

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**PRINCIPAL BENCH****NEW DELHI****COMPANY APPEAL (AT)(INS) NO.501 OF 2023**

(Arising out of judgement and order dated 09.02.2023 passed by National Company Law Tribunal, Mumbai in CP{(IB) No.1049/MB-IV/2021)

In the matter of:

Advantagesai Projects Private Ltd
C-1, Mahavir Complex, Opp JhunJhun Wala Hospital
Near Akashwani, Jalna Road,
Aurangabad 431001 Appellant

Vs

Akshay Techforge Pvt Ltd
Plot No.X-280, Oswal Complex, MIDC,
Waluj
Aurangabad 431136
Maharashtra

Also at

Akshay Techforge Pvt Ltd
Plot No.17, 18 and 19, Gut No.53,
Sujaipur,
Tq. Gangapur,
Distt Aurangabad
Maharashtra 431136 Respondent

For Appellant:Ms Pinki Anand, Sr Advocate, Mr Balendu Shekhar, Mr Rajkumar Maurya, Ms Saudamini Sharma, Ms Tanisha S., Ms Nayoleeka Purty, Advocates.

For Respondent:Mr Avinash R Khanolkar, Ms Surekha Yadav, Ms Khushbu B, Advocates.

JUDGEMENT**JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)**

This appeal is filed against an impugned order dated 09.02.2023 passed by Ld. Adjudicating Authority, National Company Law Tribunal, Mumbai in

CP(IB) No.1049/MB-IV/2021 whereby an application under Section 7 of IBC filed by the appellant was dismissed.

2. The brief facts as alleged by the appellant are as follows:-

a) The Respondent had defaulted on a loan from State Bank of India and was in need of funds to settle the OTS Amount. In lieu of the same, the Respondent approached the Appellant herein, as they had done in past, for loan to settle the said dues. The Appellant had already disbursed a sum of Rs. 48,36,540 (Rupees Forty-Eight Lakhs Thirty-Six Thousand Five Hundred and Forty) upto 12.11.2018. In light of One Time Settlement with SBI, the Respondent was in dire need of more funds. At that stage and in lieu of the same, the Appellant and the Respondent executed an Agreement to Sale dated 09.04.2019, wherein the earlier disbursement of Rs. 48,36,540/- was acknowledged by the Respondent and the Appellant had further agreed to lend another sum of Rs. 1,00,00,000/- (Rupees One Crore only). The payment of Rs. 1,00,00,000/- was made by the appellant directly in the respondent's OTS account on 12.04.2019. The Respondent was required to repay the said sum on or before 31.03.2020 and upon failure, Respondent had agreed to execute Sale Deed for its plots of land being "Plot No. 17, 18 and 19, Gut No. 53, Sajapur, Tq. Gangapur, Dist. Aurangabad - 431 136 ("Plot"), otherwise, as per clause 3, upon receipt of entire payment on/before 31.03.2020 to appellant, agreement to sale was deemed to be cancelled. Clause 5 of the agreement also provided needed option for the respondent *to raise money for paying the appellant by even mortgaging the said piece of land to any financial institutions;*

b) as the respondent failed in repaying the loan, Appellant and Respondent executed yet another agreement dated 01.04.2020 wherein the terms of repayment for the loans disbursed to the Respondent were extended up to 31.03.2021. It was also agreed if the dues were not repaid by the Respondent, the Sale Deed for the plot of land would be executed on or before 30.04.2021 with giving the same flexibility *i.e., as per clause 6 of the agreement dated 01.04.2020 also provided needed option for the respondent to raise money for paying the appellant by even mortgaging the said piece of land to any financial institutions;*

c) the Appellant and Respondent then executed another Memorandum of Understanding dated 09.04.2020 wherein the Respondent had agreed to pay interest at 18% p.a, on monthly basis or 30% of profit; whichever was higher. Further, the interest was agreed to be payable by the Respondent on compounding basis on the balance outstanding as on 01.04.2020 and *the calculation of interest shall be from 01.09.2018 till the date of payment of total outstanding dues to the Appellant.* The Respondent defaulted in paying the dues of the Applicant and a sum of Rs. 2,39,17,469.66 became receivable by the Appellant from the Respondent as per agreed terms of agreement.

