

National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 180 of 2021

(Arising out of Order dated 18th January, 2021 passed by National Company Law Tribunal, Jaipur Bench (Rajasthan), in I.A. No. 135/JPR/2019 in C.P. No. (IB)-86/ND/2018).

IN THE MATTER OF:

Sach Marketing Pvt. Ltd.

174, Dakshinpara Road, Kolkata,

West Bengal – 700028 (India)

E-mail: soubhik_11@yahoo.com

...Appellant

Versus

**Resolution Professional of Mount Shivalik
Industries Ltd., Ms. Pratibha Khandelwal**

F2/14, LIC Flats, Sector-2, Vidyadhar Nagar,

Jaipur-302039 (Rajasthan)

E-mail: cspratibhak@gmail.com

...Respondent

**Appellant: Mr. NPS Chawla, Mr. Sujoy Datta, Mr. Abhijeet Sinha
& Ms. Sakshi Singh, Advocates.**

**Respondent: Mr. Abhishek Anand, Mr. Viren Sharma &
Ms. Pratibha Khandelwal, Advocate for RP.
Mr. Ankit Popli, Advocate for RA.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Challenge in this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as the ‘Code’) read with Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 (hereinafter referred to as ‘NCLAT Rules’) is against the Impugned Order dated 18.01.2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Jaipur Bench, Rajasthan) in I.A. No. 135/JPR/2019

in C.P. No. (IB)- 86/ND/2018 preferred by the Appellant herein against the decision of the Resolution Professional (RP) of Mount Shivalik Industries Ltd. (hereinafter referred to as the '**Corporate Debtor**').

2. By the Impugned Order, the Learned Adjudicating Authority while dismissing I.A. No. 135/JPR/2019 has observed as follows:-

“19. For availing a loan / financial assistance the parties must enter into a financial contract setting out the terms of the financial debt, including the tenure of the debt, interest payable and date of repayment as defined under clause (d) of sub rule (1) of Rule 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

20. Undoubtedly such security deposit is returnable and represents a future obligation. The treatment of said security deposit in the financial statement of the Corporate Debtor for period 01.07 .2014 to 30.06.2015 annexed by the Applicant in rejoinder is not evidently obvious so as to straight-away validate Applicant's contention of deducing by implication. The Corporate Debtor in its balance sheet for year ended 31.03 .2016 and 30.03.2017 has shown security deposits under the head non-current liabilities whereas in the balance sheet for year ended 31.03.2018, under the head current liabilities. there are two items, one is unsecured borrowing through intercorporate deposit and the other is security deposit. However, from none of the financial statements is it lucidly and unequivocally clear that such security deposit and/or intercorporate deposit

includes the amount provided by the Applicant under the appointment letters dated 01.04.2014 and 01 .04.2015. In any case, classification of any sum of money under current or non-current liability is not indicative of its actual use/ purpose.

21. Further after analysing Form 26 AS annexed by the Applicant vide dairy no. 1967/2019, it is noted that the Corporate Debtor had deducted tax under Section 194A and 194H of the Income Tax Act, 1961 for FY 2013-14 and 2014.15 and for FY 2015-16 tax was deducted under Section 194A and 194J. Section 194A deals with interest other than interest on securities. Section 194H deals with income by way of commission or brokerage and Section 194 J deals with fees for professional or technical services. The above observation shows that the Corporate Debtor had deducted tax against the interest on the amount provided by the Applicant. On the other hand, the Applicant has failed to submit sufficient documents to establish that the amount was borrowed by the Corporate Debtor for commercial purpose, as it is nowhere mentioned in the letters dated 01.04.2014 and 01 .04.2015 that the corporate debtor is in need of money or the said deposit will be used for its business activities. In effect the Applicant is saying that it was an agreement that was stretched beyond the textual narrative and normal literal understanding thereof and was camouflaged, perhaps wrongly or for any hidden motives, with or without complicity, of the Applicant. Such twisting of any actual or alleged understanding to avoid parameters of statute, rules,

guidelines, etc. is an inherent admission of collusion. Applicant cannot take advantage of own wrongs.

