of the present transaction. He also relied upon the decision of this Court in the case of ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited*[5].** He submitted that it was very clear from the terms of the agreement that the money was repayable after a fixed tenure without a deduction or provision for forfeiture. An interest @21% per annum was the consideration for the time value of money. The learned counsel submitted that the NCLAT was right in going into the issue of the true nature and effect of the transaction reflected in the agreements. Relying upon the decision of this Court in

[7] (2023) 1 SCC 724

the case of ***Pioneer Urban Land and Infrastructure Ltd***[2], the learned counsel submitted that clause (f) of sub-section (8) of Section 5 of the IBC is a "catch all" and "residuary" provision which includes any transaction having the commercial effect of borrowing and any transaction which is used as a tool for raising finance.

8. The learned senior counsel submitted that the agreements entered into were the tools for raising finance, and no actual services have ever been rendered to the first respondent or other lenders. Therefore, in view of the law laid down by this Court in the case of ***V.E.A. Annamalai Chettiar & Ors. v. S.V.V.S. Veerappa Chettiar & Ors.***[8], the true effect of the transaction has been taken into consideration. It is pointed out that the corporate debtor has established a practice of raising finance through private entities in the garb of security deposit under various services agreements. The learned counsel, therefore, submitted that no fault can be found with the impugned judgment.

9. The learned counsel appearing for the second respondent-Resolution Professional, supported the appellants by contending that the money advanced by the first respondent cannot be categorised as a financial debt. Therefore, the first respondent was an operational creditor. He relied upon the definition of "operational debt" under sub-section (21) of Section 5 of the IBC. He submitted that the security deposit was not meant to reorganize the corporate

[8] AIR 1956 SC 12

debtor's debts. He submitted that the agreements are service agreements by which the corporate debtor agreed to take services from the first respondent for consideration. Therefore, the security deposit was obviously to ensure the performance of the terms of the agreements by the first respondent. He submitted that accounting treatment cannot override the law and the definition of "operational debt" under the IBC. He submitted that none of the ingredients of clauses (a) to (f) of sub-section (8) of Section 5 are present in the case at hand. In this case, there is no disbursal of debt. He submitted that there was no financial contract between the corporate debtor and the first respondent. Lastly, he submitted that in view of the judgment dated 29th September 2018 of the NCLAT on an application filed by M/s. New View Consultants Pvt. Ltd., the second respondent categorised the first respondent as operational creditor. He would, therefore, submit that the view taken by the NCLAT was not correct.

CONSIDERATION OF SUBMISSIONS ON THE CONCEPT OF FINANCIAL AND OPERATIONAL DEBT

10. Sub-section (11) of Section 3 of the IBC defines 'debt', which reads thus:

> **"3.** In this Code, unless the context otherwise requires,-
> .. ..
>
> (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;

> .. ..
> .. .**"**

Thus, a debt has to be a liability or obligation in respect of a claim that is due from any person. Sub-section (11) uses the words "means" and "includes". Financial debt and operational debt are included in the definition of debt. Thus, financial debt or operational debt must arise out of a liability or obligation in respect of a claim.

11. "Claim" is defined under sub-section (6) of Section 3 of the IBC, which reads thus:

> **"3.** In this Code, unless the context otherwise requires,-
>
> .. ..
> .. .. .
>
> (6) "claim" means –
>
> (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;
>
> (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;
>
> .. ..
> .. .**"**

Clause (a) shows that every right to receive payment is a claim, whether or not such right is reduced to a judgment. A right to receive payment is a claim, even if disputed,

undisputed, secured, or unsecured. The right to receive payment can be either legal or equitable. Clause (b) includes the right to remedy for a breach of contract under any law for the time being in force. Thus, a liability or obligation is not covered by the definition of "debt" unless it is in respect of a claim covered by sub-section (6) of Section 3 of the IBC.