Accordingly, the Appellant approached the Ld. Adjudicating Authority U/S 7 of the Insolvency and Bankruptcy Code, 2016;

3. The learned senior counsel for the appellant has argued that while passing the impugned order dated 09.02.2023, Ld. Adjudicating Authority has erroneously dismissed the application of the Appellant u/s 7 of the Insolvency and Bankruptcy Code holding the transaction between the Appellant and the Respondent is a sale/purchase transaction and is not a 'financial debt'. It is argued the Ld. Adjudicating authority has erred by not appreciating the fact that as per the MoU entered into between the parties, the Corporate Debtor had to return the amount paid on its behalf by the Appellant with interest, indicating time value of money and therefore the Appellant squarely falls within the definition of '*Financial Creditor*' under Section 5(7) of the Insolvency and Bankruptcy Code, 2016.

4. Further it is argued the Ld. Adjudicating Authority ought to have appreciated the Respondent has in the First Agreement dated 09.04.2019; Second Agreement dated 01.04.2020 and MoU dated 09.04.2020 unequivocally acknowledged the financial assistance given by the Appellant as loans and advances. More over, the Appellant had also fulfilled its obligation of payment of One Time Settlement of the Respondent to State Bank of India, therefore, the Ld. Adjudicating Authority ought to have appreciated that the financial assistance provided by the Appellant to the Respondent constitutes a commercial effect of borrowing. It is argued the Ld. Adjudicating Authority failed to appreciate, the 'debt' satisfies the threefold criteria of 'disbursal, 'time value of money 'and commercial effect of borrowing 'for being a 'financial debt. The disbursal of the loans and advances have been

acknowledged all through by the Respondent and have nowhere been disputed by the Respondent. The MoU entered into between the Appellant and the Respondent clearly stipulates the Respondent has agreed to pay interest @18% p.a. or 30% profit whichever is higher and the interest shall be payable on compounding basis on the balance outstanding as on 01.04.2020 and the calculation of interest shall be from 01.09.2018 till the date of payment to the Appellant. It is argued as per Section 5(8) of the Insolvency and Bankruptcy Code, 2016, a "financial debt", means a *debt along with interest*, if any, which is disbursed against the consideration for the time value of money and it includes, any amount raised under *any other transaction, including any forward sale or purchase agreement, having the commercial effect of borrowing*. It is argued the Ld. Adjudicating Authority grossly erred in not appreciating this relevant and material fact that the Appellant's financial assistance qualified as a "financial debt" and the Appellant is a "financial creditor"

5. The learned senior counsel for the appellant argued the Ld. Adjudicating Authority ought to have appreciated the agreement to sale was a *security* in favour of the Appellant in the event of default by the Respondent and that it failed to appreciate the Respondent even defied the agreed terms of settlement and illegally mortgaged without the consent, knowledge and approval of appellant, the Plots No. 17, 18 and 19, Gut No. 53, Sajapur, Tq. Gangapur, Dist. Aurangabad- 431136, with Deogiri Nagari Sahakari Bank Limited, which was required to be used only for the purposes of paying loan amount given by the appellant.

6. The learned senior counsel for respondent on the other hand supported the impugned order saying the real intention was to execute sale deed and the respondent is still inclined to execute it by clearing of the mortgage upon such plots.

7. Heard.

8. We have gone through the documents annexed with the paper book, more specifically the agreements and the MOU executed between the parties. The first agreement entered into between the parties was an agreement to sell dated 09.04.2019 with following terms and conditions:-

1. Whereas party of first part Akshay Techforge Pvt Ltd decided to sale Plot No.17, 18 & 19, Gut No.53, Sajapur, Tq.Gangapur, Dist Aurangabad 431136 for total consideration of Rs.1,65,00,000/-.

2. Whereas party of second part Advantagesai Projects Pvt Ltd has made the payment of Rs.48,00,000/- till date to party of first part Akshay Techforge Pvt Ltd as per the Annexure-I and agreed to make the further payment of Rs.1,00,00,000/- by way of R GS on 10 April 2019 to party of first part Akshay Techforge Pvt Ltd.

