

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 2018 of 2024

**[Arising out of the Order dated 24.10.2024, passed by the
'Adjudicating Authority' (National Company Law Tribunal,
Kolkata Bench), Court-II in CP(IB)/78(KB)2024]**

IN THE MATTER OF:

Mr. Ram Ratan Modi

Suspended Director of
Citystar Infrastructure Limited
R/o 4A, Bright Street, Kolkata -19,
Presently at New Delhi

...Appellant

Versus

1. Sumangal Dealmark Pvt. Ltd.
Having its registered office at:
403, Sagar Trade Cube, 104,
S.P. Mukherjee Road, Kolkata 700026. **...Respondent No.1**
2. SM Carriers Pvt. Ltd.
Having its registered office at:
Sagar Trade Cube, Room No. 402,
4th Floor, 104, S.P. Mukherjee Road,
Kolkata 700026. **...Respondent No.2**
3. Samriddhi Metals Pvt. Ltd.,
Having its registered office at:
Unit No. 401, 104, S.P. Mukherjee Road,
Kolkata 700026. **...Respondent No.3**
4. S.M. Niryat Private Limited,
Having its registered office at:
402, Sagar Trade Cube, 104,
S.P. Mukherjee Road, Kolkata 700026. **...Respondent No.4**
5. Citystar Infrastructures Ltd.
Having its registered office at:
5 Gorky Terrace, 2nd Floor, Kolkata,
West Bengal, India, 700017
Through IRP Mr. Aditya Kumar Tibrewal
Having Registration No.
IBBI/IPA 001/IP-P00743/2017-2018/11249 **...Respondent No.5**

Present:

For Appellant : Mr. Abhijeet Sinha, Sr. Advocate with Mr. Rudrajit
Sarkar, Ms. Sonia Dube, Mr. Tamoghna Saha, Ms.

Pushpa Sharma, Ms. Kanchan Yadav, Ms. Saumya Sharma and Ms. Pushpa Mishra, Advocates.

For Respondent : Mr. Krishnendu Datta, Sr. Advocate with Ms. Apoorva Pandey, Ms. Adyasha Nanda and Mr. Yash Tandon, Advocates for R-1.

Mr. Anand Varma, Advocate for R-2 to R-4.

J U D G M E N T
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

Introduction

The present Appeal, preferred by suspended Director of the Corporate Debtor (“CD”) under Section 61 of the Insolvency and Bankruptcy Code, 2016, arises from an order dated October 24, 2024, passed by the National Company Law Tribunal (NCLT), Kolkata, admitting a Section 7 petition filed by Respondents Nos. 1 to 4 against Respondent No. 5, the Corporate Debtor- Citystar Infrastructures Ltd.

Submissions of Appellant

2. The present Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016, arises from an order dated October 24, 2024, passed by the National Company Law Tribunal (NCLT), Kolkata, admitting a Section 7 petition filed by Respondents Nos. 1 to 4 against Respondent No. 5, the Corporate Debtor.

3. The Appellant, a Suspended Director of the Corporate Debtor- Citystar Infrastructures Ltd, challenges this order.

4. The Corporate Debtor, a real estate development company, had been involved in a project at Premises No. 530/1, Jodhpur Park, Kolkata, which

was owned by a housing society. Premises No. 530/1, Jodhpur Park, Kolkata is owned by the Bengal Secretariat Cooperative Land Mortgage Bank & Housing Society Ltd. (hereinafter referred to as "Society"); At the time of the acquisition of the said premises by the society, there was already a market operating therefrom. An agreement was entered between the Society and the Kolkata Municipal Corporation (KMC) for development of the said premises by construction of a commercial market and residential premises thereat. Kolkata Municipal Corporation had initially decided to develop the premises itself along with the partner on Build Operate Transfer (BOT) basis. The Appellant was selected as BOT partner of the corporation. Subsequently, the Kolkata Municipal Corporation exited from the project and the Respondent No. 5 was requested to develop the premises. In this connection, agreements were entered on 12.10.2007 between the Society, the Corporate Debtor and the Kolkata Municipal Corporation and the other between the Society and the Corporate Debtor.

5. Although, the Respondent No. 5/Corporate Debtor paid compensation money to the KMC and also incurred diverse other expenses, not much head way could be made as the shop and stall holders were already in occupation of the premises and it became difficult to take possession from them despite diverse agreements and memoranda having been entered with them.

6. In this background, as the Corporate Debtor having already invested substantially in the development of the premises, from around 2013, started looking for a partner. In this background, the Respondent No. 1 expressed interest in joining the Corporate Debtor as a partner. An agreement was

entered into on February 18, 2014 wherein it was clearly agreed that the Respondent No. 1 would pay an interest free security deposit of 20 crores which would be refunded after completion of the project (Clause 6). Additionally, the Respondent No. 1 would arrange funds for meeting the cost of construction and development (Clause 7). In consideration of the aforesaid, the Respondent No. 1 would be entitled to 50% share in the profit which would include the costs incurred in the project.

7. The Respondent No. 1, however, failed and/or neglected in meetings its obligation under the project. The Respondent No. 1 and its associate i.e. Respondent No. 2 to 4 have so far only made an aggregate payment of ₹13.20 crores.

8. Notwithstanding the aforesaid, which resulted in delay in rehabilitation of a portion of the shop/stall owners, the Corporate Debtor ultimately managed to obtain vacant possession of the portion of the premises measuring 28,000 sq. ft. by shifting some stall owners to construction made on a 5,500 sq. ft. portion on the said premises. The Corporate Debtor also got prepared a building plan for construction on the vacated portion of the said premises which it thereafter submitted for sanction to the KMC. The Corporate Debtor received a demand of ₹4,97,21,868/- from the KMC on 08.03.2018, which was not paid by the Respondent No. 1 in breach of the terms of the agreement.

9. In the year, 2021, the Respondent No. 1 expressed interest in developing the project itself by compensating the Corporate Debtor for

relinquishing its rights as developer and upon reimbursing all expenses incurred by the Corporate Debtor in connection with the project. The proposed agreement in this connection did not provide for refund of the said sum of ₹13.20 crores or any part thereof. As no final agreement could be reached between the parties, the Respondent No. 1 started wrongfully contending that the security deposit paid under the agreement of February 18, 2014 was a loan and was required to be refunded with interest. Several correspondences were exchanged between the parties on November 23, 2022, February 25, 2022 and December 7, 2022 wherefrom the disputes would become evident. In the circumstances, the Corporate Debtor terminated the agreement dated February 18, 2014 on December 24, 2022. Arbitration proceedings were also commenced by the Corporate Debtor and is currently pending before the arbitral tribunal and is at the stage of evidence. Despite pendency of the arbitration proceedings, the Respondents instituted proceedings under Section 7 of the IBC on the premise that the said sum of ₹13.20 crores was a loan.

10. NCLT held that the amount of 13.20 crores is to be treated as a financial debt, thereby admitting proceedings under Section 7 of the IBC.

11. Appellant contends that the money advanced by the Respondents were in the nature of "interest free" security deposit and did not come within the ambit of Financial Debt. There could be no component of principal or interest attached to it. Respondents cannot be and are not Financial Creditors ("FC") within the meaning of Section 5 (7) of IBC. The money was receivable by the Respondents only upon completion of the project, and payable out of the

profits generated from development, which does not come within the ambit of Section 5 (8) of IBC. The interest free security deposit made by the Respondents could not have the commercial effect of borrowing as the money was repayable only out of the profits of development on completion of the project. There could no question of any debt having become due or payable by the Corporate Debtor to the Respondent No. 1 or any of the other Respondents. Section 3 (11) of IBC defines "debt" as "a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

12. Admittedly the project has not yet been completed. Also admittedly the Corporate Debtor has represented that on completion of the project it will repay the security deposit of ₹13,20,00,000/- to the entities from whom the same has been received, subject to adjustment of the loss and damage that the Corporate Debtor has suffered on account of the breach of the Agreement dated February 18, 2014, for which the Corporate Debtor has claimed in the pending arbitration proceeding.

13. The contention of the Respondents that the sum of ₹13,20,00,000/- paid to the Corporate Debtor was a loan is- (a) contrary to the express terms of the Agreement dated February 18, 2014, on which transaction document the claim is premised; (b) it is contrary to the pleadings of the Respondent No.1 in the pending arbitral proceeding; and (c) is an attempt on the part of the Respondents to shop judicial fora.

14. Having made a counter claim against the Corporate Debtor in the pending arbitral proceeding for damages allegedly suffered on account of the Corporate Debtor's breach of the agreement dated February 18, 2014, the Respondent No. 1 (purporting to represent the claim of the other Respondents in the arbitration), has made a subsequent contrary claim in the petition filed under Section 7 of the Code.

15. TDS is not an acknowledgement of liability. As such no reliance can be placed on any Form 26AS filed on behalf of the Corporate Debtor, which in any event is confined to the claim of the Respondent No. 4 for the sum of ₹15 lakhs.

16. Money invested in a development project cannot be a "Financial Debt" under Section 5 (8) of IBC.

17. The Application under Section 7 of the Code had been filed in abuse of the provisions of the Code and in abuse of the process of the Tribunal.

18. The primary issue involved in this present appeal arises out of an agreement dated 18th February 2014 (@page 214) entered by the Appellant/CD and the Respondent/FC No. 1. Alleging to be Financial Creditors (FCs), they have claimed that a principal sum of ₹13,20,00,000/- is due to them in terms of the said agreement.

19. Corporate Debtor is the developer of a project in Kolkata having development rights. The FC No. 1 had joined the Corporate Debtor as a

partner to invest in the project. The said agreement had two obligations which required the FC/FCs to have fulfilled which are as follows:

- (i) They were required to make an interest free deposit of ₹20 Crores to the CD and same was to be returned after the project is complete.
- (ii) They were also required to provide financial assistance from time to time for meeting the cost of construction.

