

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI

Company Appeal (AT) (Insolvency) No. 778 of 2020

[Arising out of order dated 20.03.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) in Company Petition (IB) 4186/MB/2019]

IN THE MATTER OF:

M/s VRG Healthcare Pvt. Ltd.

Plot No. 278, Central Bazaar Road,
Ramdespeth, Nagpur, Maharashtra-
440011.

..... Appellant.
(Financial Creditor)

Versus

M/s VRG Infrastructure Pvt. Ltd.

Plot No. N-4, 19 Great Nag Road, Nagpur,
Maharashtra- 440018.

..... Respondent.
(Corporate Debtor)

Present:

For Appellant: **Mr. Samar Bansal, Mr. Shreeyash U. Lalit, Mr. Manan Shishodia, Mr. Abhinav Aggarwal, Ms. Runjhun Garg, Mr. K. Abhay, Advocates.**

For Respondent: **Mr. Gaurav Mitra, Mr. Ishan Ray Chaudhury, Advocates.**

J U D G M E N T
(22nd March, 2023)

Justice Anant Bijay Singh:

The instant Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (***for short IBC***) has been preferred by the Appellant being aggrieved

and dissatisfied by the order 20.03.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) in Company Petition (IB) 4186/MB/2019 whereby petition under Section 7 of the IBC filed by Appellant with a prayer to initiate the Corporate Insolvency Resolution Process against Respondent herein – “VRG Infrastructure Private Limited (Corporate Debtor)” was dismissed holding that the claim of the Petitioner is not a Financial Debt within the meaning of Section 5(8) of IBC.

2. The facts giving rise to the instant Appeal are as follows:

i) The Appellant was incorporated on 19.12.2006. The Appellant started a Hospital in the name and style of ‘*Meditrina Institute of Medical Sciences*’ which was run by the Appellant since the year 2012. The Appellant and the Respondent have had common promoter directors viz. Mr. Ganesh Chakkarwar and Mr. Gitesh Muttemwar. Both the aforementioned persons were Directors of the Appellant company since its inception and were also promoters and shareholders of the Appellant company. While Mr. Chakkarwar continues to be a 33% shareholder and Director of the Appellant company till date, Mr. Gitesh Muttemwar resigned from the Board of Directors on 03.08.2016. Presently, the Appellant company has three Directors viz. Dr. Sameer Paltewar, Mrs. Sonali Paltewar and Mr. Ganesh Chakkarwar. Furthermore, Mr. Chakkarwar and Mr. Muttemwar have also been Directors and shareholders of the Respondent company since its inception on 04.11.2004.

ii) The Appellant and the Respondent are not group companies, however both the Appellant and Respondent have been operating with the name ‘VRG’, signifying the common interest of the promoters/shareholders/directors in both

the companies. The Appellant company, a sum of INR 25,00,000/- was transferred from the Respondent company to the Appellant company on 12.02.2011 vide Cheque No. 490804. The Balance Sheet for the Appellant company demonstrates the receipt of this money for the Financial Year 2010-11, which was co-signed by the common Director of both the Appellant and Respondent companies. The fact that these monies were advanced as against the credit given by Mr. Gitesh Muttemwar is also corroborated by the fact that the ledger Account maintained by the Appellant company demonstrates that the amount of INR 25,00,000/- so received was accounted for, against the credit entry in the name of Mr. Gitesh Muttemwar, in addition to INR 39,29,963/-, which was the amount already having been advanced by Mr. Gitesh Muttemwar to the Appellant company. On 26.03.2011, the Appellant company returned an amount of INR 10,00,000/- to Mr. Gitesh Muttemwar vide Cheque No. 797591. Thus, the Balance Sheet as on 31.03.2011 shows that an amount of INR 54,29,963/- (which also includes the amount of INR 25,00,000/- transferred by the Respondent company to the Appellant company) was payable to Mr. Gitesh Muttemwar.