22. *The Hon'ble NCLAT in the matter of **Prayag Polytech Pvt. Ltd. Vs. Gem Batteries Pvt. Ltd. in (Company Appeal (AT) (Insolvency) No. 713 of 2019)**, dated 24.09.2019 has observed as under:*

“6. We have gone through the records and the impugned order. Merely pointing out that TDS was deducted would not be sufficient to conclude that there was financial debt. TDS can be deducted for various reasons.

7. As regard relying on Section 10 of the Contract Act, 1872, in our view IBC is a complete code in itself Section 238 of IBC has overriding effect on provisions inconsistent with IBC. The 'Financial contract' is defined in "Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016" Rule 3(1)(d) requires setting out the terms of the financial debt including tenure etc. We find that Appellant has failed to show any record showing financial debt to be there. As such, we are unable to find any fault in the impugned order while rejecting Section 7 application.”

23. *In the instant Application no detailed initial agreement is available. Also, there is no addendum or fresh documentation explaining changing nature of agreement/ engagement, from depot management to sales promotion. Within the facts narrated by the Applicant, it is difficult to ascertain the extent and type of services. These could be vastly different from what is stated in the letters of engagement or even as claimed by the Applicant.*

24. *Scope and canvass of the agreement cannot be left to the imagination. There is no visibility into the nitty-gritty or character of the avowed agreement. The wording is rather flavourless. If the agreement reflected something else initially and then changed hue and colour, there is no explicit indication or documentation in this regard. There has to be legally valid supporting corroboration. Mere assertion about different character of understanding while referring to documents reflecting something else is itself suspicious. It cannot be that a flimsy document is created between parties to suit convenience of interpretation or twist implication altogether. In legal terms a person cannot approbate and reprobate at the same time.*

25. *Merely intercorporate deposit does not make it a financial debt, amidst the background and facts stated by the Applicant. Just because the interest component may have resulted in a larger income for the Applicant, or the Corporate Debtor may have acknowledged interest payable does not make it a core financial deal.*

26. *In view of the foregoing discussion, it can be concluded that the RP has rightly considered the claim of the Applicant as operational debt. The Application bearing IA No. 135/JPR/2019 is dismissed and disposed of. Copy of the order be served to the parties.”*

3. **Submissions on behalf of Learned Counsel appearing for the**

Appellant:

- The 'Corporate Debtor' is in the business of manufacturing and distributing beer in India. An Agreement dated 01.04.2014 was executed between the 'Corporate Debtor' and the Appellant appointing the Appellant as sales promoter for promotion of beer for 12 months for the following terms and conditions:-

"1. You will be allowed Rs. 4,000/- per month for your promoter work.

2. You will be working in close co-ordination 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 the 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 and conditions. Please sign duplicate copy of this letter and return the same to us for our records.”

(Emphasis Supplied)

- Subsequently on 01.04.2015 another Agreement was executed, with similar terms and conditions except for one modification in Clause 10 with respect to ‘Security Deposit’ which is detailed as hereunder:-

“You have to deposit minimum security of Rs. 53,15,000/- with the Company which will carry interest at 21% per annum. We will provide you interest of Rs. 23,85,850/- at 21% per annum”.