20. The FC No. 1 out of its aforesaid two obligations under the agreement have fulfilled only a part of obligation (i) by providing a sum of ₹13.20 Crore payment towards the interest free deposit to the CD and same was to be returned after the project is complete. FCs have never provided any financial assistance to the CD. As regards obligation (ii) no funding or payment was ever made.

21. In the ongoing arbitration in their Statement of Defence and Counter Claim FCs have not represented the sum of ₹13.20 crores to be a loan given to the CD. Instead, they have alleged breach of the agreement dated 18th February 2014 by the CD and have claimed damages on account of such alleged breach. Appellant relies on the Statement of Defence and Counter Claim (SOD & CC) filed by the FC 1 in the Arbitration proceeding for this agreement. Appellant claims that the stand in the Section 7 petition is contrary to their Defence in the arbitration.

22. The statements made before a judicial tribunal cannot be overlooked, the sharing of profit will only arise once funding towards cost of development is provided for and admittedly obligation (ii) was never fulfilled by the FCs.

23. Appellant also relies on the FCs email dated 23.11.2022 wherein they have termed the entire transaction as an "Advance Against Property" and advance against property is not a "financial debt" and relies on **Sugan Choudhary v. Arun Enterprises & Anr.** being Company Appeal (AT) (Insolvency) No. 746 of 2022.

24. Appellant also claims that any disbursement of money does not automatically make it a "financial debt". The agreement clearly indicates that only if the FCs fulfil its obligation (ii) will be entitled to the profit at the ratio of 50:50. The Respondents in course of their arguments sought to project that interest is the element of profit. Even in that case, the element of interest falls within FCs' obligation (ii) which was never fulfilled, and no amount was ever paid by the FCs under the category of obligation (ii) and thus profit/interest cannot be claimed under obligation (i) which was admittedly an interest free security deposit.

25. Respondent in their arguments have relied upon Clause 6 and have tried to supersede all other clauses in the agreement. Such argument is contrary to Clauses 2, 3 read with 9 of the agreement. A General Clause in the contract cannot override the Specific/Special Clauses. Such interpretation must be adjudicated in the arbitration.

26. Further, as will appear from the said agreement (page 214), FC No. 1 had agreed to invest as a partner towards the entire cost of development of the property in question in consideration for a portion of the profits of such development (page 217 at Clause 2) Clause 6 records in unambiguous terms

that the FC 1 would pay the said sum of ₹20 crores by itself or through its associates (the other FCs) as "interest free security deposit" which would be refunded by the Developer CD "after completion of the project". Clause 7 of the agreement clearly records that the said sum of ₹20 crores were to be paid as "interest free security deposit" and apart from that the FC No. 1 was further obliged to arrange funds apart from the Security Deposit from time to time for meeting the cost of construction by itself or through its associates. Clause 9 of the said agreement also makes it clear that the sum of ₹13.20 crores were not a loan, but an investment made by the FC 1 and its associates to earn profit arrived at by sharing the total cost of the project in the ratio 50:50.

27. The entire agreement must be read as a whole and not in piecemeal. The harmonious construction of the Clauses in the agreement will clearly reveal that not a single payment was to be made and/or have been made towards time value of money. This apart, most importantly, the Hon'ble Supreme Court in the case of **Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund (2021) 6 SCC 436** has held that at this stage where the issue is to whether there is any debt and/or default, the arbitral proceedings between the parties are held to be maintainable. Lastly, the stand taken by the Respondents in the arbitration requires adjudication of three things:

1. The Respondents are estopped from shifting their stance in arbitration and contradict the same and take a new stance in the Section 7 petition. The CD most humbly submits that the Respondents are estopped by their own pleadings and cannot shift their stance as per their convenience. (**Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad reported in (2005) 11 SCC 314**). There was a clear understanding of the terms between the parties and that the Respondents/FCs have failed to honour both the obligations under the agreement.
2. Further, the payment as disbursed by the Respondents was clearly understood by both the parties that it was an interest

free Security Deposit and not a loan and that there was no time value for money. This was the reason the Respondent for almost 10 years had never raised any demand and/or email.

3. Lastly, no person can take advantage of his own wrong and reap benefit out of it. The Hon'ble Supreme Court in the case of **Kusheshwar Prasad Singh v. State of Bihar reported in (2007) 11 sec 447** has clearly held that one cannot be allowed to take undue advantage of their own default in failure to act in accordance with law and initiate fresh proceedings.

28. The said agreement being clear and unambiguous, there can be no question of the FCs now contending that the sum of ₹13.20 crores was paid to the CD as a loan or is refundable with interest.

29. The Respondent No. 1/FC No. 1 has not submitted any loan agreement showing that the CD, was obligated to pay interest on the alleged investment or that same was in consideration of the time value of money, which is clearly absent in this case. Reply filed by Respondents to the present Appeal do not reflect any admission or acknowledgement of Rs: 13.20 Crores. It is only the sum of ₹15 lacs paid by the FC No. 4 namely, S.M. Niryat Private Limited that has been shown as loan in the books of the CD to which interest has been credited. Since the date of execution of the agreement till date, the financial statements of the Appellant/CD would show that entire sum of ₹13.20 Crore has been treated as a Security Deposit. It is now settled law that deduction of TDS is not in itself either determinative of the nature of transaction or acknowledgement of debt and even assuming the said sum of ₹15 lacs to be a loan, the same does not cross the threshold limit of ₹1 crore. Tax Deducted at Source is not an admission of debt is settled in the judgment dated 9th September, 2024 in **P.M. Cold Storage Private Limited vs Goouksheer Farm Fresh Pvt. Ltd.**

30. Further, according to the Insolvency and Bankruptcy Code, 2016 (IBC) in India, an interest-free security deposit is not considered a debt. This is because it doesn't involve any interest or time value of money component. The IBC defines debt as *"any liability or obligation in respect of a claim which is due from any person."*

31. Interest-free security deposits are typically considered as a form of security or guarantee, rather than a debt. The alleged amount being shown in the Section 7 Application as 'financial debt' is itself challenged since there are no amounts that are due or recoverable by the Financial Creditor from the Corporate Debtor. The Financial Creditor is neither a money lender nor does it have licence to operate as a non-banking finance company to provide loan to another company when, in fact, the entire transaction is that of the agreement of land development and Financial Creditor was an investor in the project.

32. It has been further held in **Vipul Limited Vs. Solitaire Buildmart Pvt. Ltd, (2020) SCC Online NCLAT 620**, a Section 7 Application by a joint development partner is not maintainable as the amount cannot be construed as 'financial debt' as defined under Section 5(8) of the Code.

33. Also, the subject agreement does not contain any provision for payment of interest to the Financial Creditor as claimed in the Section 7 application. Nor does it specify the tenure of the alleged loan, security for loan, repayment terms, events of default and consequences of default which are the essential ingredients or elements of a financial contract. Hon'ble NCLAT in **Jagbasera**

Infratech Private Limited Vs. Rawal Variety Construction Private Limited

(2022) SCC Online NCLAT 167 has held that amount invested in the 'Joint Venture Project' by the Financial Creditor in its capacity as a 'Promoter' and 'Investor' does not fall within the ambit of the definition of 'Financial Debt' under Section 5(8) of the Code. The Financial Creditor has failed to adduce credible evidence to substantiate its claim that the transaction was, in fact, a financial debt owed by the Corporate Debtor to the Financial Creditor and that there was a borrower-lender relationship between the Corporate Debtor and the Financial Creditor which is mandatory for an application under Section 7 of the Code to succeed.

Submissions of the Respondent:

34. Appellant has not substantiated in its grounds for appeal as to why the order dated 24.10.2024 merits the interference of this Hon'ble Appellate Tribunal. Appeal under Section 61 of IBC is meritless and ought to be dismissed by this Hon'ble Appellate Tribunal.

35. All of the development obligations under the Development Agreement of 12.10.2007 remained that of the Corporate Debtor. No obligations were cast on Respondent No. 1-4/FCs vis-à-vis the development of the property, nor is there any stipulation in the 18.02.2014 agreement to indicate that the FCs were investors/partners in the development of the project. Their status was solely and exclusively that of a FC. It is for this reason that Respondent No. 1 and its associates i.e., Respondent No. 2, 3 and 4 had disbursed funds in terms of the Agreement dated 18.02.2014.

36. The Corporate Debtor admits firstly, that there was a disbursement of INR 13.20 crores by Respondent No. 1-4 to Respondent No. 5/CD and secondly, that the said amount was utilised by it for facilitating development of the project.

37. The Appellant's case that Corporate Debtor sought further assistance or was entitled to further financial assistance beyond INR 13.20 crores from Respondent No. 1-4 is not borne out of any contemporaneous document neither before the NLCT nor before this Appellate Tribunal. In fact, there is nothing on record that Corporate Debtor, sought further financial assistance from Respondent No. 1-4, before the FC's demand vide email dated 23.11.2022. Indeed, it could not have, in as much Respondent No. 1-4 has already disbursed INR 13.20 crores for the purpose of funding the development obligations of the Corporate Debtor. The Corporate Debtors misleading defense that the disbursement of INR 13.20 crores was utilised to obtain vacant possession of the subject premises is also blatantly incorrect inasmuch as Clause 1 (c) of the Agreement dated 18.02.2014 clearly records the representation of the Corporate Debtor to Respondent Nos. 1-4 that vacant possession of the land had already been obtained by the Corporate Debtor:

“(c) The said Society (land owner) has already made over vacant possession of the said land to the said Developer for the purpose of development thereof and construction of buildings on the terms and conditions stated in the said development agreement.”

38. Furthermore, Clause 1 (b) also records that the obligation to get building plans duly sanctioned as per the terms of the Development Agreement from

KMC, was incumbent upon the Corporate Debtor alone and no obligations of the FCs were contemplated in this regard.