iii) On 25.03.2013, an amount of INR 10,55,000/- was again paid to Mr. Gitesh Muttemwar as against his contribution towards the purchase of additional shares of the Appellant company. Thus, the Ledger Account of the Appellant company as on 31.03.2013 would demonstrate that the outstanding amount payable to Mr. Muttemwar was INR 43,74,963/-. On 30.04.2015, the Appellant company refunded the amount against redemption of previously purchased shares of Buldhana Urban Cooperative Society (Bank) in the name of

Mr. Gitesh Muttemwar amounting to INR 22,00,000/- towards the loan given to the Appellant by its Director, Mr. Muttemwar. The Ledger Account of the Appellant as on 31.03.2016 would demonstrate that the outstanding amount payable to Mr. Muttemwar was INR 21,74,963/-. Finally, as on 31.05.2016, the entire outstanding amount payable to Mr. Gitesh Muttemwar to the tune of INR 21,74,963/- was paid off. The Ledger Account of the Appellant maintained by the Appellant company as on 31.03.2017, also indicates that the monies payable to Mr. Gitesh Muttemwar were fully paid off and settled. The said fact can also be corroborated from the Balance Sheets of the Appellant company, on which Mr. Chakkarwar was co-signing. The said fact is extremely pertinent because both Mr. Muttemwar and Mr. Chakkarwar were promoters, shareholders and Directors of the Respondent company. At no point of time did the Balance Sheets of the Appellant company ever record any amount of INR 25,00,000/- as payable to the Respondent Company. Furthermore, the Respondent Company was never shown as a Financial Creditor.

iv) It is evident that the Amount of INR 25,00,000/- advanced by the Respondent company to the Appellant company vide Cheque No. 490804 on 12.02.2011 was evidently marked as against the credit entry of Mr. Gitesh Muttemwar. It is equally evident that Mr. Muttemwar was a common promoter, as well as shareholder and Director of both the Appellant and Respondent companies. Therefore, it cannot be gainsaid that the amount of INR 25,00,000/- advanced by the Respondent company on 12.02.2011 was treated as monies payable to Mr. Gitesh Muttemwar, since he had an overwhelming influence over the accounts of both the Appellant and Respondent companies, owing to him

being the promoter, shareholder and Director of the said companies. If the Respondent has a grievance that the said monies of INR 25,00,000/- were not repaid, it should address these grievances against its Director, Mr. Gitesh Muttemwar as the said entry was marked against Mr. Gitesh Muttemwar, who has been repaid for the same. In summation, it is not possible to assert that the loans advanced by the Respondent company (to be marked against the credit entry of Mr. Gitesh Muttemwar) were not paid and settled.

v) Till August 2016, the shareholding of the Appellant company was such that Mr. Gitesh Muttemwar and Mr. Ganesh Chakkarwar were both shareholders, promoters and Directors of the Appellant company. On 30.08.2016, Mr. Gitesh Muttemwar resigned from the Board of Directors. Simultaneously, in August 2016, the shareholding of the company was also altered after Dr. Paltewar purchased the shares at INR 55/- per share, which was more than the book value of the shares of the company at the time. It can be seen that no benefit accrued to Dr. Patewar through this transaction. It is important to note that even after August, 2016, the registered office of the company continued to be in the personal office of Mr. Gitesh Muttemwar and he continued as the Chairman cum Managing Director of the Appellant company till 17.11.2017.

vi) Despite the exit of Mr. Gitesh Muttemwar from the Appellant company on 03.08.2016, Mr. Gitesh Muttemwar continued to be the CMD of the said company. Furthermore, Mr. Ganesh Chakkarwar was also a common Director of the Appellant as well as Respondent company and was evidently the promoter, shareholder of both companies and signatory to the balance sheets of both the

companies. During the tenure of Mr. Chakkarwar as the CMD of the Appellant company, that the Appellant gave an unsecured loan of INR 25,00,000/- to the Respondent company by way of Cheques dated 21.07.2017 was for an amount of INR 15,00,000/- and dated 05.08.2017 was for an amount of INR 10,00,000/. On 17.11.2017, owing to the demand for explanations for the financial irregularities and improprieties, Mr. Ganesh Chakkarwar resigned as the CMD of the Appellant company. It was also resolved that the registered office of the Appellant company be shifted to the Hospital premises, i.e. away from the personal office of Mr. Ganesh Chakkarwar.