- An amount of Rs. 61,00,850/- (Rs. 53,15,000/- + Rs. 7,85,850/-) was provided by the Appellant in the year 2014 and the remaining deposit amount of Rs. 25,00,000/- was adjusted from the funds provided by the Appellant vide letter date 09.01.2014. While so, the ‘Corporate Debtor’ unilaterally adjusted the said amount from the security balance lying in the interest fund account to the Security Deposit/Loan Account during the Financial Year 2015-16 as recorded in its ledgers. On the due date i.e. on 31.03.2016, the ‘Corporate Debtor’ admitted the interest liability of Rs. 18,06,000/-. The ‘Corporate Debtor’ failed to pay interest and the Appellant paid tax on the net interest income earned by it on accrual basis.
- While so, the ‘Corporate Debtor’ was admitted into Insolvency on 12.06.2018 and the Appellant filed their claim of Rs. 1,58,341/- as of

‘Operational Debt’ and Rs. 1,41,39,410/- as ‘Financial Debt’ including the interest amount. The RP addressed an email dated 18.03.2019 stating that the claim for ‘Financial Debt’ has been considered as an ‘Operational Debt’ on the basis of the Order dated 28.09.2018 passed by the Adjudicating Authority in CP No. (IB)- 86/ND/2018. Aggrieved by the decision of the RP, the Appellant preferred I.A. 135/JPR/2019 seeking a direction to quash the unlawful classification and for admitting the claim as ‘Financial Debt’. The Adjudicating Authority in the Impugned Order dated 18.01.2021 has observed that the RP has rightly considered the claim as ‘Operational Debt’. The Learned Counsel argued that the Adjudicating Authority has failed to appreciate that Section 5(8)(f) is a ‘residuary’ and ‘catch all provision’ and would cover all transactions which have the commercial effect of borrowing. In support of his contention the Learned Counsel placed reliance on the Judgement of the Hon’ble Supreme Court in **‘Pioneer Urban Land and Infrastructure Ltd. & Anr.’ Vs. ‘Union of India & Ors.’ in Writ Petition (Civil) No. 43 of 2019.**

- Learned Counsel strenuously contended that even as per the Insolvency Law Committee Report dated March 2018 any transaction structure as a tool or means for raising finance would be included as ‘Financial Debt’ under Section 5(8)(f) of the Code. The Resolution Professional has no adjudicatory power and the Adjudicating Authority did not take this aspect into consideration. Learned Counsel placed reliance on the Judgement of this Tribunal in **‘Rishabh Jain’ Vs.**

‘S.S. Enterprises & Anr.’ Company Appeal (AT) (Insolvency) No. 1383 of 2019 in which this Tribunal has observed that one has to go into the intent of the parties while interpreting an MoU, which clearly gives rise to the surmise that the same was given by way of financial assistance attracting interest payable thereon.

- Learned Counsel contended that the amount deposited could not be a mere ‘Security Deposit’ as there were no other transactions between the parties and the money was mandatorily returnable after a fixed tenure without any deduction or forfeiture. It was not a fixed sum. The ‘Corporate Debtor’ has established a practice of securing ‘Financial Debt’ in the garb of ‘Security Deposits’ under various Agreements, for attaining financial assistance from private entities instead of getting the same from Banks and Financial Institutions. Learned Counsel also raised the question as to whether Adjudicating Authority can categorise the debt and drew our attention to the I.A. preferred by the Appellant on 02.05.2019, which he submitted was pending for more than a year.

4. **Submissions of the Learned Counsel appearing for the Respondent/Resolution Professional of the ‘Corporate Debtor’:**

- Learned Counsel for the Respondent/Resolution Professional for the ‘Corporate Debtor’ submitted that one of the ‘Financial Creditors’ i.e. New View Consultants Pvt. Ltd. had earlier challenged the decision of the RP to include one Mahalakshmi Traders as a ‘Financial Creditor’ by way of an Application before the Adjudicating Authority being I.A.

No. 02/JPR/2018. Vide Order dated 28.09.2018, the Adjudicating Authority had dismissed the Application filed by New View Consultants Pvt. Ltd. and by Kunal Bottle Co. Ltd. challenging the inclusion of Mahalakshmi Traders as a 'Financial Creditor' and as a Member of the CoC.