39. Since the FCs had already disbursed INR 13.20 crores, and since there was no progress by the Corporate Debtor towards the development of the project, there was no obligation upon the FCs to disburse further sums since the funding was contingent on the development obligations of the Corporate Debtor.

40. Since the project was nowhere near completion and consequently, it seemed that the Corporate Debtor will not refund the financial assistance it availed from the FCs (which had commercial effect of borrowing), nor will the FCs be able to recoup profit in the share of 50:50 (which amounted to time value of money), FCs demanded refund of the disbursed amount of INR 13.20 crores along with interest from the Corporate Debtor vide letter dated 23.11.2022.

41. It is also submitted that the nature of the transaction between the parties herein, cannot be determined solely and exclusively by reference to the term – ‘security deposit’ in light of the well settled law that for a debt to be considered a ‘financial debt’, the nature of the underlying transaction is seen and not its nomenclature; therefore, the Appellant cannot contend that the financial assistance availed by the CD cannot be construed as a financial debt, as defined under Section 5 (8) of IBC.

42. It is claimed of the FCs is indisputably a ‘financial debt’ as it falls squarely within the contours of the definition under Section 5 (8) of IBC:

“Firstly, the debt of INR 13.20 crores disbursed by the FCs to the CD was indisputably lent in the nature of financial assistance and had a commercial effect of borrowing.

Secondly, the 50:50 profit sharing from the revenue earned from the project between the FCs and the CD was the consideration for time value of money.

Thirdly, in any case, the sums so lent by the FCs clearly has commercial effect of borrowing and constituted a ‘financial debt’ as per Section 5(8)(f) of IBC, 2016.”

43. Moreover, the agreement dated 18.02.2014 does not contemplate fulfilment of any work or performance under the contract by R1-4/FCs for which it disbursed the amounts as a ‘security deposit’ to secure its performance under the agreement, and hence it becomes manifestly clear that the transaction of INR 13.20 crores is nothing but a financial debt, which is due and payable by the Corporate Debtor to the FCs.

44. In any case, Respondent No. 5/ Corporate Debtor has time and again admitted (while executing the agreement dated 18.02.2014, in its Board Resolution issued on 28.01.2014 as well as its reply to the Section 7 petition filed before the Adjudicating Authority) that the security deposit/money advanced to it by the FCs is in the nature of a ‘financial debt’. Neither the Corporate Debtor nor the Appellant can approbate and reprobate qua the true nature of the financial assistance availed by it, to its advantage.

45. It is also pertinent to note that the Corporate Debtor has itself admitted and acknowledged payment of interest on the disbursed amounts by the FCs. Respondent No. 4 herein had provided financial assistance of INR 15 lakhs to the Corporate Debtor, and the Corporate Debtor has provided a ledger statement in lieu of the said amounts so advanced by Respondent No. 4

accounting for and including interest of INR 3 lakhs at the rate of 12% per annum. While the Corporate Debtor has neither produced nor provided similar ledger for Respondent No. 1–3, it is submitted that firstly, the Corporate Debtor’s ledger for R-4 is an admission of interest being payable and indeed paid by the CD towards the financial assistance extended by the Answering Respondents and secondly, the non-production by the Corporate Debtor of its ledgers for R1-3 must lead to an adverse inference that the Corporate Debtor has similarly accounted for interest in lieu of the sums disbursed by the other FCs as well. It is also pertinent to mention that in filing the present appeal before this Hon’ble Appellate Tribunal, the Corporate Debtor while filing the entire record before the NCLT, has deliberately omitted to produce the ledger for Respondent No.4 and is thus guilty of concealing and suppressing material documents.

46. Furthermore, the Corporate Debtor also deposited TDS in accordance with the provisions of Income Tax Act, 1961 from 2019 till March, 2020 towards the interest payable on account of financial assistance granted by the Respondent No.4/FC.

47. Once the Corporate Debtor has acceded to the nature of the transaction being a ‘financial debt’, it cannot later resile from it on the ground that it is payable only after the purported completion of the project, wherein the Corporate Debtor is yet to obtain basic necessary permits. It is submitted that in a similarly placed matter, the Hon’ble Supreme Court in **Global Credit Capital Limited & Anr. v. Sach Marketing Pvt. Ltd. & Anr. 2024 INSC 340** has reiterated the settled principles of law in order to determine whether a

security deposit and its underlying interest could be construed as ‘financial debt’ under Section 5(8) of IBC, 2016.

48. Upon the demand of the disbursed amounts by the FCs vide letter dated 23.11.2022 and the subsequent termination of the Agreement dated 18.02.2014 by the Corporate Debtor on 24.12.2022, the debt of INR 13.20 crores and the interest thereupon became due and payable and the non-payment of the same is a default on part of the Corporate Debtor. There is no basis in either law or in fact for the Corporate Debtor to not repay the defaulted amount of INR 13.20 crores and accrued interest.

49. There is no clause in the agreement entitling the Corporate Debtor to forfeit the said security deposit. The Appellant has made no case to rebut the undisputable fact that after the Corporate Debtor itself terminated the Agreement dated 18.02.2014, the financial assistance granted to it became due and payable upon the termination of the Agreement dated 18.02.2014 vide letter dated 24.12.2022. The Corporate Debtor cannot be allowed to retain the money to its advantage and to the detriment of the FCs. The same has also been succinctly held by the NCLT in para 7.16 of the impugned order:

“7.16. Once, the agreement is terminated the corporate debtor cannot hold on to one Clause of the same agreement which allows him to refund the amount upon completion of the project. Moment there is no denial by the corporate debtor that he has received 13.2 crores from the financial creditor, the same will have to be returned to them, upon termination of the agreement that too by the corporate debtor unilaterally on 24.12.2022.”

50. Appellant’s contention that the Section 7 proceedings are a counter-blast to the ongoing arbitration proceedings is without any basis in law inasmuch pending arbitral proceedings do not bar a FC to institute proceedings under

IBC, 2016 against a defaulting Corporate Debtor. Rather, it is submitted that the Corporate Debtor's invocation of arbitration is nothing else but an abuse of process of law to avoid its liabilities arising from the financial assistance. In any case, it is well settled that insofar as the application under Section 7 of the IBC are concerned, any dispute raised by the Corporate Debtor is irrelevant in consideration of the debt and default of the Corporate Debtor in repayment thereof.

51. Appellant's fallacious and hyper-technical contention that since the financial agreement dated 18.02.2014 stipulated disbursement of security deposit without any interest, and thus, the transaction cannot be construed as a financial debt, has no basis in fact or in law. It is submitted that the Corporate Debtor has already treated the disbursement as a loan carrying interest by paying TDS for the interest accrued on the loan disbursed by Respondent No.1, the said stand cannot later be resiled from vis-à-vis loans availed from other FCs under the Agreement dated 18.02.2014.

52. Hon'ble Supreme Court in para 31 of **Orator Marketing v Samtex Desinz Pvt Ltd**. Civil Appeal No. 2231 of 2021 has settled the law in this regard that financial assistance even though it may not carry interest, can still qualify to be a financial debt under Section 5(8) of IBC, 2016.

53. In light of the above, it becomes clear that the amounts disbursed by the FCs to R-5/ Corporate Debtor, to the tune of INR 13.20 crores (being the principal amount) and its accrued interest is the 'debt' due and payable by R5/ Corporate Debtor to the FCs. The 'default' of R-5/ Corporate Debtor is also

evident from the record inasmuch it failed to meet its obligations under the Agreement dated 18.02.104, including getting building plans sanctioned and developing the premises within three years, failing to refund the financial assistance disbursed by the FCs and also being unable to repay the FCs profits in the ratio of 50:50. The Corporate Debtor further committed a default when it failed to repay the FCs the disbursed amount and the accrued interest, even after terminating the Agreement dated 18.02.2014 itself.

54. Corporate Debtor repeatedly and consistently admitted that amount disbursed to it by the FCs was in the nature of 'financial assistance' in its correspondences with the FCs, its own pleadings before the Arbitral Tribunal in an arbitration which it initiated, and most pertinently, in its reply before the NCLT as well as its Appeal before this Hon'ble Appellate Tribunal. Now the CD cannot contend that the amounts so disbursed were not in the nature of a 'financial debt' under Section 5(8) of IBC, in light of its own treatment of the funds as 'financial assistance' for development of the project premises. NCLT has rightly deduced that the factum of disbursement is not denied by the CD. Nor has the CD denied disbursement before this Hon'ble Tribunal. Moreover, the CD has not taken a single ground in its appeal before this Appellate Tribunal to sufficiently rebut the finding of the NCLT that the profit sharing of 50% amounts to consideration for time value of money disbursed by the CD, making the amounts disbursed a financial debt.

55. There are numerous judgements of this Appellate Tribunal as well as the Hon'ble Supreme Court wherein disbursement for the purposes of funding, against consideration for time value of money, even under the nomenclature of Security

Deposit, has been held to be in the nature of ‘financial debt’ under Section 5(8) of IBC.

56. The Corporate Debtor raised a fallacious plea before the NCLT that the disbursed amounts were not in the nature of ‘financial debt’. However, the nature of the disbursements being that of ‘financial assistance’ is an undisputed fact, even as per the CD’s own admissions and pleadings.

57. Independent and separate from the above admissions by the CD of the amount disbursed being towards “financial assistance”, the CD has also repeatedly admitted in various letters and pleadings that the finance for the project included furnishing of SD and that it utilised the amount of ₹13.20 crores disbursed by Respondents No. 1-4 towards development of the property.