vii) These unsecured loans, advanced by way of aforesaid Cheques have still not been repaid by the Respondent company. It is imperative to note that the balance sheet of the Respondent company continued to show the Appellant company as a debtor till Financial Year 2017-18, despite the fact that Mr. Gitesh Muttemwar had prevailed upon Appellant company to mark the said entry as against the credit entry of Mr. Muttemwar and was subsequently paid off and settled. This is also in complete contrast to the averments made by the Respondent before the Adjudicating Authority where it has averred that the amount of INR 25,00,000/-, which was given through aforesaid Cheques was received as a repayment of the pre-existing loan disbursed on 12.02.2011. Admittedly, the said amounts were received by the Respondent company. Therefore, whether or not there was an interest and whether or not there was a written agreement was immaterial, as long as it was clear that an amount was due as financial debt which was in the nature of commercial borrowing.

viii) In light of the fact that the loan of 12.02.2011 was settle and paid off in May 2016 and having admitted the receipt of cheques dated 21.07.2017 and 05.08.2017, the Respondent company deliberately chose not to repay the same, despite a Legal Notice dated 10.01.2019 being sent by the Appellant company seeking repayment of the said financial debt. In a further testament to the fraud played upon the Appellant and Respondent companies by giving several unsecured loans and violating all compliances required of related party transactions under the Companies Act, 2013, Mr. Vishal Muttemwar and Mr. Gitesh Muttemwar issued a Legal Notice dated 15.01.2019 requesting dr. Paltewar for monies to the tune of INR 2,37,56,88/- to Vishal Muttemwar and INR 8,83,68,31/- to Mr. Gitesh Muttemwar, respectively. It cannot be gainsaid that these fictitious claims have still not been acted upon by Mr. Vishal Muttemwar and Mr. Gitesh Muttemwar and were only intended to intimidate and harass Dr. Paltewar from pusuing the legitimate claim of financial debt owed by the Respondent company to the Appellant company herein.

ix) Another related fact to consider is that before the filing of Legal Notice dated 10.01.2019, the erstwhile CMD of the company, Mr. Chakkarwar, had filed a petition under Sections 241 and 242 of the Companies Act, 2013 alleging oppression and mismanagement against the Appellant company. On 09.07.2019, the NCLT, Mumbai Bench ordered that a forensic audit be conducted into the affairs of the Appellant company since the latter had also willingly agreed to such audit in order to demonstrate its *bona-fides*. Sometime in May, 2020, the forensic auditor filed its report before the Tribunal giving damning conclusions against Dr. Paltewar, the present CMD of the Appellant

company. The Appellant company is in the process of filing its objections against the said report, as the conclusions were based on inadmissible and fabricated documentary evidence, not part of the books of accounts. However, one important aspect to consider is that even the forensic audit report, despite its partisan approach towards attacking Dr. Paltewar, has recognized that the amount of INR 25,00,000/- was disbursed by the Appellant company to the Respondent company herein as an unsecured loan. This further crystallises the stance of the Appellant company since the forensic report also recognizes that the amounts disbursed via Cheques dated 21.07.2017 and 05.08.2017 were in the nature of a commercial borrowing.

x) Aggrieved by the non-payment of monies by the Respondent company, the Appellant company vide Board Resolution dated 24.06.2019 resolved that the company will take steps to initiate corporate insolvency resolution process under Section 7 of the IBC against the Respondent company for failure to furnish the outstanding payment of INR 25,00,000/- exclusive of the interest chargeable thereon. Thus, the application was filed before the Adjudicating Authority on 20.07.2019. Thereafter, after hearing the parties, the Adjudicating Authority dismissed the aforesaid Section 7 Application holding that the claim of the Petitioner is not a Financial Debt within the meaning of Section 5(8) of IBC. Hence this Appeal.

3. The Ld. Counsel for the Appellant during the course of argument and grounds taken in the memo of appeal along with written submissions submitted that the monies transferred on 12.02.2011 to the Appellant were repayable to Mr. Muttemwar and the Respondent is stopped from claiming otherwise. Mr.