- The Learned Counsel drew our attention to the Order dated 28.09.2018 whereby the Adjudicating Authority, while dismissing the Application, observed as follows:-

“16. However, sales agency commission and amounts due arising purely out of the agency relationship including the security deposit placed as between the Corporate Debtor and the respondent should be strictly excluded from the purview of 'financial debt' in order to compute extent of financial debt in CoC.

In the circumstances, all the applications stands dismissed, however without costs.”

- Learned Counsel contended that 'Security Deposit' does not fall within the definition of Section 5(8) of the Code to be categorised as a 'Financial Debt'. He drew our attention to the Agreement executed between Appellant and the 'Corporate Debtor' wherein the Appellant was termed as a C&F Agent, hired basically for promotion of sale of beer. He submitted that the aforementioned Order dated 28.09.2018 had not been challenged and has since attained finality and hence the same principle is also applicable to the Appellant herein.

5. **Submission of the Learned Counsel appearing for the Proposed Intervenor/Successful Resolution Applicant:**

- Learned Counsel appearing for Kals Distilleries Pvt. Ltd./the Successful Resolution Applicant contended that no money has been advanced as a 'Financial Debt' by the Appellant herein; that the letters dated 01.04.2014, 01.04.2015 and 09.01.2014 specify that the 'Corporate Debtor' had appointed the Appellant to provide certain services as sale promotion and the amount to be deposited as 'security' by the Appellant arises out of the said transaction; that the basic ingredient for a debt to be a 'Financial Debt' within the meaning of Section 5(8) of the Code is that the disbursement of debt should be with consideration for a time value of money which is not present in the said case; that for availing a loan/financial assistance, the parties must enter into a financial contract setting out the terms of 'Financial Debt' including a tenure of debt, interest payable and the debt of repayment as defined under Clause (d) of sub-Rule (1) of Rule 3 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016; by virtue of Order dated 09.03.2020, the approval of the Applicant's Resolution Plan has been stayed and the entire plant and machinery is deteriorating and may become obsolete if not attended to immediately; that beer is a seasonal product and the Applicant has missed two seasons because of an inordinate delay in approval of the Resolution Plan.

Assessment:

6. On an Appeal preferred by the Resolution Applicant, the Hon'ble Supreme Court in **Civil Appeal No. 4756 of 2021**, vide Order dated 13.08.2021 has dismissed the Appeal with a direction to this Tribunal to decide the matter on 28.09.2021. The matter was heard at length on 28.09.2021 and Orders were reserved. The Written Submissions were filed on 05.10.2021.

7. The question which arises in this Appeal is whether this 'Security Deposit' and the interest thereon would fall within the ambit of the definition of 'Financial Debt' as defined under Section 5(8)(f) of the Code.

8. At this juncture, it is pertinent to reproduce the relevant Sections of the Code namely Section 3(10), Section 5(8), Section 5(20) and Section 5(21) as hereunder:-

"3. Definitions.—In this Code, unless the context otherwise requires,—

.....

(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;"

"5. Definitions.—In this Part, unless the context otherwise requires,—

.....

(8) "financial debt" means a debt along with 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 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-clauses (a) to (h) of this clause;

.....

(20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the 1[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;”