3. Whereas party of first part Akshay Techforge Pvt Ltd and second part Advantagesai Projects Pvt Ltd has mutually agreed that, the Loans & Advances given by party of first part Akshay Techforge Pvt Ltd to party of second part Advantagesai Projects Pvt Ltd shall be repaid on or before the. 31/03/2020 and if same is repaid the this agreement to sale shall be deemed to be cancelled

4. Whereas party of first part has agreed to repay the amount taken from second party of second part Advantagesai Projects Pvt Ltd on or before 31 March 2020 of Rs.1,49,00,000/- and if they failed to do same then they will execute the Sale Deed in favor of party of second part Advantagesai Projects Pvt Ltd before the 30 April 2020 by receiving the balance payment of Rs.17,00,000/-.

5. Whereas-party of first part Akshay Techforge Pvt Ltd has clearly stated that the funds received from party of second part Advantagesai Projects Pvt Ltd will be utilised towards the

repayment of OTS of State Bank of India, MIDC, Waluj, Aurangabad where Land & Building stated above and Plant & Machinery is mortgaged. Once the above said property mortgaged i.e. Land & Building to State Bank of India, MIDC, Waluj, Aurangabad release then the original papers of Land & Building shall be handed over to Sh Rajesh Suresh Chaurasia Managing Director of Advantagesai Projects Pvt Ltd immediately, also with the written consent from party of second part Advantagcsai Projects Pvt Ltd Land & Building of Akshay Techforge Pvt Ltd situated at Plot No.17, 18 & 19, Gut No:53, Sajapur, Tq.Gangapur, Dist Aurangabad 431136 can be mortgaged to any financial institutions to release the hand loan of party of second part Advantagesai Projects Pvt Ltd.

9. Admittedly the Respondent did not pay a single penny towards loan amount and hence another agreement to sell dated 1.4.2020 was executed which had more or less the same provisions as in the first agreement dated 09.04.2019.

10. Lastly on 09.04.2020 a MOU was entered into between the parties which had the following relevant clauses:-

1. This Memorandum of Understanding is in continuation with the terms and conditions mentioned in the agreement to sale executed between party of first part Akshay 'Techforge Pvt. Ltd. and second part Advantagesai Projects Pvt. Ltd. on dated 01/04/2020.

2. Whereas party of first part Akshay Techforge Pvt. Ltd. decided to sale Plot No.17, 18 & 19, Gut No.53, Sajapur, Tq.Gangapur, Dist Aurangabad 431136 for total consideration of Rs.1,35,94.727/-(Rupee!_ One Crore thirty five lacs ninety four thousand seven hundred twenty seven only).

3. Whereas the party of second part Advantagcsai Projects Pvt. Ltd. has also shown the interest -and agreed to buy Plot No.17, 18 & 19 G t No.53 Sajapur, Tq. Gangapur, Distt. Aurangabad and made the payment on various date to party of first part Aksbay Techforge Pvt. Ltd. which is shown separately in Annexure-1.

*4. Whereas the party of first part Akshay Techforge Pvt Ltd has agreed to pay the interest @ **18% per annum on monthly basis or 30% of profit whichever is higher**, the interest payable is to be calculated on monthly basis on the amount*

outstanding in the previous month and shall be calculated on monthly compounding basis.

5. The interest payable for the previous month shall be paid within 7 days of the following month.

*6. The party of first part Akshay Techforge Pvt Ltd agreed to pay the **interest on monthly basis @ 18% per annum or 30% of profit whichever is higher**, the interest shall be payable on compounding basis on the balance outstanding as on 01st April, 2020 and the **calculation of interest shall be from 01st September, 2018 till the date of payment to the party of second part Advantagesai Projects Pvt Ltd.***

11. Admittedly the words 'interest' and 'profit' were mentioned in the last document *viz* MOU dated 09.04.2020 yet it was never paid as *admittedly* the respondent did not have either the capacity to repay or had no intention. A bare perusal of the documents above would show the intention of the parties was never to purchase/sell the aforesaid plots.

12. In Shivam Agriols Pvt Ltd Vs Shree Krishan Vanaspathi Industries Pvt Ltd 2023 SCC OnLine NCLAT 233 this Tribunal held as follows:-

15. Before we proceed to answer the questions as delineated above, a prefatory glance at certain definition clauses which find place in [Section 3](#) under Part I Preliminary and in [Section 5](#) under Part II Chapter I Preliminary of the IBC would be constructive: -

[Sections](#)

3(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;

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

3(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;

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

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) (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) (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;*

16. Now coming to answer the first question, we need to notice in precise terms the sequence of events and nature of transaction which has taken place between the Appellant and the Respondent pursuant to the two MoUs which have been Company Appeal (AT)(Insolvency) No.982 of 2022 entered into between them in the background of OTS proposal as well as the contemporaneous execution of A2S.