12. Sub-section (8) of Section 5 of the IBC defines "financial debt", which reads thus:

> **"5.** In this Part, unless the context otherwise requires,-
> .. ..
>
> **(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 dematerialised 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 non-recourse 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-clause (a) to (h) of this clause.**"**
>
> (emphasis added)

The definition incorporates the expression "means and includes". The first part of the definition, which starts with the word "means", provides that there has to be a debt along with interest, if any, which is disbursed against the consideration for the time value of money. The word "and" appears after the word "money". Before the words "and includes", the legislature has not incorporated a comma. After the word "includes", the legislature has incorporated categories (a) to (i) of financial debts. Hence, the cases covered by categories (a) to (i) must satisfy the test laid down by the earlier part of the sub-section (8). The test laid down therein is that there has to be a debt along with interest, if any, and it must be disbursed against the consideration for the time value of money. This Court had an occasion to deal with the definition of "financial debt" in its various decisions. The first decision is in the case of ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited***[5]. Paragraphs 46 to 50 read thus:

> **"The essentials for financial debt and financial creditor**
>
> **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.

47. As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.

48. It is also evident that what is being dealt with and described in Section 5(7) and in Section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code.

49. Expounding yet further, in our view, the peculiar elements of these expressions "financial creditor" and "financial debt", as occurring in Sections 5(7) and 5(8), when visualised and compared with the generic expressions "creditor" and "debt"

respectively, as occurring in Sections 3(10) and 3(11) of the Code, the scheme of things envisaged by the Code becomes clearer. The generic term "creditor" is defined to mean any person to whom the debt is owed and then, it has also been made clear that it includes a "financial creditor", a "secured creditor", an "unsecured creditor", an "operational creditor", and a "decree-holder". Similarly, a "debt" means a liability or obligation in respect of a claim which is due from any person and this expression has also been given an extended meaning to include a "financial debt" and an "operational debt".

49.1. The use of the expression "means and includes" in these clauses, on the very same principles of interpretation as indicated above, makes it clear that for a person to become a creditor, there has to be a debt i.e. a liability or obligation in respect of a claim which may be due from any person. A "secured creditor" in terms of Section 3(30) means a creditor in whose favour a security interest is created; and "security interest", in terms of Section 3(31), means a right, title or interest or claim of property created in favour of or provided for a secured creditor by a transaction which secures payment for the purpose of an obligation and it includes, amongst others, a mortgage. Thus, any mortgage created in favour of a creditor leads to a security interest being created and thereby, the creditor becomes a secured creditor. However, when all the defining clauses are read together and harmoniously, it is clear

that the legislature has maintained a distinction amongst the expressions "financial creditor", "operational creditor", "secured creditor" and "unsecured creditor". Every secured creditor would be a creditor; and every financial creditor would also be a creditor but every secured creditor may not be a financial creditor. As noticed, the expressions "financial debt" and "financial creditor", having their specific and distinct connotations and roles in insolvency and liquidation process of corporate persons, have only been defined in Part II whereas the expressions "secured creditor" and "security interest" are defined in Part I.

50. A conjoint reading of the statutory provisions with the enunciation of this Court in Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] , leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression "financial creditor" is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders,

namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor.

50.1. Keeping the objectives of the Code in view, the position and role of a person having only security interest over the assets of the corporate debtor could easily be contrasted with the role of a financial creditor because the former shall have only the interest of realising the value of its security (there being no other stakes involved and least any stake in the corporate debtor's growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in rejuvenation, revival and growth of the corporate debtor. Thus understood, it is clear that if the former i.e. a person having only security interest over the assets of the corporate debtor is also included as a financial creditor and thereby allowed to have its say in the processes contemplated by Part II of the Code, the growth and revival of the corporate debtor may be the casualty. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution.