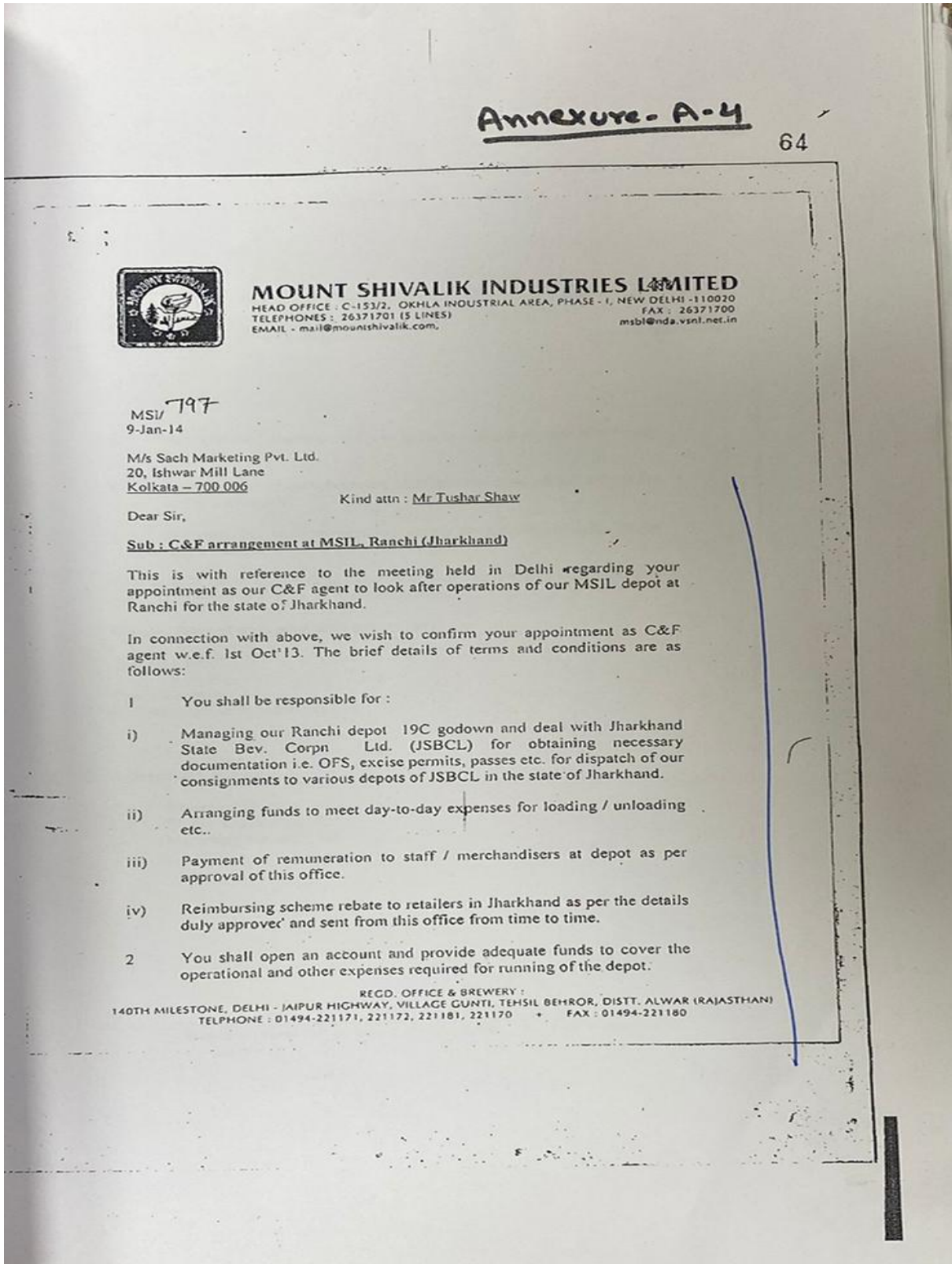
(Emphasis Supplied)

9. For the sake of brevity, the terms of Agreement dated 01.04.2014 and 01.04.2015 detailed in the aforementioned para 3 are not being repeated.

10. By the Agreement executed between the parties, the Appellant herein was appointed as a sales promoter for promotion of beer at Ranchi. Clause 10 stipulates that the Appellants should deposit a minimum security of Rs. 53,15,000/- with the ‘Corporate Debtor’ which will carry interest at 21% per annum. It is significantly mentioned that the ‘Corporate Debtor’ would provide interest of Rs. 7,85,850/- at 21% per annum. This is the conditional Clause meaning thereby that only in the event of the Appellant making such a deposit, he would be appointed as a sales promoter. Thereafter on 01.04.2015 another Agreement was executed with a modification in Clause 10. Though the minimum ‘Security Deposit’ of Rs. 53,15,000/- that the Company carrying interest at 21% per annum was retained, the amount against which interest at 21% per annum would be

paid by the 'Corporate Debtor' to the Appellant herein was modified to Rs. 32,85,850/-.