58. As an afterthought and a counterblast to its innumerable admissions, CD has relied upon a single and stray statement of the FCs in their Statement of Defence and Counter Claim (‘SOD/CC’) before the Arbitral tribunal to contend that the disbursement of SD is an obligation independent of the disbursement of funds for construction of the project. It is most pertinent to note that it is not open for the CD to contend that the amounts disbursed to it was merely in the nature of SD and not financial assistance for construction of the project, in light of its own repeated admissions in correspondences with the FC, pleadings before the Arbitral Tribunal, NCLT as well as its treatment of the funds disbursed by the FCs towards construction and development of the project. Admittedly, Clauses 3, 6 and 7 of the Agreement have to be read harmoniously. While Clauses 3 and 7 stipulates that the FCs will make

available funds to the CD from time to time for meeting costs of construction, not a single document has been brought on record either before the NCLT or before this Appellate Tribunal which establishes that CD asked for more funds, which fact has not been refuted by the CD.

59. Additionally, after CD itself unilaterally terminated the agreement, it has no right to retain the amounts paid. The impugned judgement in paras 7.16 records that the moment there is no denial by the CD that he received money, upon termination, money has to be returned.

60. Notably, there is no survival clause in the agreement which saves certain obligations after termination of the said the agreement. The CD has raised several fallacious and hyper technical objections that since the Agreement stipulated that the financial assistance by the FC of INR 13.20 crore disbursed to CD was interest free, the same cannot be a financial debt, which contention has been rejected by the Supreme Court by holding that financial assistance even without interest, can still qualify to be a financial debt in **Orator Marketing Pvt. Ltd. v. Samtex Desinz Pv. Ltd (2021 SCC OnLine SC 513**, paras 29 and 31).

61. Corporate Debtor expressly admits to its liability towards payment of accrued 'interest on loan' in its ledger accounts between 01.04.2019 to 31.03.2022. This document was surreptitiously withheld by the Appellant while filing the present appeal.

62. Furthermore, Corporate Debtor deposited TDS in accordance with Section 194A of the Income Tax Act, 1961 during the FY 2019-2020 and 2020-

2021 towards the interest payable on account of financial assistance granted by the FC No.4. Thus, even as per the Corporate Debtor, financial debt owed by the Corporate Debtor carried consideration for time value of money. The CD has relied upon this Hon'ble Court on the judgment of **Prayag Polytech Pvt. Ltd. Vs Gem Batteries Pvt. Ltd. in CA(AT)(Ins.) No. 713 of 2019** to submit that mere deduction of TDS would not be sufficient to conclude that there was financial debt. However, this Hon'ble Appellate Tribunal in **Rahul H Mehta v Gajendra Investment CA (AT) (INS) No. 739 of 2022**, has held that, "We have no quarrel with the proposition laid down in Prayag Polytech judgement supra that TDS cannot be the basis of a financial debt, but the present facts of the case is distinguishable in that the Adjudicating Authority has relied on material other than TDS in coming to the finding that financial debt owed by the Corporate Debtor to the Financial Creditor." Corporate Debtor has not approached this Appellate Tribunal with clean hands inasmuch it has withheld a material document which was part of the record before the NCLT, which establish that the Corporate Debtor has admittedly treated the disbursed amount as interest bearing in its ledger accounts and also deducted and deposited TDS under Form 16A for the same amount.

63. Respondent also claims that in any case, the 50:50 profit sharing arrangement as per Clause 9 of the Agreement is also indicative of the commercial effect of borrowing in the Agreement. The Hon'ble Supreme Court in **Pioneer Urban Land & Infrastructure Limited & Anr. vs. Union of India (2019) 8 SCC 416** has observed when a debt can be construed to be a financial debt having 'commercial effect of a borrowing'. The commercial effect of borrowing in the present case is in the form of profit sharing as well as interest.

Such amounts fall under Section 5(8)(f) of IBC i.e., the ‘catch all provision’ which states that Section 5 (8) (f) of IBC is a residuary ‘catch-all’ provision, taking within its matters which are not subsumed within the other sub-clauses. The issue regarding similar disbursement of debt for consideration for time value of money has been categorically held to be a ‘financial debt’ by the judgement of the Hon’ble Supreme Court in **Global Credit Capital Limited v. Sach Marketing**, 2024 INSC 340.

64. The CD further submits that even if INR 13.20 crores is taken as a debt, it is not due and payable as it is refundable only upon completion of the project, that the development contracts for mutual benefit do not amount to financial debt and that the part payment of the SD is a default on part of the FCs. The said contentions have been rejected by this Hon’ble Tribunal in **Arunkumar Jayantilal Muchhala v. Awaita Properties Pvt. Ltd.** CA (AT) (INS) No. 4828 of 2023. We also note that this Appellate Tribunal has also held disbursements under similar agreements to be ‘financial debt’ as per **Adhunik Corp Ltd v Shivam India Ltd.** CA(AT) (INS) No. 1427 of 2023 **Dhruv Harjai v PPG Asian Paints Pvt Ltd.** CA(AT)(INS) No. 60 of 2023, paras 17, 19, 20, 21 [Respondents’ Judgment Compilation, pg. 365 @ 369-371].

65. The Appellant has also submitted during oral arguments that the Agreement is in the form of a joint venture agreement as the end result is in the form of profit from sales and is not merely a refund of funds disbursed. In that regard, it is submitted that the impugned judgement in paras 7.5, 7.6 and 7.7 adequately deals with this objection by distinguishing a JV agreement with the present agreement. In the former, each partner gets their share of the

constructed premises to sell on their own, be it on losses or profit. However, in the present Agreement, the CD is only to get return of its disbursed amount, along with 50% profits in lieu of interest as consideration for time value of money.

66. It has also been argued by the Appellant that since FCs have claimed INR 13.20 crores in its SOD/CC, it cannot claim the same under Section 7, which argument has been considered and rejected by this Hon'ble Appellate Tribunal in **Century Aluminum Company v Religare Finvest CA (AT) (INS) No. 1719 of 2024** [Respondents' Judgment Compilation, pg. 311 @ 320] by holding that proceedings under Section 7 of the IBC cannot be kept pending till the adjudication of the arbitration proceedings as Section 7 proceeding is a special remedy. The present appeal ought to be rejected at the threshold. Furthermore, this Tribunal may kindly consider suitable penalty against the Appellant for its material and fraudulent suppressions and concealments, including by way of proceedings under Section 65 of the Code.

Appraisal:

67. This Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 has been preferred by the suspended Director of the Corporate Debtor, Citystar Infrastructures Ltd. ("CD"), assailing the order dated 24.10.2024 passed by the National Company Law Tribunal, Kolkata in CP(IB)/78(KB)/2024, whereby the application filed under Section 7 of the IBC by Respondents No. 1–4 ("Financial Creditors" / "FCs") was admitted. Before proceeding further, we recapitulate the chronology of events as noted below:

<u>Date</u>	<u>Events</u>
June 1998	An agreement was executed between Bengal Secretariat Co-operative Land Mortgage Bank and Housing Society ('Society') as Owner of the premises and Kolkata Municipal Corporation ('KMC') for construction of market complex as a residential cum commercial complex at premises ('Project').
12.10.2007	KMC decided to exit from the project and accordingly an agreement was executed between Society, KMC and the Corporate Debtor, wherein KMC transferred all its rights in the Project to CD for a consideration of INR 3.51 Crore. A second Agreement was executed between CD and Society wherein exclusive rights were given to CD to develop the project.
28.01.2014	Four years after the 2007 development agreement, R-/CD passed a Board Resolution dated 28.01.2014 authorizing its representative/the Appellant herein to, “enter into an agreement with M/s Sumangal Dealmark Private Limited for financial assistance in respect of development of the land admeasuring an area of about 5 Bighas 8 Cottahs 9 Chittacks and 14 Sq. Ft. situated at 1/530A Ganahat Road, Kolkata.”
13.02.2014	FC-1 Sumangal passed a Board Resolution authorizing the entering into of an agreement with the Corporate Debtor “to give financial assistance in respect of development of land”
18.02.2014	<u>Agreement dated 18.02.2014 ('Agreement')</u> executed between FC-1 and CD wherein the Financial Creditor extended financial assistance to CD to meet the total cost of construction and development of the project and accordingly, FC-1, along with its group and associate companies (Respondents No.2-4) lent a sum of INR 20 crores by way of financial assistance.
2014-2018	FCs duly disbursed a sum of INR 13.20 Crore as financial assistance to Respondent No.5/CD in several tranches over the years 2014, 2015 and 2018. The disbursement of INR 13.20 crores has never been disputed by the CD.
23.11.2022	Due to the stagnancy in the project development, FCs demanded refund of the amounts given as financial assistance to CD and demanded a sum of INR 46.08 Crore.
25.11.2022	CD denied refunding the sums extended by the Financial Creditors. CD demanded sum of INR 6.80 Crore of the financial assistance of INR 20 Crore, as stated in Clause 6 of

	Agreement and attributed the same as breach on the part of FCs resulting into damages.
07.12.2022	FCs again demanded refund of the financial debt within 10 days.
24.12.2022	CD terminated the Agreement dated 18.02.2014 and invoked the arbitration clause in accordance with Section 21 of the Arbitration and Conciliation Act, 1996.
15.03.2023	Reply was sent by FCs to the Termination Letter and FCs demanded refund of the financial assistance along with interest in view of termination of the Agreement within 7 days.
July 2023	CD instituted arbitration and in its Statement of Claim ('SOC') filed before the Id. Arbitral tribunal against FC No.1, the CD sought a declaration that the SD of INR 13.20 crores paid by the FCs is in the nature of an investment and is repayable without interest only upon completion of the project development and further, a perpetual injunction restraining the FCs from representing that the sum of INR 13.20 crores is a loan.
October 2023	FC No.1 filed its Statement of Defence ('SOD') and Counter Claim ('CC') claiming an award of INR 13.20 crores with 18% interest p.a. and an award for INR 5.11 crores as damages.
18.04.2024	C.P. (IB) No. 78/KB/2024 instituted by FCs showing that an amount of INR 13.20 crores was due and payable by the CD along with accrued interest. Total amount claimed in Section 7 is INR 78.73 crores.
24.10.2024	NCLT passed order dated 24.10.2024, whereby it admitted the petition filed by the Respondent No.1-4 against Respondent No.5/Corporate Debtor under Section 7 of the IBC.