> **50.2.** Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third-party securities), even if falling within the description of "secured creditor" by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of "financial creditors" as per the definitions contained in sub-sections (7) and (8) of Section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of "debt" under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a "financial debt" within the meaning of Section 5(8) of the Code.**"**
>
> (emphasis added)

A Bench of three Hon'ble Judges of this Court in the case of ***Phoenix ARC Private Limited***[6] dealt with the issue in greater detail. It also dealt with the concept of the time value of money. In paragraphs 44 to 47 of the said decision, this Court held thus:

> **"44.** Section 5(8) IBC provides a definition of "financial debt" in the following terms:
>
> XXX XXX XXX
>
> **G.3.2. Financial creditor and financial debt**
>
> **45.** Under Section 5(7) IBC, a person can be categorised as a financial creditor if a financial debt is owed to it. Section 5(8) IBC stipulates that the essential ingredient of a financial debt

is disbursal against consideration for the time value of money. This Court, speaking through Rohinton F. Nariman, J., in Swiss Ribbons (P) Ltd. v. Union of India [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] has held : (SCC p. 64, para 42)

> "42. 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."
>
> (emphasis supplied)

46. In this context, it would be relevant to discuss the meaning of the terms "disburse" and "time value of money" used in the principal clause of Section 5(8) IBC. This Court has interpreted the term "disbursal" in Pioneer Urban Land & Infrastructure Ltd. v. Union of India [Pioneer Urban Land & Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1] in the following terms : (SCC p. 511, paras 70-71)

> "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."

47. The report of the Insolvency Law Committee dated 26-3-2018 has discussed the interpretation of the term "time value of money" and stated:

> "1.4. The current definition of "financial debt" under Section 5(8) of the Code uses the words " [Ed. : The matter between two

> asterisks has been emphasised in original.] includes [Ed. : The matter between two asterisks has been emphasised in original.] ", thus the kinds of financial debts illustrated are not exhaustive. The phrase " [Ed. : The matter between two asterisks has been emphasised in original.] disbursed against the consideration for the time value of money [Ed. : The matter between two asterisks has been emphasised in original.] " has been the subject of interpretation only in a handful of cases under the Code. **The words "time value" have been interpreted to mean compensation or the price paid for the length of time for which the money has been disbursed. This may be in the form of interest paid on the money, or factoring of a discount in the payment.**"
>
> (emphasis added)**"**

In the case of ***Pioneer Urban Land and Infrastructure Ltd. & Anr***[2], this issue was dealt with in paragraphs 76 and 77, which read thus:

> **"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."
>
> ***
>
> "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 added)

FINDINGS ON FACTUAL ASPECTS

13. In light of the interpretation put by this Court to the definition of financial debt, it is necessary to come back to the facts of the case. The relevant agreements for our consideration are in the form of letters dated 1st April 2014 and 1st April 2015. The corporate debtor addressed the

letters to the first respondent. The relevant part of the agreement/letter dated 1st April 2014 reads thus:

> "..
> SACH MARKETING PVT LTD
> JHARKHAND
>
> Dear Sir,
>
> We are pleased to appoint you as our SALES PROMOTER for promotion of Beer at Ranchi (Jharkhand) on the following terms and conditions:
>
> **1. You will be allowed Rs.4,000/- per month for your promote work.**
>
> 2. You will be working in close coordination with company's Marketing Manager for the aforementioned area, who shall convey the instructions in writing to you.
>
> 3. The selling rates of our beer shall be decided by the company from time to time and you will not change them without prior confirmation from the company. Further, you shall not commit to any party about any rebate or any discount etc without prior authorization from us.
>
> 4. The appointment shall be w.e.f. 1st April, 2014 for a period of 12 months ending 31st March, 2015.
>
> 5. The settlement of commission as stated above in point no.1 shall be on quarterly basis.
>
> 6. Notwithstanding anything provided above this appointment in terms hereof may be terminated by us during the

term of appointment aforesaid by giving to you thirty days notice in writing in this behalf from the date of dispatch of notice.

7. You shall not be entitled upon termination of this agreement or appointment within the terms hereof to claim any damages or compensation from the company for such termination or consequent thereupon or otherwise relative thereto against the other.

8. Forthwith upon determination of this agreement appointment you shall cease all dealings on behalf of the company and shall deliver custody of all premises, stock, cash negotiable instruments, papers and documents and other items and things of the company coming into the custody of these presents.