11. At this juncture, it is pertinent to reproduce the Agreement dated 09.01.2014, whereby the Appellant had entered into an arrangement with the 'Corporate Debtor', whereunder the Appellant was required to arrange funds for meeting the daily expenses for the depot of the 'Corporate Debtor':-





MOUNT SHIVALIK INDUSTRIES LIMITED

HEAD OFFICE : C-153/2, OKHLA INDUSTRIAL AREA, PHASE - I, NEW DELHI - 110020
TELEPHONES : 26371701 15 LINES | FAX : 26371700
EMAIL : mail@mountshivalik.com, msbl@nda.vsnl.net.in

3. You will send monthly details of expenses alongwith your debit notes on monthly basis.
4. Settlement of all the investment made shall be done periodically at the end of each quarter.
5. We shall fix your remuneration shortly, after review of sales in the first 3 months.

This letter is being sent in duplicate and you are requested to send duplicate copy duly signed as a token of your acceptance.

Detailed letter of agreement shall be sent later.

Thanking you,

Yours faithfully,
For Mount Shivalik Industries Ltd.

Authorised Signatory

Cc: Managing Director
Cc: Sr. Fin. Controller, HO
Cc: Marketing Manager, HO

REGD. OFFICE & BREWERY :
140TH MILESTONE, DELHI - JAIPUR HIGHWAY, VILLAGE GUNTI, TEHSIL BEHROR, DISTT. ALWAR (RAJASTHAN)
TELEPHONE : 01494-221171, 221172, 221181, 221170 + FAX : 01494-221180

12. From the aforementioned arrangement, it is clear that the Appellant was required to provide adequate funds to cover the Operational and other expenses required for running of the depot. Thereafter in April 2014, another Agreement was entered into whereby the Appellant would serve as a sales promoter for the beer manufactured by the 'Corporate Debtor'. The material on record i.e. Bank Statements show transfer of funds to the 'Corporate Debtor' detailed as hereunder:-

S. No.	Amount (INR)	Date
1.	3,00,00	11.03.2014
2.	15,000	13.03.2014
3.	19,60,000	15.03.2014
4.	12,40,000	15.03.2014
5.	18,00,052	19.03.2014
Total	5,31,50,520	

13. Further, it is seen from the said Agreement that over and above the interest bearing sum of Rs. 53,15,000/- a further sum of Rs. 7,85,850/- was also to be provided by the Appellant and interest of 21% per annum would be paid for the said amount. It is significant to mention here that this amount was not even termed as 'security' in the Agreement dated 01.04.2014.

14. Additionally, Annexure A-8 letter dated 26.10.2017 further establishes that the 'Corporate Debtor' had provided interest for the year 2016-17 amounting to Rs. 18,06,000/- in their books of account credited to the account of the Appellant herein on the date of payment of TDS. The said letter is reproduced as hereunder:-

Annexure - A8

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MOUNT SHIVALIK INDUSTRIES LIMITED

HEAD OFFICE: DPT 512, F 79 & 80, DLF PRIME TOWER, OKHLA PHASE -1,
NEW DELHI - 110020. TELEPHONES: 011-49046419
E MAIL- SHARES@MOUNTSHIVALIK.IN
CIN: L15591RJ1993PLC007168

October 26, 2017

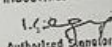
SACH MARKETING PVT LTD
HAZARIBAGH

Sub: Interest for 2016-17

Sir,

We wish to inform you that we have provided interest for the year 2016-17 amounting to Rs.18,05,000/- (Eighteen Lakh Six Thousand only) in the books of the company and will be credited to your account on the date of payment of TDS.