Muttemwar was aware that the amount transferred on 12.02.2011 to the Appellant, was credited against his ledger account, due to the following reasons:

- The Appellant was incorporated on 19.12.2006 and the Respondent was incorporated on 04.11.2004. Both the companies had two common Directors- Mr. Muttemwar and Mr. Chakkarwar.
- On 12.02.2011, a loan of INR 25,00,000/- was provided to the Appellant vide cheque no. 490804. Although the amount was transferred from the account of the Respondent, informed the Appellant that the said amount should be treated as a loan payable to Mr. Muttemwar. As a result, the ledger account as well as the balance sheet for FY 2010-11 shows that the amount of INR 25,00,000/- was accounted against the credit entry for Mr. Muttemwar.
- The consistency in these accounts is further demonstrated by the ledger accounts of successive financial years which account for INR 25,00,000/- as a loan payable towards Mr. Muttemwar: Financial Year 2012-13, Ledger account (*at page 91 of the Appeal*) and balance sheet (*at page 81 of the Appeal*); Financial Year 2015-16, Ledger account (*at page 128 of Appeal*) and balance sheet (*at page 112 of Appeal*).
- On 31.05.2016, the entire outstanding amount payable to Mr. Muttemwar was paid. This is again reflected in the ledger account as well as the HDFC Bank statements. Therefore, from FY 2010-11 to FY 2016-17, it is clear that the ledger accounts as well balance sheets were calculated while accounting for INR 25,00,000/- against the credit entry of Mr. Muttemwar.

- In response, the Respondent feebly submits that *"All the balance sheets have been signed by Dr. Paltewar and Mr. Chakkarwar - not Mr. Gitesh Muttemwar (para 29 of Reply)"*. In any case, the Respondent admits that its common Director, Mr. Chakkarwar was the CMD of the Appellant company till 17.11.2017.
- Even otherwise, Mr. Muttemwar cannot disclaim knowledge of the balance sheets as he was present during the Board Resolutions which have passed the balance sheets from FY 2010-11 to FY 2015-16. He had the right of inspection of books of accounts under Section 128 of the Companies Act, 2013; the right to peruse the financial statements during the annual general meeting under Section 129; the ability to review the auditors' report under Section 134; and also, the ability to apply for voluntary revision of these financial statements under Section 131 if these statements did not present a true and fair view of the state of affairs of the company. Mr. Muttemwar failed to exercise any of these rights and is therefore deemed to have been aware of the entry of INR 25,00,000/- against his ledger.
- Mr. Muttemwar was also involved in the financial affairs. The Board Resolution dated 03.08.2012 authorizes him to enter into, and sign agreements, on behalf of the Appellant.

4. It is further submitted that as a result, the Respondent is stopped from claiming otherwise since it is bound by the actions of its agents and through its agents, is deemed to have consented to the credit entries in the ledger account as well as balance sheets of the Appellant on account of the following reasons:

- Mr. Muttemwar exercised his influence in order to credit the loan of 12.02.2011 as against his ledger account. Both Mr. Muttemwar and Mr. Chakkarwar were common Directors and therefore were also agents of the Respondent. As a result, the Respondent acquiesced to the fact that the amount transferred to the Appellant on 12.02.2011 was a loan payable to Mr. Muttemwar and not the Respondent.
- The Appellant clearly acted to its detriment by paying out the outstanding amount of INR 25,00,000/- towards Mr. Muttemwar. The Respondent failed to provide any justification as to why its own agents, i.e., Mr. Muttemwar and Mr. Chakkarwar, who were common Directors of both companies, were completely mute from FY 2010-11 to FY 2015-6.
- A principal (Respondent) is bound by the actions of its agent (Mr. Muttemwar or Mr. Chakkarwar). In this case, the agent represented to the Appellant that the monies transferred on 12.02.2011 were to be treated as loans payable to the agent. Thus, the Appellant, believing that the agent is acting on the authority of the Respondent, has acted to its detriment.