9. The company reserve the right to appoint any, other party as Sales Promoter for, areas mentioned above.

10. You have to deposit minimum security of Rs.53,15,000/- with the Company which will carry interest @21% p.a. We will provide you interest on Rs.7,85,850/- @21% per annum.

Please acknowledge receipt and as a token of your acceptance of above terms conditions.

Please sign duplicate copy of this letter and return the same to us for our records.

Thanking you,

> .. ..”
>
> (emphasis added)

As seen from clause (4), the agreement was only for twelve months ending on 31st March 2015. Therefore, on 1st April 2015, another letter was issued by the corporate debtor to the first respondent, incorporating identical terms and conditions. The only difference is that the agreement's duration was up to 31st March 2016. Clause (10) of the agreement/letter dated 1st April 2015 reads thus:

> “.. .. ..
>
> #10 You have to deposit minimum security of Rs.53,15,000/- with the Company which will carry interest @21% per annum.
>
> We will provide you interest on Rs.32,85,850/- @21% per annum. Please acknowledge receipt and as a token of your acceptance of above terms and conditions.
>
> .. ..”

14. Where one party owes a debt to another and when the creditor is claiming under a written agreement/arrangement providing for rendering 'service', the debt is an operational debt only if the claim subject matter of the debt has some connection or co-relation with the ‘service’ subject matter of the transaction. The written document cannot be taken for its face value. Therefore, it is necessary to determine the real nature of the transaction on a plain reading of the agreements. What is surprising is that for acting as a Sales

Promoter of the beer manufactured by a corporate debtor, only a sum of Rs.4,000/- per month was made payable to the first respondent. Apart from the sum of Rs.4,000/- per month, there is no commission payable to the first respondent on the quantity of sales. Clause (6) provides for termination of the appointment by giving thirty days' notice. Though clause (10) provides for the payment of the security deposit by the first respondent, it is pertinent to note that there is no clause for the forfeiture of the security deposit. The amount specified in clause (10) has no correlation whatsoever with the performance of the other conditions of the contract by the first respondent. As there is no clause regarding forfeiture of the security deposit or part thereof, the corporate debtor was liable to refund the security deposit after the period specified therein was over with interest @21% per annum. Since the security deposit payment had no correlation with any other clause under the agreements, as held by the NCLAT, the security deposit amounts represent debts covered by sub-section (11) of Section 3 of the IBC. The reason is that the right of the first respondent to seek a refund of the security deposit with interest is a claim within the meaning of sub-section (6) of Section 3 of the IBC as the first respondent is seeking a right to payment of the deposit amount with interest. Therefore, there is no manner of doubt that there is a debt in the form of a security deposit mentioned in the said two agreements.

15. Sub-section (21) of Section 5 defines "operational debt", which reads thus:

> **"5.** In this Part, unless the context otherwise requires,-
> .. ..
> (21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;
> .. .."

The second part of the definition which deals with the payment of dues arising under any law, will not apply. However, for the applicability of the first part, the claim must be concerning the provisions of goods or services. Therefore, in the case of a contract of service, there must be a correlation between the service as agreed to be provided under the agreement and the claim. The reason is that the definition uses the phraseology "a claim in respect of the provision of goods or services". Assuming that both the agreements are genuine in the sense that they reflect the true nature of the transaction, the only claim under the agreements which will have any connection with the services rendered by the first respondent will be the claim of Rs.4,000/- per month as provided in clause (1) of both the agreements. Only this claim can be said to be concerning the provision of services. Therefore, by no stretch of imagination, the debt claimed by the first respondent can be an operational debt. We are conscious of the fact that the provision for payment of interest by the corporate debtor by itself is not the

only material factor in deciding the nature of the debt. But, in the facts of the case, the payment of the amount mentioned in clause (10) of the letter has no relation with the service supposed to be rendered by the first respondent.