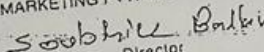
Thanking you,
For Mount Shivalik Industries Ltd

Authorised Signatory
For MOUNT SHIVALIK INDUSTRIES LIMITED

Authorized Signatory

REGD. OFFICE & FACTORY: 140TH MILESTONE, DELHI- JAIPUR HIGHWAY, VILLAGE GUNTI, TEHSIL
BEHROR, DISTT. ALWAR (RAJASTHAN) TELEPHONE : 01494-221172, 221181, 221171, 221170

Certified True Copy

SACH MARKETING PVT. LTD.


Director

15. The Hon'ble Supreme Court in '**Ram Janki Devi and Ors.**' Vs. '**Juggilal Kamlatpat**', AIR 1971 SC 2551 in para 12 has observed as follows:-

“12. The case of a deposit is something more than a mere loan of money. It will depend on the facts of each case whether the transaction is clothed with the character of a deposit of money. The surrounding circumstances, the relationship and character of the transaction and the manner in which parties treated the transaction will throw light on the true form of the transactions.”

16. The Hon'ble Supreme Court in '**V.E.A Annamalai Chettiar and Anr.**' Vs. '**S.V.V.S. Veerappa Chettiar & Ors.**', AIR 1956 SC 12 has observed that *'the answer to the question whether it was a loan or deposit would not depend merely on the terms of the document but has to be judged from the intention of the parties and the circumstances of the case. That is manifestly the correct approach'*.

17. For a debt to be termed as 'Financial Debt', the basic elements that are to be seen is whether **(a)** there is disbursal against consideration for time value of money and **(b)** whether it has a commercial effect of borrowing. The definitions provided in Sections 5(7) and 5(8) show that a 'Financial Creditor' refers to a person to whom 'Financial Debt' is owed and includes even a person to whom such a debt has been legally assigned or transferred to. A 'Financial Debt' is a debt alongwith interest which is disbursed against the consideration for the time value of money and it may include any of the events specified in sub-Clause (a) to (i). The Legislature has included **any** financial transaction in the definition of 'Financial Debt' which are usually

for a sum of money received today to be paid over a period of time in instalments, or in a single payment in future.

18. The expression *time value* has been defined in Black's Law Dictionary as '*the price associated with the length of time that an investor must wait until an investment matures or the related income is earned*'. To reiterate, any of the transactions specified in Clauses (a) to (i) of Section 5(8) would fall within the ambit of the definition of 'Financial Debt' only in the event if they include the essential elements stated in the principal clause that is element of disbursal, against the consideration for time value of money and has the commercial effect of borrowing. For a person to be defined as a Financial Creditor of the 'Corporate Debtor', it has to be shown that the 'Corporate Debtor' owes such a 'Financial Debt' to such a person.

19. In the instant case, the word 'Security Deposit' mentioned in Clause 10 of the MoU has to be given the correct interpretation as specified by the Hon'ble Supreme Court in '**V.E.A Annamalai Chettiar and Anr.**' (**Supra**). The true effect of the transaction ought to be determined from the terms of the Agreement, keeping in view, the facts and circumstances of the case. In the instant case, the 'Sales Promotion Agreement' mandated a 'Security Deposit' carrying interest at 21% per annum. It is not in dispute that the 'Corporate Debtor' did not adhere to the payment of interest and that there was a default. In other words, neither the 'Debt' nor the 'Default' is disputed. The only question which arises here is whether it is an 'Operational Debt' or a 'Financial Debt'.