5. Further, ingredients of 'financial debt' under the IBC are satisfied. The unsecured loan transferred to the Respondent on 21.07.2017 and 05.08.2017 qualifies as a 'financial debt' on account of the following reasons:

- Under section 5(8) of the IBC, financial debt *"means a debt alongwith interest, if any, which is disbursed against the consideration of the time value of money....."*. It is submitted that the usage of the words "If any" demonstrate that interest is not a *sine qua non* for the purpose of determining a borrowing as 'financial debt'. This interpretation is

supported by the decision of this Tribunal in the case of "**Shailesh Sangani v. Joel Cardoso, Company Appeal (AT) (Ins.) No. 616 of 2018**, which has also been followed in "**Ranjit v. Vijay Vakharia, 2019 SCC Online NCLAT 669**".

- In "**Pioneer Urban v/ Union of India, (2019) 8 SCC 416**", the Hon'ble Supreme Court has held that Section 5(8)(f) of the IBC is a "*catch all*" provision which is really residuary in nature and which would subsume within it, transactions which do not, in fact, fall under any of the other sub-clauses or main definition clause of Section 5(8).
- *Pioneer Urban (supra)* also observed that Section 5(8) comprises of a main definition which commences with "*means*", and clauses (a) to (i) which are prefixed with "*and includes*" cover subject matters which may not necessarily be reflected in the main part of the definition. As a result, it held that the ingredient of "*disbursed against the consideration for the time value of money*" would not be a necessary ingredient for qualifying the same as a 'financial debt'. What would be important to consider is whether the 'financial debt' had the commercial effect of a borrowing.
- In any case, *Shailesh Sangani (supra)* accepts the proposition that a consideration where "*money advanced by a promoter, director or a shareholder of a corporate debtor to improve the financial health of the company and to boost its economic prospects would have the commercial effect of a borrowing, notwithstanding the fact that interest is not payable*".
- Even otherwise, in its Legal Notice dated 10.01.2019 (*at page 242 of the Appeal*), the Appellant had claimed interest of 18% p.a. up to the filing of Company Appeal (AT) (Ins.) No. 778 of 2020

the application. Furthermore, since this was a loan payable on demand, the Legal Notice had demanded repayment of the same within 7 days. Thus, all the ingredients of a 'financial debt' under Section 5(8) were satisfied.

6. The Ld. Counsel for the Respondent during the course of argument and in his Reply Affidavit along with written submissions and additional written submissions submitted that Appellant challenged the order dated 20.03.2020 (Impugned Order) on the ground that the alleged and purported amount was not a financial debt within the meaning of Section 5(8) of the IBC in view of the glaring but admitted facts as hereunder:

- There was no written agreement between the Appellant and the Respondent;
- There is no promissory note signed by the Respondent in favour of the Appellant;
- There is no agreement for payment of interest;
- No interest has ever been demanded by the Appellant from the Respondent;
- There is no TDS certificate issued by the Respondent deducting the TDS.

7. It is further submitted that in fact Rs. 25,00,000/- is repayment of loan previously given by Respondent to Appellant in 2011 by Respondent to Appellant. The above is fully corroborated by the Appellant in legal notice dated 10.01.2019. The said notice does not specify any agreed rate of interest, the period for which the loan was given nor does it say when the amount became refundable. Hence, the Adjudicating Authority rightly dismissed the Section 7 Company Appeal (AT) (Ins.) No. 778 of 2020

Application and keeping in mind that alleged loan is in fact repayment for loan previously granted by Respondent to Appellant. The Appellant Form-1 in Part-IV, there is no reference of any agreed rate of interest, also no reference of date of default. The calculation sheet of interest is attached without any date of default.

8. It is further submitted that in reply to Company Petition where we have categorically stated that the alleged loan was given by the Respondent to the Appellant and no loan was ever given by the Appellant. The Appellant filed Appellant's Bank statement with Punjab National Bank clearly shows that Rs. 25.00 Lac is received from VRG Infrastructure Private Limited, the Respondent. A Certificate dated 07.01.2020 (*at page 250 of the Reply to the Appeal*) of the Statutory Auditor of the Respondent certifying that Rs. 25 Lac paid by the Respondent to the Appellant during 2010-2011. The Appellant admits it has received Rs. 25 Lac from Respondent (*at page 273 of Appeal*). The Appellant does not deny having received Rs. 25 Lac but alleges that Rs. 25 Lac had come from Mr. Gitesh Muttemwar, Director of the Respondent company contrary to its own Bank Statement where it is clearly shown that amount had come from Respondent. The Appellant neither has any authorization from the Respondent to treat this amount as loan by Mr. Muttemwar nor any authorization was produced by Mr. Muttemwar to credit of amount of Rs. 25 Lac in his favour in the Books of Accounts of Appellant though admittedly, Rs. 25 Lac had come from the Respondent.