68. We note that the CD was engaged in redevelopment of premises at 530/1, Jodhpur Park, Kolkata. On 18.02.2014, the CD and Respondent No. 1 had entered into an agreement under which:

- i. Respondent No. 1 (with associates, Respondents 2-4) would provide an interest-free security deposit of ₹20 crores, refundable after completion of the project (Clause 6 of the Agreement).
- ii. Respondent No. 1 would also arrange further funds for construction and development (Clause 7 of the Agreement).

69. Against this, ₹13.20 crores was disbursed by the FCs. The CD utilised these funds towards development-related obligations. Disputes arose; the CD

terminated the agreement on 24.12.2022 and invoked arbitration. Pending arbitration, FCs filed a petition under Section 7 of the IBC, claiming the sum as financial debt. The NCLT admitted the petition which is challenged herein.

70. Appellant contends that ₹13.20 crores was an interest-free security deposit, not a financial debt, the amount was refundable only after project completion, not immediately payable. Appellant claims that FCs themselves described it as advance against property in arbitration and cannot change their stand (Relies on **Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad**¹, **(2005) 11 SCC 314**). Appellant also contends Arbitration is already pending; issues should be resolved in Arbitration and relies on **Indus Biotech (P) Ltd. v. Kotak India Venture**², **(2021) 6 SCC 436**). Appellant relies on the following other judgements:

- **Sugan Choudhary v. Arun Enterprises, CA(AT)(Ins) 746/2022**³ **(02.05.2025)** – advance against property is not financial debt.
- **Vipul Ltd. v. Solitaire Buildmart Pvt. Ltd.**⁴, **2020 SCC OnLine NCLAT 620** – joint development partner cannot maintain Section 7.
- **P.M. Cold Storage Pvt. Ltd. v. Goouksheer Farm Fresh Pvt. Ltd.**⁵, **NCLAT, 09.09.2024** – TDS deduction is not acknowledgement of liability.

71. Rebutting the claims of the Appellants, Respondents point out that the fact of disbursal and utilisation is undisputed; CD itself admitted it in its own letters, pleadings, and termination notice of 24.12.2022. It also contends that

¹ Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad, (2005) 11 SCC 314

² Indus Biotech (P) Ltd. v. Kotak India Venture, (2021) 6 SCC 436

³ Sugan Choudhary v. Arun Enterprises, CA(AT)(Ins) 746/2022

⁴ Vipul Ltd. v. Solitaire Buildmart Pvt. Ltd., 2020 SCC OnLine NCLAT 620

⁵ P.M. Cold Storage Pvt. Ltd. v. Goouksheer Farm Fresh Pvt. Ltd., NCLAT, 09.09.2024

“Security deposit” is a mere nomenclature; the transaction was financial assistance with profit share, amounting to time value of money. Once the CD terminated the agreement (24.12.2022), the obligation to refund crystallised; retaining funds amounts to default. Ledger entries (2019–22) and TDS deductions demonstrate that interest was accounted for. Respondent also places its reliance on the following judgments:

- **Orator Marketing Pvt. Ltd. v. Samtex Desinz Pvt. Ltd., 2021 SCC OnLine SC 513⁶** – even interest-free financial assistance can be financial debt.
- **Global Credit Capital Ltd. v. Sach Marketing Pvt. Ltd.⁷, 2024 INSC 340** – refundable deposits with profit/interest are financial debt.
- **Pioneer Urban Land & Infrastructure Ltd. v. Union of India⁸, (2019) 8 SCC 416** – Section 5(8)(f) is a “catch-all” covering commercial borrowings.
- **Arunkumar Jayantilal Muchhala v. Awaita Properties Pvt. Ltd.⁹, CA(AT)(INS) 4828/2023** – infusion with expectation of profit is financial debt.
- **Century Aluminum Co. v. Religare Finvest¹⁰, CA(AT)(INS) 1719/2024**: Arbitration pendency does not bar IBC proceedings.

72. We note that the impugned order of the NCLT has given the following findings:

“7.5. In terms of the said agreement the financial creditor is supposed to render financial assistance (which has been termed as interest free security deposit) of ₹ 20 crores, which the corporate debtor is required to refund after the completion of the said project along with 50 per cent of the profit share, in lieu of interest, which is normally charged in any financial assistance / loan arrangements.

⁶ Orator Marketing Pvt. Ltd. v. Samtex Desinz Pvt. Ltd., 2021 SCC OnLine SC 513

⁷ Global Credit Capital Ltd. v. Sach Marketing Pvt. Ltd., 2024 INSC 340

⁸ Pioneer Urban Land & Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416

⁹ Arunkumar Jayantilal Muchhala v. Awaita Properties Pvt. Ltd., CA(AT)(INS) 4828/2023

¹⁰ Century Aluminum Co. v. Religare Finvest, CA(AT)(INS) 1719/2024

7.6. Clause 9 of the Agreement states that in lieu of this arrangement, the profits arrived at from the project would be shared equally between the Developer and the Company. The project profit should be arrived at by sharing the total cost of the project in the ratio of 50:50 including the cost already incurred till date.

7.7 Therefore, the agreement clearly contemplates return of the so called interest free security deposit unlike usual development agreements where each partner is entitled to get share of the constructed premises, which they are entitled to sell and get back the amount invested along with profits or losses.

...

7.9 However, in the given case there is a clear contemplation of return of interest free security deposit. We have also noted that the applicant is not securing anything in the entire scheme of things, for the amount to be called as “security deposit”. Hence, instead of going merely by the words “security deposit” we need to understand the intention between the parties, when they executed the said agreement dated 18th February 2014.

7.10. The agreement contemplates return of the amount after completion of the project, with consideration in the form of share in profit.

7.11. The agreement does not provide any ownership right to the Applicant in the premises to be constructed by the respondent. It has been expressly stated in the agreement made between the Applicant and the respondent that the development agreement made between the Bengal Secretariat Co-operative Land Mortgage Bank and Housing Society Limited (in short ‘BSCHSL’) and the respondent herein is independent and different from the agreement executed between the financial creditor and the corporate debtor. Therefore, it is very clear that financial creditor is not a joint venture partner or co-owner of the project or joint developer in the scheme of things.

...

7.14. In the given case, it is not that money has been advanced without any compensation. In lieu of interest, the agreement provides for paying 50 per cent of the profit share made from the project to the financial creditor. It may be

relevant to note that the agreement does not provide for sharing of losses, unlike the normal Joint Venture Agreements where the partners are required to share profits and losses in the agreed ratios. Thus, the financial creditor has lent money with clear intention of getting compensation (time value of money) in the form of profit.

...

7.16. Once, the agreement is terminated the corporate debtor cannot hold on to one Clause of the same agreement which allows him to refund the amount upon completion of the project. Moment there is no denial by the corporate debtor that he has received 13.2 crores from the financial creditor, the same will have to be returned to them, upon termination of the agreement that too by the corporate debtor unilaterally on 24.12.2022.

7.17. Therefore, the debt and default has been established and the defaulted debt, according to us is a financial debt as funds disbursed by the financial creditor meets the definition of financial debt under Section 5(8) of IBC. The amount has been disbursed against consideration for the time value of money in the form of 50 per cent of the share profit. The disbursement contemplates return of the amount after the completion of the project. Thus, the transaction has the commercial effect of borrowing as defined under Section 5(8)(f) as well, apart from main Section 5(8) of IBC”

Main points for determination:

73. The main issue involved in this Appeal arises out of an agreement dated 18th February 2014 entered by the Appellant/CD and the Respondent/FC No.

1. Financial creditors (FCs) claim that a principal sum of ₹13,20,00,000/- is due to them in terms of the said agreement. Application under Section 7 has been admitted by the Adjudicating Authority. To decide the Appeal against the order, we need to answer the following:

1. Does the ₹13.20 crores disbursed constitute “financial debt” under Section 5(8) IBC in the facts and circumstances of the case?
2. Has default been established?

3. Does pendency of arbitral proceedings bar initiation of CIRP under Section 7 IBC?

Analysis & Findings

74. We begin with the first question of whether the amount of ₹13.20 crores disbursed constitutes a financial debt under Section 5(8) of the Code or not. Before proceeding further, it would be instructive to note the definition of financial debt as per the Code which is reproduced as follows:

“5(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;

.....

- (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;

The definition of financial debt as reproduced above clearly indicates to include debt and interest, if any.

75. Further we see the financial debt in the light of the agreement (@ page 214) between the parties. Relevant excerpts of the agreement dated 18.02.2014 and the CD's reply are reproduced herein below:

“Excerpts of Agreement dated 18.02.2014

“AND WHEREAS by virtue of a Development Agreement dated 12th October, 2007 made between the said Society and the said Developer and registered at Additional Registrar of Assurances, Kolkata under Registration No. I-03773/ 14, the said 'Developer' was entrusted to develop the aforesaid property on the terms and conditions as recorded therein.

...

AND WHEREAS the developer has approached the said Company to assist the Developer by providing total financial assistance to meet the total cost of construction and development of the said property to be developed by the said Developer AND the said Company has agreed to assist the Developer by providing desired and financial assistance and making available funds from time to time for meeting the cost of construction and entire development of the said property on the terms and conditions hereinafter stated...”

2. The Company has assured the Developer that it is fully capable to meet the requirement of funds for development of the said property in pursuance of the captioned Development Agreement.