16. Now, coming back to the definition of a financial debt under sub-section (8) of Section 5 of the IBC, in the facts of the case, there is no doubt that there is a debt with interest @21% per annum. The provision made for interest payment shows that it represents consideration for the time value of money. Now, we come to clause (f) of sub-section (8) of Section 5 of the IBC. The first condition of applicability of clause (f) is that the amount must be raised under any other transaction. Any other transaction means a transaction which is not covered by clauses (a) to (e). Clause (f) covers all those transactions not covered by any of these sub-clauses of sub-section (8) that satisfy the test in the first part of Section 8. The condition for the applicability of clause (f) is that the transaction must have the commercial effect of borrowing. "Transaction" has been defined in sub-section (33) of Section 3 of the IBC, which includes an agreement or arrangement in writing for the transfer of assets, funds, goods, etc., from or to the corporate debtor. In this case, there is an arrangement in writing for the transfer of funds to the corporate debtor. Therefore, the first condition incorporated in clause (f) is fulfilled.

17. To decide whether the second condition had been fulfilled, it is necessary to refer to the factual findings recorded in the impugned judgment. The NCLAT has referred

to the letter dated 26th October 2017 addressed by the corporate debtor to the first respondent. We have perused a copy of the said letter annexed to the counter. By the said letter, the corporate debtor informed the first respondent that for the year 2016-2017, the corporate debtor had provided the interest amounting to Rs.18,06,000/- in the books of the corporate debtor and that the sum will be credited to the account of the first respondent on the date of payment of TDS. In paragraph 21 of the impugned judgment, it is held that the financial statement of the first respondent for the Financial Year 2017-2018 shows revenue from the interest on the security deposit. It is also held that the amounts were treated as long-term loans and advances in the financial statement of the corporate debtor for the Financial Year 2015-2016. Moreover, in the financial statement of the corporate debtor for the Financial Year 2016-17, the amounts paid by the first respondent were shown as "other long-term liabilities". Therefore, if the letter mentioned above and the financial statements of the corporate debtor are considered, it is evident that the amount raised under the said two agreements has the commercial effect of borrowing as the corporate debtor treated the said amount as borrowed from the first respondent.

CONCLUSION

18. Therefore, we have no hesitation in concurring with the NCLAT's view that the amounts covered by security deposits under the agreements constitute financial debt. As it is a financial debt owed by the first respondent, sub-section (7) of

Section 5 of the IBC makes the first respondent a financial creditor.

19. The contracts subject matter of the Civil Appeal Nos. 6991 to 6994 of 2022 are in the form of letters, which provide for similar clauses as in the case of agreements subject matter of Civil Appeal No. 1143 of 2022.

SUMMARY

20. Subject to what is held above, we summarize our legal conclusions:

a. There cannot be a debt within the meaning of sub-section (11) of section 5 of the IB Code unless there is a claim within the meaning of sub-section (6) of section 5 of thereof;

b. The test to determine whether a debt is a financial debt within the meaning of sub-section (8) of section 5 is the existence of a debt along with interest, if any, which is disbursed against the consideration for the time value of money. The cases covered by categories (a) to (i) of sub-section (8) must satisfy the said test laid down by the earlier part of sub-section (8) of section 5;

c. While deciding the issue of whether a debt is a financial debt or an operational debt arising out of a transaction covered by an agreement or arrangement in writing, it is necessary to ascertain

what is the real nature of the transaction reflected in the writing; and

d. Where one party owes a debt to another and when the creditor is claiming under a written agreement/ arrangement providing for rendering 'service', the debt is an operational debt only if the claim subject matter of the debt has some connection or co-relation with the 'service' subject matter of the transaction.

OPERATIVE PART

21. For the reasons recorded earlier, we hold that the view taken by the NCLAT under the impugned judgments and orders is correct and will have to be upheld. Therefore, we confirm the impugned judgments and dismiss the appeals with no order as to costs. The Resolution Professional shall continue with the CIRP process in accordance with the impugned judgments.

.....J.
(Abhay S. Oka)

.....J.
(Pankaj Mithal)

New Delhi;
April 25, 2024.