9. It is further submitted that for the first time in its Rejoinder before the NCLT, Appellant took a complete 'U' turn and falsely alleged that both are not Company Appeal (AT) (Ins.) No. 778 of 2020

Group Companies but operates under the common name VRG, signifying common interest of identical promoters/shareholders/directors/influence in both the companies i.e. Appellant and the Respondent. Neither such plea was taken by Appellant in its company petition nor in its legal notice prior to filing CP before NCLT. The Appellant company was incorporate in December, 2006 by Mr. Gitesh Muttemwar of Respondent, Dr. Sameer Paltewar of Appellant company. Appellant company was promoted by three persons, their name and respective shareholdings are shown against each:

- i) Mr. Ganesh Chakkarwar - Third Party, 50% paid-up capital
- ii) Dr. Sameer Paltewar, of the Appellant Company, 25% paid-up capital
- iii) Mr. Gitesh Muttemwar, Respondent Company, 25% paid-up capital

10. Further, Mr. Gitesh Muttemwar of Respondent Company also invested Rs. 28.60 Lac in the paid-up share capital of Appellant company pto 03.08.2016. Mr. Gitesh Muttemwar also made an investment in the form of loan, financial assistance and investments in Appellant company which stood at Rs. 1.08 crores as on 31.03.2015. During 2015-16, one Mr. Arun Amidwar joined the Appellant company and the shareholding of the four groups of Appellant company was as follows:-

- | | |
|---|--------|
| i) Shri Ganesh Chakkarwar Group | 40% |
| ii) Dr. Sameer Paltewar (Appellant Company) | 15.75% |
| iii) Mr. Arun Amidwar | 15% |
| iv) Mr. Gitesh Muttemwar (Respondent Company) | 29% |

11. It is further submitted that the NCLT makes a categoric finding leading to the dismissal of the Section 7 application filed by the Appellants. The Bench Company Appeal (AT) (Ins.) No. 778 of 2020

holds two clear observations in the Impugned Order – (i) there has been no disbursement; and (ii) no time value of money is present.

(i) No disbursement:- The Respondent submitted that the Appellant’s case is riddled with irregularities and devoid of essential ingredients required to satisfy the test of admission of CIRP. The Appellant has not been able to show any agreement validly executed between the Appellant and the Respondent to substantiate its claim. Further, the Appellant has been unable to show that there was any repayment date agreed or specified by the parties. The Respondent draws attention to Part V (*Particulars of Financial Debt*) of the Section 7 application, wherein, no agreement has been provided and further, no document evidencing a repayment date for the alleged ‘loan’ has been provided. On the contrary, no disbursement was made by the Appellant. In fact, loans were granted by the Respondent to the Appellant (*at page 60 of the Appeal*). Further, these loans were granted to the Appellant in Financial Year 2011. Therefore, in an attempt to mislead the Bench, the Appellant is categorising the repayment of loan to the Respondent in the year 2017, as a financial debt.

(ii) No consideration for time value of money:- The Respondent submitted that Section 5(8) of the IBC defines ‘financial debt’ as a “*debt along with interest, if any, which is disbursed against the consideration for the time value of money....*”. Therefore, there are to essential ingredients within the definition of financial debt that need to be satisfied – (i) there must be a disbursement; and (ii) the disbursement must be against consideration for time value of money.