3. On the basis of the said assurance of developer and the Company to each other as stated in paragraphs 1 & 2 herein above and as agreed between the developer and the company, the said Company has agreed to make available funds as shall be required from time to time by the Developer for the purpose of development of the said land and buildings agreed to be constructed on the said respective plots of land by the said Developer.

....

6. The said Company by itself and/or through its associates will pay to the Developer interest free security deposit (“Security Deposit”) of ₹20,00,00,000 (Rupees Twenty Crore) only under this Agreement and the said Developer will refund the security deposit after completion of the said project.

7. The Company shall arrange funds from time to time for meeting the cost of construction and entire development of the said property in terms of this agreement by itself and/or through its associates. Out of the said funds to be introduced the developer shall be entitled to fulfil its obligations under the said Development Agreement. In fact, the funds to be made available by the Company by itself and/or through its associates will be utilized by the developer for an in connection with the development of the said property, construction and completion of the buildings thereon under the respective development agreement entered into between the developer and the

Society (land owner). The Developer shall look after the day to day operations of the project through its team.

8. The developer agrees not to assign and transfer or deal with the Developers right under the development agreement without obtaining confirmation/consent from the Company.

9. The said Developer and the said Company do hereby confirm and agree that in lieu of this arrangement for development of the project in the manner stated in preceding paragraph, the profits arrived at from the project would be shared equally between the Developer and the Company. The project profit shall be arrived at by sharing the total cost of the project in the ratio of 50:50 including the cost already incurred till date.”

76. We find that Agreement Clauses (6–9) clearly indicates that the disbursed funds were to be refunded with profit share—profit, representing time value of money. Perusal of the clauses of the Agreement indicates that it clearly provides for return of the amounts disbursed. This is unlike a joint venture where partners share profits and losses.

77. Furthermore, CD has repeatedly admitted that amount disbursed to it by the FCs was in the nature of ‘financial assistance’ in its correspondences with the FCs, its own pleadings before the Arbitral Tribunal in an arbitration which it initiated, and most pertinently, in its reply before the NCLT as well as its Appeal before this Hon’ble Appellate Tribunal, some of them are as follows:

- Board Resolution issued by the CD on 28.01.2014. [APB, Pg. 339]
- CD’s termination letter dated 24.12.2022 [APB, pg. 256]
- CD’s Reply to the Section 7 application before the NCLT [APB, pg. 2049]
- Appellant’s Appeal: [Appeal, pg. 33]
- CD’s Statement of Claim (‘SOC’) filed before the Arbitral Tribunal [APB, pg. 619]
- CD’s Evidence Affidavit before the Arbitral Tribunal [APB, pg.1997@2002]

78. We note few such admissions of the Appellant. From the material placed on record we note the admission of Respondent No.1 in this Section 7 petition reply before the Adjudicating Authority, which is extracted as below:

3(o): "...As it was clearly intended that the amount of security deposit would be utilized by the Corporate Debtor for obtaining vacant possession of the said premises, the agreement did not provide for refund of any part or portion of the same before completion of development and realization of proceeds therefrom..."

3(p): "...Being well and fully aware of the fact that the said security deposit amounts paid by it and/or its associates had been used by the Corporate Debtor for rehabilitation of shop/stall owners, the Financial Creditor No.1, and neither did its associate companies being Financial Creditor No.2 to 4, question the Corporate Debtor's use or utilization of such security deposit amounts or any part or portion of the same."

3(s): "As the Financial Creditor No.1 had agreed to finance the entire costs of development of the same premises, including all costs connected with and/or incidental thereto, it was obliged to make payment of the sum demanded by the Kolkata Municipal Corporation towards sanction fee, which, however, despite the Corporate Debtor's repeated requests, it refused to pay..."

...

3(y). "In or around November, 2022 the Financial Creditor No.1 made it abundantly clear to the Corporate Debtor that it did not intend to perform its financing obligations under the agreement of 18th February, 2014 on which development of the said premises was dependent..."

...

3(gg). ...the Financial Creditor must await the completion of development of the premises and the realization of revenue therefrom."

79. We also note another similar admission with respect to financing in the Corporate Debtor's termination letter dated 24.12.2022 which amounts to an admission of the financial assistance rendered by Respondent No.1-4:

"...an agreement was entered into between you and ourselves whereby and whereunder you agreed to make payment of a sum of Rs.20 crores to us as interest free security deposit as also to finance the entire cost of development of the said premises including all

construction and incidental costs. As will appear from the agreement of 18th February, 2014, you had thereby undertaken to provide such required finance for the project including furnishing of interest free security of Rs.20 crores, either by yourselves or through your associates.... The agreement clearly obliged you, by yourselves and/or your associates, to make payment of the entire committed security amount and to finance the entire cost of development... ... you and your associate namely S.M. Carriers Private Limited, Samridhi Metals Private Limited and S.M. Niryat Private Limited made payment of an aggregate sum of Rs.13.20 crores to us. As is evident from the agreement of 18th February 2014, the same was only a financing agreement.”

80. As noted above Respondent No. 5/ Corporate Debtor has time and again admitted that the security deposit/money advanced to it by the FCs is in the nature of a ‘financial debt’. Appellant cannot now contend that the amounts so disbursed were not in the nature of a ‘financial debt’ under Section 5(8) of IBC, in light of its own treatment of the funds as ‘financial assistance’ for development of the project premises. We note that the Appellant cannot approbate and reprobate qua the true nature of the financial assistance availed by it, to its advantage.

81. We further note that NCLT held that the amounts were to be refunded with profit share as consideration for time value of money, thus having the **commercial effect of borrowing** within Section 5(8)(f) IBC. To understand the implications of the Section 5(8)(f) we reproduce it again as follows:

5(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--

...

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

82. We also look into the arguments of the Appellant as to how, the 50:50 profit sharing arrangement as per Clause 9 of the Agreement is indicative of the commercial effect of borrowing as in the Agreement. Appellant contends

that the Hon'ble Supreme Court in **Pioneer Urban Land & Infrastructure Limited & Anr. vs. Union of India (2019) 8 SCC 416** has observed when a debt can be construed to be a financial debt having 'commercial effect of a borrowing'. The relevant para is extracted below:

"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....

77. "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."

83. Respondent contends that the commercial effect of borrowing in the present case is in the form of profit sharing as well as interest and such amounts fall under Section 5(8)(f) of IBC i.e., the 'catch all provision' as contained in paras 75 & 84 of Pioneer Urban Land (supra) which states that Section 5 (8) (f) of IBC is a residuary 'catch-all' provision, taking within its matters which are not subsumed within the other sub-clauses. Paras 75 & 84 of Pioneer Urban Land (supra) are extracted as below for convenience:

"...

75. It is clear from a reading of these judgments that *noscitur a sociis* being a mere rule of construction cannot be applied in the present case as it is clear that wider words have been deliberately used in a residuary provision, to make the scope of the definition of "financial debt" subsume matters which are not found in the other sub-clauses of Section 5(8). This contention must also, therefore, be rejected.

....

84. ... In the present case, it is clear that the deeming fiction that is used by the explanation is to put beyond doubt the fact that allottees are to be regarded as financial creditors within the enacting part contained in Section 5(8)(f) of the Code.”

84. Appellant contends that the question in Pioneer Urban Land & Infrastructure Limited (supra) was whether homebuyers would come under the category of financial creditors. This judgment doesn't deal with a case wherein the alleged Financial Creditor had advanced Security Deposit for development of a project and was a profit-sharing partner in the development project. We note that the facts may be different but the Hon'ble Supreme Court has laid a principle which is that *“It is clear from a reading of these judgments that noscitur a sociis being a mere rule of construction cannot be applied in the present case as it is clear that wider words have been deliberately used in a residuary provision, to make the scope of the definition of “financial debt” subsume matters which are not found in the other sub-clauses of Section 5(8).”* Therefore, we find that in the facts and circumstances of this case, thus we find that NCLT rightly held that the amounts were to be refunded with profit share as consideration for time value of money, thus having the commercial effect of borrowing within Section 5(8)(f) IBC.

85. Appellant contends the payment as disbursed by the Respondents was clearly understood by both the parties as an interest free Security Deposit and not a loan and that there was no time value for money. This was the reason the Respondent for almost 10 years had never raised any demand and/or email. Lastly, no person can take advantage of his own wrong and reap benefit out of it. Appellant contends that disbursement of money doesn't

automatically make it a financial debt. The agreement provides that if the FCs fulfil its second obligation, only then it will be entitled to the profit in the ratio of 50:50. Appellant contends that Respondents cannot claim this profit – which is interest as per their claim as they have not fulfilled second obligation. Contradicting the claims of the Appellant, the Respondents place their reliance on the case of **Global Credit (supra)**, where in similar disbursement of debt was in consideration for time value of money and it has been categorically held to be a financial debt by the judgment of the Hon'ble Supreme Court wherein, it was held that:

“....

14. Where one party owes a debt to another and when the creditor is claiming under a written agreement/arrangement providing for rendering 'service', the debt is an operational debt only if the claim subject matter of the debt has some connection or correlation with the 'service' subject matter of the transaction. The written document cannot be taken for its face value. Therefore, it is necessary to determine the real nature of the transaction on a plain reading of the agreements. What is surprising is that for acting as a Sales Promoter of the beer manufactured by a corporate debtor, only a sum of Rs.4,000/- per month was made payable to the first respondent. Apart from the sum of Rs.4,000/- per month, there is no commission payable to the first respondent on the quantity of sales. Clause (6) provides for termination of the appointment by giving thirty days' notice. Though clause (10) provides for the payment of the security deposit by the first respondent, it is pertinent to note that there is no clause for the forfeiture of the security deposit. The amount specified in clause (10) has no correlation whatsoever with the performance of the other conditions of the contract by the first respondent. As there is no clause regarding forfeiture of the security deposit or part thereof, the corporate debtor was liable to refund the security deposit after the period specified therein was over with interest @21% per annum. Since the security deposit payment had no correlation with any other clause under the agreements, as held by the NCLAT, the security deposit amounts represent debts covered by sub-section (11) of Section 3 of the IBC. The reason is that the right of the first respondent to seek a refund of the security deposit with interest is a claim within the meaning of sub-section (6) of Section 3 of the IBC as the first respondent is seeking a right to payment of the deposit

amount with interest. Therefore, there is no manner of doubt that there is a debt in the form of a security deposit mentioned in the said two agreements.