20. Learned Counsel for the Appellant in his Written Submissions dated 05.10.2021 has placed reliance on the recent Judgement of the Hon'ble Supreme Court in **'M/s. Orator Marketing Pvt. Ltd.' Vs. 'M/s. Samtex Desinz Pvt. Ltd.' Civil Appeal No. 2231 of 2021** in support of his contention that the debt in the attendant case is a 'Financial Debt'. The Hon'ble Supreme Court in paras 20 to 23 has observed as follows:-

"20. A 'corporate debtor' means a corporate person who owes a debt to any person, as per the definition of this expression in Section 3(8) of the IBC. Section 3(11) defines 'debt' to mean "a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt." The word 'claim' has been defined in Section 3(6) to mean inter alia "a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured." 'Default' is defined in section 3(12) to mean "non-payment of a debt when the whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the Corporate Debtor, as the case may be." Under Section 5(7) of the IBC 'financial creditor' means any person to whom a financial debt is owed and includes a person to whom such debt has legally been assigned.

21. The definition of 'financial debt' in Section 5(8) of the 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) of the IBC. The definition of 'financial debt' in Section 5(8) includes the components of sub-clauses (a) to (i) of the said Section.

22. The 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 of the 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.”

(Emphasis Supplied)

21. The Appellant had specifically denied securing any 'stocks' 'goods' or other properties to the 'Corporate Debtor' and was only appointed for the sole purpose of sales promotion of beer. The financial statement of the Appellant for the Financial Year 2017-18 shows revenue from interest on the 'Security Deposit'. The financial statements mention the 'Security Deposit' under the head of other financial liabilities alongwith entries such as 'interest accrued on borrowings'. The said amounts were treated as long term loans and advance in the financial statement of the 'Corporate Debtor' for the Financial Year 2015-16 and under 'other long term liabilities' for the Financial Year 2016-17. To reiterate, the 'Security Deposit' amount had admittedly an element of interest payable at 21% per annum and hence can be construed as having commercial effect of borrowing. The fact that amounts were paid with a

specific term and tenure is evident from the term loan dated 01.04.2014, 01.04.2015 which specifies the time periods. It is significant to note that the Appellant paid tax on the net interest income earned by it on accrual basis.

22. The 'Corporate Debtor' had accepted the 'Security Deposit' from the Appellant and credited the interest for some time against such amounts for the period 2014-15, and bearing in mind the payment of interest on the amounts borrowed by the 'Corporate Debtor' is nothing but a consideration for the time value of money and the interest is being paid to the Appellant for using the money belonging to the Appellant over a period of time and hence we arrive at the conclusion that the status of Appellant is that of a Financial Creditor vis-à-vis the amount of 'Security Deposit' as per Section 5(7) read with Section 5(8) of the Code. We are of the considered view that the ratio of the Judgement of the Hon'ble Supreme Court in '**M/s. Orator Marketing Pvt. Ltd.**' (*Supra*) is squarely applicable to the facts of this case and we hold that the 'debt' in question is a 'Financial Debt'.

23. Now we address ourselves to the fact that the Resolution Plan has already been accepted by the CoC and is pending before the NCLT for approval. The material on record shows that the Appellant herein had filed an Interim Application on 02.05.2019, challenging the rejection, but while the I.A. preferred by the Appellant was kept pending, the RP filed I.A. 186/JPR/2019 seeking approval of the Resolution Plan was filed and the Adjudicating Authority dismissed the I.A. preferred by the Appellant only on 18.01.2021. The Appellant Counsel has submitted that they are not pressing for reconstitution of the CoC at this stage and do not intend to challenge or

oppose the Resolution Plan, but only to seek for the debt amount to be treated as a 'Financial Debt'.

24. For all the aforementioned reasons, this Appeal is allowed and the Impugned Order is set aside. We hold that the said amount of debt herein is to be treated as a 'Financial Debt'. We are also conscious of the importance of timelines to be maintained by us as observed by the Hon'ble Supreme Court in '***Ebix Singapore Pvt. Ltd. Vs. Committee of Creditors of Educomp Solutions Ltd. & Anr.***' **Civil Appeal No. 3224 of 2020** and therefore request the Adjudicating Authority to decide the matter as expeditiously as practicable.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
07th October, 2021

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