17. For better appreciation of the factual matrix, it may be useful at this stage to notice the salient clauses of the MoUs and A2S as reproduced hereunder: -

MoU of 25.11.2014 (MoU-

WHEREAS:

B. One of the terms of the Lease Deed is that the Seller shall not transfer, assign or otherwise part with possession of the Plot except with the prior permission of SIDCUL;

C. The Seller has represented to the Buyer that the Seller will complete all formalities and obtain requisite permission from SIDCUL for transferring the said Plot in favour of the Buyer and the Seller acknowledges that the Buyer has entered into this MoU only on the reliance of the promise of the Seller to obtain approval from SIDCUL for transfer of interest in Plot from the Seller to the Buyer;

E. The Buyer is interested in acquiring the entire right, title and interest in the Unit (including but not limited to the Plot) from the Seller, free from all encumbrances, subject to approval from SIDCUL for such transfer and for the consideration mentioned herein under and subject to the terms and conditions as contained in this MoU.

28. In the present facts of the case, that money had been disbursed by the Appellant on behalf of Corporate Debtor to SBI towards loan repayment is undisputed. It is also an admitted fact that no interest was either claimed by the Appellant nor paid by the Corporate Debtor. That the component of interest is not a sine qua non for bringing a debt within the fold of financial debt has been clearly held by the Hon'ble Supreme Court in [Orator](#) (supra). We are, therefore, not able to accept the misconceived finding of the Adjudicating Authority that simply

because the instant transaction was bereft of loan component and no time was fixed for repayment, it did not qualify to be a financial debt.

29. We now proceed to examine whether in the present case, disbursement of money has taken place against the consideration for time value of money and whether commercial effect of borrowing is found to underpin the transaction. At the outset, we acknowledge that the concept of time value of money has not been expressly defined in the IBC. Undoubtedly, the most typical illustration of time value is in the form of interest on the principal amount that has been borrowed. However, it is now a well settled proposition of law that interest on loan is not the only binding criterion for determining time value of money. The Insolvency Law Company Appeal (AT)(Insolvency) No.982 of 2022 Report, 2018 has also held time value of money to mean compensation or the price paid for the length of time for which money has been disbursed. Thus, 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.

30. We also notice that the Adjudicating Authority in the impugned order has held that in the absence of time fixed for repayment, it cannot be said that the loan was advanced for time value of money. Even if the loan extended was not interest-bearing and no time was fixed for repayment, it would be both skewed and misconstrued to hold that the loan was disbursed without time value of money. The Appellant had advanced the payment with an intent to gain from the land, plant and machinery and factory building changing hands from the Corporate Debtor to the Appellant as borne out from Clause 4.1.2 of MoU-2. The expectation to benefit from acquiring the entire right, title and interest over the subject property at a lesser rate compared to the market value has to be factorized as 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.

13. Further in *Kolla Kotswara Rao Vs Dr. S.K. Srihari Raju and Another* 2021 SCC OnLine NCLAT 110 this Tribunal held as under:-

16. It is evident that though money has been paid under an Agreement to Sell, it is seen that the same was paid by the first Respondent to the Lender Bank only on behalf of the 'Corporate Debtor' and furthermore **in the event of the failure on the part of the 'Corporate Debtor' to adhere to the terms of the Agreement, the said consideration amount was to be repaid by the 'Corporate Debtor' alongwith interest in the event the transaction did not materialize.** It is seen from the record that a Right to Payment accrued to the first Respondent in terms of Clause 11 of the Agreement.

17. The Hon'ble Supreme Court in '[Pioneer Urban Land and Infrastructure Ltd. & Anr.](#)' (Supra) while dealing with the scope of [Section 5\(8\)\(f\)](#) of the Code held as follows;

"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 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:

(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 Company Appeal (AT) (Insolvency) No. 717 of 2020 would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay installments 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 (Second Edition, 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 whole: 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 produce 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 home buyers 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 home buyers. The "something equivalent" in these matters is obviously the flat/apartment. Also of importance is the Company Appeal (AT) (Insolvency) No. 717 of 2020 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.