15. Therefore, by no stretch of imagination, the debt claimed by the first respondent can be an operational debt. We are conscious of the fact that the provision for payment of interest by the corporate debtor by itself is not the only material factor in deciding the nature of the debt. But, in the facts of the case, the payment of the amount mentioned in clause (10) of the letter has no relation with the service supposed to be rendered by the first respondent.”

86. The Appellant contends that the case of **Global Credit Capital Ltd. (supra)** does not apply here as there was no agreement to return the security deposit with interest. Appellant contends that Hon’ble Supreme Court in this case has held that a security deposit with interest is a financial debt, as it has the commercial effect of borrowing, whereas in the present case the security deposit is completely interest free. In this case the Hon’ble Supreme Court while observing the facts of the case also noted that, “it is necessary to determine the real nature of the transaction on a plain reading of the agreements”. Pertinently, the Hon’ble Court held the security debt payable to the FC as a financial debt by stating that, “as there is no clause regarding forfeiture of the security deposit or part thereof, the corporate debtor was liable to refund the security deposit...” We are, therefore, inclined to reject the arguments presented by the Appellant on non-applicability of this judgement to the assistance of the Respondent. After going through the submissions of both the parties and also the cited judgment, we find that in the present facts and circumstance of the case, the security deposit was refundable and we cannot agree to dispute that it is a financial debt irrespective of other clauses in the agreement.

87. Appellant contends that that even if INR 13.20 crores is taken as a debt, it is not due and payable as it is refundable only upon completion of the project, as the development contracts for mutual benefit do not amount to financial debt and that the part payment of the Security Deposit is a default on part of the FCs. Per contra Respondent claims that the said contentions have been rejected by this Appellate Tribunal in **Arunkumar Jayantilal Muchhala v. Awaita Properties Pvt. Ltd.** CA (AT) (INS) No. 4828 of 2023 as extracted below:

“24 ... We find merit in the argument canvassed by Respondent No.1 that money advanced was towards meeting working capital needs of the Corporate Debtor and for boosting its economic prospects and hence it was a disbursal against the consideration for the time value of money. As long as the lender visualizes an element of profit and enhancement of economic prospect in return for the money advanced for certain time period, the loan in question entails time value of money and acquires the colour of commercial borrowing which is clearly borne out from the facts of the present case. It has all the trappings of a financial debt and squarely falls within the purview of Section 5(8) of IBC. It is trite law that under the IBC once a debt which becomes due or payable, in law and in fact, and if there is incidence of non-payment of the said debt in full or even part thereof, CIRP may be triggered by the financial creditor as long as the amount in default is above the threshold limit. Once the Adjudicating Authority is subjectively satisfied that there is a debt and a default has been committed by the Corporate Debtor and the Section 7 application is complete in all respects, the Adjudicating Authority in the exercise of summary jurisdiction has to admit the Section 7 application.”

The facts and circumstances do support the case of the Respondent to take assistance of this judgement.

88. Furthermore, this Hon'ble Appellate Tribunal has also held disbursements under similar agreements to be 'financial debt' in this case of **Adhunik Corp Ltd v Shivam India Ltd.** CA(AT) (INS) No. 1427 of 2023 and the relevant extract is as follows:

“24. When we peruse the clauses of the MoA, it is an undisputed fact that payment of interest against disbursal was not specifically mentioned in the clauses. Be that as it may, we are of the considered opinion that the IBC does not provide for any prescriptive requirement for the Financial Creditor to place on record formal written agreements/documents between the parties to establish that the disbursal made was in the form of loan with interest. It would be misconceived to hold that the fund infusion did not qualify to be a financial debt merely because loan component was not explicitly mentioned in the MoA. It is a well settled proposition of law that interest on loan is not the only binding criterion for determining time value of money.Viewed against this backdrop, the contention of the Respondent that the disbursal of the fund was bereft of loan component and hence not in the nature of a financial debt does not have legs to stand on.

26. The essential condition which needs to be fulfilled is disbursement against the consideration for time value of money. Since in the present case, the infusion of funds was a transaction which has direct bearing on the business carried out by the Corporate Debtor, raising of the amount through the above agreement has the commercial effect of borrowing. The clauses of the MoA contain clear indication that the infusion of funds was being done with the intent of earning profits and the investments was therefore for consideration for the time value of money. Therefore, this transaction has the contours of a borrowing as contemplated under Section 5(8) of IBC. The investments made by the Appellant-Financial Creditor was with an eye for consideration for time value of money and therefore the transaction had commercial effect of borrowing.”

89. Appellant contends that the issue in Adhunik was whether Adhunik having infused sums for running of the business and having a lien over assets of the Corporate Debtor is a Financial Creditor or not. In the instant case there is no such lien and more so, the FC was supposed to make arrangements for funds for the construction of the project in terms of Clause 7 of the agreement which is apart from the Security Deposit which was admittedly not done. We note that the above judgment has been upheld by Hon’ble Supreme Court vide order dated 05.05.2025 in CA No. 5392/2025 and also supports the case of the Respondents.

90. Appellant relies on the judgement of **Sugan Choudhary v. Arun Enterprises**, CA(AT)(Ins) 746/2022 (NCLAT, 02.05.2025) wherein it was held that advance against property is not a financial debt. Appellant contends that FC's email dated 23.11.2022 had termed the entire transaction as an "Advance Against Property" and claims that advance against property is not a "financial debt". In the case of **Sugan Choudhary (supra)**, this Appellate Tribunal had held that the consideration received as an advance under an agreement to sell an immovable property, which was later sought to be refunded with interest due to non-performance cannot amount to financial debt under Section 5(8) of the Code, since it is not disbursement against time value of money. Thus, in no circumstances, the said Security Deposit can be referred to as a "financial debt". Respondent, on the other hand, has argued that all of the development obligations under the Development Agreement of 12.10.2007 remained that of the Corporate Debtor. No obligations were cast on Respondent No. 1-4/FCs vis-à-vis the development of the property, nor is there any stipulation in the 18.02.2014 agreement to indicate that the FCs were investors/partners in the development of the project. Their status was solely and exclusively that of a FC. It is for this reason that Respondent No. 1 and its associates i.e., Respondent No. 2, 3 and 4 had disbursed funds in terms of the Agreement dated 18.02.2014 and this is not a case of advance against a property. We find that facts of the present case are distinguishable from **Sugan Choudhary (supra)** in which it was held that advance against property is not financial debt and therefore this judgement doesn't support the case of the Appellant.

91. Appellant has also relied upon **Vipul Limited Vs. Solitaire Buildmart Pvt. Ltd, (2020) SCC Online NCLAT 620**, wherein it was held that a Section 7 Application by a joint development partner is not maintainable as the amount cannot be construed as 'financial debt' as defined under Section 5(8) of the Code. We note that the agreement between the parties in the present case, cannot be construed to be an agreement wherein the Respondent is a joint development partner. Rather, it is a unique agreement with characteristics of security deposit to act as financial assistance and this form of sharing of profits from the project. Also, security deposit was to be returned. The facts of the present case are distinguishable from the cited case. We find that the respondent is not a joint development partner as is clear from clauses 6 to 9 of the agreement between the two parties. Therefore, the judgment is of no assistance to the Appellant.

92. Appellant claims that FCs themselves described it as advance against property in arbitration and cannot change their stand and relies on **Sangramsinh P. Gaekwad (supra)**. Appellant claims that the Respondents are estopped from shifting their stance in arbitration and contradict the same and take a new stance in the Section 7 petition, as per their convenience. Appellant claims that there was a clear understanding of the terms between the parties and the Respondents/FCs have failed to honour both the obligations under the agreement. We note that Appellant has time and again admitted that the security deposit/money advanced to it by the FCs is in the nature of a 'financial debt', as noted by us herein earlier. In this case we note that on 24.12.2022, the Corporate Debtor terminated the agreement and

invoked arbitration under Section 21 of the Arbitration & Conciliation Act, 1996. Thereafter, arbitration proceedings are pending at the stage of evidence. We note that pending arbitral proceedings do not bar a FC to institute proceedings under IBC, 2016 against a defaulting Corporate Debtor. Rather, we note that the Corporate Debtor's invocation of arbitration is nothing but an abuse of process of law to avoid its liabilities arising from the financial assistance. Furthermore, insofar as the application under Section 7 of the IBC is concerned, any dispute raised by the Corporate Debtor is irrelevant in consideration of the debt and default of the Corporate Debtor in repayment thereof. From the facts of the case, we find that the case is otherwise. We note that rather Appellant cannot shift their stance.

93. To canvass further support, the Respondent has relied on **Century Aluminium (supra)** wherein this Appellant Tribunal had held that Section 7 proceedings cannot be kept pending till the adjudication of the arbitration proceedings as Section 7 proceeding in a special remedy. It has also been argued by the Appellant that since FCs have claimed INR 13.20 crores in its SOD/CC, it cannot claim the same under Section 7, which argument has been considered and rejected by this Hon'ble Appellate Tribunal in **Century Aluminum Company v Religare Finvest CA (AT) (INS) No. 1719 of 2024** by holding that proceedings under Section 7 IBC cannot be kept pending till the adjudication of the arbitration proceedings as Section 7 proceeding is a special remedy.