12. Further, the Appellant has submitted that both companies are not group companies. Therefore, the Respondent submitted that a loan given by an Company Appeal (AT) (Ins.) No. 778 of 2020

unrelated company to another without any (i) written agreement; (ii) loan term; (iii) repayment date and (iv) without getting any consideration in return, does not qualify as financial debt that had been disbursed for time value of money. In the impugned order at para 15 has categorically held that the debt in question does not qualify as a financial debt. In this regard, the Hon'ble Supreme Court, in its judgment dated 26.02.2020, in **“Anuj Jain v. Axis Bank, Civil Appeal Nos. 8512-8527 of 2019”**, has held time value of money to be a necessary prerequisite to classify a debt as a financial debt. The relevant para 43 is hereunder:

“43. 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 disbursement 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 sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-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 sub-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 sub-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 subclauses (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.”

13. It is further submitted that not a single document has been produced to show that the said amount was to be repaid after a particular period. Additionally, no default date has been specified in the Section 7 application. Therefore, without prejudice, it cannot be said that the alleged amount became “due and payable” by the Respondent. In the light of the Hon’ble Supreme Court Company Appeal (AT) (Ins.) No. 778 of 2020

decision in the case of **“Innoventive Industries case at para 30 and in Swiss Ribbons case at para 50”**, it is stated that the trigger of a financial creditors application is *non-payment of dues*. In the legal notice dated 10.01.2019, the Appellant has not claimed that the alleged loan was given for any particular period and to be repaid at a particular date by the Respondent.

14. It is further submitted that the Hon’ble Supreme Court judgment in **“Orator Marketing Pvt. Ltd. v. Samtex Desinz Pvt. Ltd., (2021) SCC Online SC 513”**, relied by the Appellant during argument, does not and cannot overrule the decision of the Hon’ble Supreme Court in Anuj Jain. In ‘Orator Marketing’ case, the Hon’ble Supreme Court does not deal with consideration for time value of money. ‘Orator Marketing’ case simply deals with the issue of interest. Further, the facts of ‘Orator Marketing’ case are significantly different from the fact of the matter at hand, whereby, there was a grant of term loan based on a written agreement between the parties agreeing to NIL interest. In the instant case, no such agreement or document has been brought forward by the Appellant. Further, the ‘Orator Marketing’ case, the amount disbursed met the requirements of amount being disbursed in consideration of time value of money. In the instant case, the amounts disbursed do not meet such a threshold, particularly without any underlying agreement or other record to substantiate the claim.

15. This Appellate Tribunal in the case of **“Starlog Enterprises Ltd. v. Avil Menezes, IRP for AMW Motors Ltd., at para 7, (2021 SCC Online NCLAT 2307)**, has distinguished the facts of ‘Orator Marketing’ to reaffirm that

consideration for time value of money is an essential ingredient in classification of Financial Debt.

16. The Impugned Order has clearly stated that there has been no disbursement, in the first instance, and consequently, consideration for time value of money is absent, the Appellant cannot seek to challenge the second observation without satisfying the preliminary challenge to his claim. For the aforesaid reasons, the Respondent prayed that the instant Appeal be dismissed.

17. After hearing the parties and going through the pleadings made on behalf of the parties, we are of the considered view that we agree with the findings given by the Adjudicating Authority that the Appellant has not produced any agreement between the Appellant and the Respondent that any interest would be payable by the Respondent/Corporate Debtor against the alleged loan. Further, the Adjudicating Authority rightly come to the conclusion that in order to qualify the debt to be a 'financial debt', it is necessary that the amount advanced to the Corporate Debtor is against the time value of money, which is totally absent in the present matter. Further, it was held that since the Appellant is not a financial creditor as the Appellant has not disbursed money against the consideration for the time value. Accordingly, the claim of the Appellant is not a 'financial debt' within the meaning of Section 5(8) of the IBC. Keeping in view of the aforementioned, we do not find any merit in the Appeal to interfere with the order impugned passed by the Adjudicating Authority. The impugned order dated 20.03.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) in Company Petition (IB) 4186/MB/2019 is hereby

affirmed. The instant Appeal is hereby dismissed. I.A., if any, stands disposed off. No order as to costs.

18. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench), forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Mr. Kanthi Narahari]
Member (Technical)

New Delhi

22nd March, 2023

R. Nath.