20. And therefore the ratio [laid down by](#) the Hon'ble Apex Court with respect to 'Financial Debt' in '[Pioneer Urban Land and Infrastructure Ltd. & Anr.](#)' (Supra) is squarely applicable to the facts of this case.

14. Now after going through the documents executed between the parties and also the law discussed above, we now proceed to find the real intention

of the parties behind executing these documents. Admittedly the existence of financial assistance, as recorded in the 1st agreement dated 09.04.2019, second agreement dated 01.04.2020 and MOU dated 09.04.2020 executed by the respondent, has not been disputed. Now to find the real nature of financial assistance, *if* was against time value of money, one would need to go through various clauses of these agreements. Admittedly the agreement dated 09.04.2019 clearly mention the funds received from the appellant were to be utilised towards repayment of OTS of State Bank of India, Aurangabad where the land and building stated above and even its plant and machinery was mortgaged. The agreement provided that was once the mortgaged property was released then the original papers were to be handed over to the Managing Director of the appellant and/or in the alternative Plots No. 17, 18 and 19 situated at Distt. Aurangabad *viz* the subject property could be mortgaged to any financial institution to release the said loan of the appellant.

15. Thus as above the intention was only to repay the loan of the appellant *per* these agreements. The respondent was rather authorised to mortgage the subject property to repay such loan. Hence it cannot be said the real intention of he parties was sale/purchase of the subject property.

16. The second agreement dated 01.04.2020 also reiterated the above intention. Lastly the MOU dated 09.04.2020 specifically noted the Respondent had agreed to pay an interest @ 18% per annum on monthly compounding basis or 30% of profit whichever is higher. The interest payable was to be calculated on monthly basis on the amount outstanding in the previous month i.e. on monthly compounded basis. Thus it appears the real

intention was not to purchase and sell the said plots but was only to give security for the loan given. Admittedly the clauses of the MOU would show the interest was to be charged on monthly compounding basis. Further it is to be noted the transaction never had any fixed amount of consideration for sale/purchase of such property.

17. We have also perused the ledger account of the respondent as maintained by the appellant, wherein its account was described as a *loan account*. Similarly the copy of the ledger of the appellant, as maintained by the respondent, from 01.04.2017 to 31.03.2018 as well as from 01.04.2018 till 31.03.2019 would also show the account of the appellant, a *loan account*. Thus both the parties in its financial statements duly described the transaction as a *loan transaction* and it squarely satisfy the valid criteria of *financial debt; of disbursal; of time value of money and commercial effect of borrowing* as laid down in Kolla Koteswar Rao (Supra). Admittedly the loan carried an interest @ 18%, on monthly compounding basis. It had fixed date of repayment i.e. 31.03.2021 and it contained an element of profit and enhancement of economic prospects in return for the money financed for certain *time period*, the loan in question thus entail the time value of money and acquired the colour of commercial borrowing.

18. Thus we found that the Ld. NCLT erred in not observing the real intention of the appellant and the respondent which rather was never to enforce the agreement to sell. Admittedly the subject property is still mortgaged with some financial institution and is not cleared for sale. Admittedly the clauses of the agreements of 09.04.2019 and 01.04.2020

clearly stipulate such property could be mortgaged by the respondent to repay the loan of the appellant. If the intention was of sale/purchase then why such clause(s) would have been entered into the agreements dated 09.04.2019 and 01.04.2020. Thus the real intention of the parties was to treat the transaction, a *loan transaction*. The respondent always acknowledged the receipt of loan and advances in all its three agreements in its ledger statements and never disputed it.

19. Thus the above financial assistance is duly covered within the definition of *financial debt* as prescribed under Section 5(8) of the Code. The impugned order dated 09.02.2023 thus is liable to be set aside. Hence it is set aside and the petition filed under Section 7 of the Code by the appellant, is admitted. Pending applications are also disposed of. The parties to appear before the Ld. NCLT for further orders on 01.07.2025.

(Justice Yogesh Khanna)
Member (Judicial)

(Mr. Ajai Das Mehrotra)
Member (Technical)

Dated:23 -05-2025

Bm/md