94. Respondent has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Indus Biotech (P) Ltd. v. Kotak India Venture**

(Offshore) Fund reported in (2021) 6 SCC 436. This judgment at para 29 clearly provides primacy to Section 7 proceedings and says:

“...

29. Therefore, to sum up the procedure, it is clarified that in any proceeding which is pending before the Adjudicating Authority under Section 7 of IB Code, if such petition is admitted upon the Adjudicating Authority recording the satisfaction with regard to the default and the debt being due from the corporate debtor, any application under Section 8 of the Act, 1996 made thereafter will not be maintainable. In a situation where the petition under Section 7 of IB Code is yet to be admitted and, in such proceedings, if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority is duty bound to first decide the application under Section 7 of the IB Code by recording a satisfaction with regard to there being default or not, even if the application under Section 8 of Act, 1996 is kept along for consideration. In such event, the natural consequence of the consideration made therein on Section 7 of IB Code application would befall on the application under Section 8 of the Act, 1996.”

95. On the contrary, Appellant contends that the Hon'ble Supreme Court in the case of **Indus Biotech (supra)** has held that at this stage where the issue as to whether there is any debt and/or default, the arbitral proceedings between the parties are held to be maintainable. But the perusal of above judgement clearly brings out the ratio that “In a situation where the petition under Section 7 of IB Code is yet to be admitted and, in such proceedings, if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority is duty bound to first decide the application under Section 7 of the IB Code by recording a satisfaction with regard to there being default or not, even if the application under Section 8 of Act, 1996 is kept along for consideration.”

Therefore, we find that the above judgment does not support the case of the Appellant as it provides primacy to Section 7 proceeding.

96. On the issue of financial assistance without interest, the respondent also places its reliance on **Orator Marketing Pvt. Ltd. (supra)**. It claims that the Hon'ble Supreme Court had held that financial assistance even without interest can still qualify to be a financial debt. Respondent relies on para 29, 31 of the judgment:

“...
29.

In Jaypee Infratech Ltd. (supra), the debts in question were in the form of third-party security, given by the Corporate Debtor to secure loans and advances obtained a third party from the Respondent Lender and, therefore, held not to be a financial debt within the meaning of Section 5(8) of the IBC. There was no occasion for this Court to consider the status of a term loan advanced to meet the working capital requirements of the Corporate Debtor, which did not carry interest. Having regard to the Aims, Objects and Scheme of the IBC, there is no discernible reason, why a term loan to meet the financial requirements of a Corporate Debtor for its operation, which obviously has the commercial effect of borrowing, should be excluded from the purview of a financial debt.

....
31.

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

97. On the contrary the Appellant claims that the issue in **Orator Marketing Pvt. Ltd. (supra)** was whether a term loan granted to a Corporate

Debtor without any provision for payment of interest thereon would constitute a financial debt and this judgment does not deal with a case wherein the alleged Financial Creditor had advanced security deposit for development of a project and was a profit sharing partner in the development project. The arguments of the Appellant cannot be accepted in the light of the clarity given by Hon'ble Supreme Court in para 31 wherein the definition of debt is noted to be expansive and does not expressly exclude an interest free loan. We are therefore inclined to agree with the argument of the respondent that the security deposit is an interest free financial debt.

98. Appellant also contends that the entire agreement must be read as a whole and not in piecemeal. The harmonious construction of the Clauses in the agreement will clearly reveal that not a single payment was to be made and/or have been made towards time value of money. Respondent, on the other hand, contends that for a debt to be considered as financial debt, the nature of the underlying transaction is seen and not its nomenclature of being "security deposit". Respondent places its reliance on **Orator Marketing (supra)**.

99. Appellant has also relied upon the judgment of the Hon'ble Supreme Court in the case of **Kusheshwar Prasad Singh v. State of Bihar reported in (2007) 11 SCC 447** wherein it was held that one cannot be allowed to take undue advantage of their own default in failure to act in accordance with law and initiate fresh proceedings. Facts do not suggest any defects on the part of Respondent also. Perusal of the judgment indicates that it to be

distinguishable as it relates to tenancy and land laws and is not at all applicable in the facts of the case and therefore Appellant does not get any support from this judgement.

100. Appellant claims that Respondent No. 1/FC No. 1 has not submitted any loan agreement showing that the CD, was obligated to pay interest on the alleged investment or that same was in consideration of the time value of money, which is clearly absent in this case. It also claims that it is only the sum of ₹15 lacs paid by the FC No. 4 namely, S.M. Niryat Private Limited that has been shown as loan in the books of the CD to which interest has been credited. Since the date of execution of the agreement till date, the financial statements of the Appellant/CD would show that entire sum of Rs. 13.20 Crore has been treated as a Security Deposit. It is now settled law that deduction of TDS is not in itself either determinative of the nature of transaction or acknowledgement of debt and even assuming the said sum of ₹15 lacs to be a loan, the same does not cross the threshold limit of ₹1 crore. Tax Deducted at Source is not an admission of debt is settled in the judgment dated 9th September, 2024 in **P.M. Cold Storage Private Limited vs Goouksheer Farm Fresh Pvt. Ltd.** Per contra Respondent contends that CD has admittedly treated the disbursed amount as interest bearing in its ledger accounts and also deducted and deposited TDS under Form 16A for the same amount. We note that in this judgement para 20 states that *“The fact that the corporate debtor has paid TDS on interest payable cannot be considered as acknowledgment in writing of the liability by the corporate debtor and therefore, such TDS payment will not have any effect of being an acknowledgment of said*

debt". We note that the Corporate Debtor deposited TDS in accordance with Section 194A of the Income Tax Act, 1961 during the FY 2019-2020 and 2020-2021 towards the interest payable on account of financial assistance granted by the FC No.4. Thus, even as per the Corporate Debtor, financial debt owed by the Corporate Debtor carried consideration for time value of money. Reliance on the judgment of **Prayag Polytech Pvt. Ltd. Vs Gem Batteries Pvt. Ltd. in CA(AT)(Ins.) No. 713 of 2019** to submit that mere deduction of TDS would not be sufficient to conclude that there was financial debt may not be the applicable in the present case as in a later case, this Appellate Tribunal in **Rahul H Mehta v Gajendra Investment CA (AT) (INS) No. 739 of 2022**, has held that, *"We have no quarrel with the proposition laid down in Prayag Polytech judgement supra that TDS cannot be the basis of a financial debt, but the present facts of the case is distinguishable in that the Adjudicating Authority has relied on material other than TDS in coming to the finding that financial debt owed by the Corporate Debtor to the Financial Creditor."* And same is the case here as the debt and default is clearly established basis other material itself and we need not rely on the arguments of TDS been though they are strong grounds as the Corporate Debtor has admittedly treated the disbursed amount as interest bearing in its ledger accounts and also deducted and deposited TDS under Form 16A for the same amount. We therefore find that the facts of the cited case are clearly distinguishable and cannot provide any assistance to the Appellant.

101. Appellant contends that the FC No. 1 out of its aforesaid two obligations under the agreement have fulfilled only a part of obligation (i) by providing a

sum of ₹13.20 Crore payment towards the interest free deposit to the CD and same was to be returned after the project is complete. FCs have never provided any financial assistance to the CD. As regards obligation (ii) no funding or payment was ever made. Per contra Respondent contends that the Appellant's case that Corporate Debtor sought further assistance or was entitled to further financial assistance beyond INR 13.20 crores from Respondent No. 1-4 is not borne out of any contemporaneous document neither before the NLCT nor before this Hon'ble Appellate Tribunal. In fact, there is nothing on record that Corporate Debtor, sought further financial assistance from Respondent No. 1-4, before the FC's demand vide email dated 23.11.2022. The arguments presented by the Appellant are not tenable and we reject this argument as it is not borne out of material on record.

102. We further note that Respondent No. 1-4 have already disbursed INR 13.20 crores for the purpose of funding the development obligations of the Corporate Debtor. We agree with the argument of the respondent that the Corporate Debtors defense that the disbursement of INR 13.20 crores was utilised to obtain vacant possession of the subject premises is found to be incorrect inasmuch as Clause 1 (c) of the Agreement dated 18.02.2014 clearly records the representation of the Corporate Debtor to Respondent Nos. 1-4 that vacant possession of the land had already been obtained by the Corporate Debtor:

“(c) The said Society (land owner) has already made over vacant possession of the said land to the said Developer for the purpose of development thereof and construction of buildings on the terms and conditions stated in the said development agreement.”

Thus, we find that Appellant has made misleading representations at least on this count.

103. Moving to the second question of whether default has been established or not, we note that the corporate debtor had unilaterally terminated the agreement on 24th December 2022. Once the CD has terminated the agreement, it cannot retain the funds given by the Financial Creditor. Therefore, it needs to refund the funds and since it has not refunded the default is clearly established.

104. The last question relating to the issue of pendency of arbitral proceedings having any bar on the initiation of CIRP under Section 7 of IBC has been very well established herein earlier. We have already noted that there is no bar in the initiation of CIRP proceedings even if arbitral proceedings are pending. **Indus Biotech (2021)** allows parallel remedies; insolvency must proceed if debt and default exist.

105. Accordingly, all points are answered against the Appellant.

106. As a result, basis the facts and circumstances of the case as noted by us herein earlier, we do not find any infirmity in the findings of the adjudicating authority as noted above.

Conclusion & Order

107. For the reasons recorded earlier, we conclude:

- The disbursed amount of ₹13.20 crores qualifies as a financial debt within Section 5(8)(f) IBC.
- Default stands established upon termination of the Agreement.

- Pendency of arbitral proceedings does not preclude admission of Section 7 Application.

The Appeal is dismissed. The order dated 24.10.2024 of the Adjudicating Authority, Kolkata, admitting the Section 7 petition is affirmed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

New Delhi.
August 29, 2025.

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