

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 544 of 2024

**[Arising out of the Impugned Order dated 17.01.2024 passed by the
Adjudicating Authority, National Company Law Tribunal,
Ahmedabad Bench-II in C.P. (IB) No. 122 of 2022]**

In the matter of:

**M/s Meck Pharmaceuticals and
Chemicals Pvt. Ltd.**

CIN: U24110GJ1992PTC018370

Having Registered Office at:

606, Harikrupa Tower,

B/h. Gujarat College,

S.M. Road, Ahmedabad,

Gujarat- 380006

e-mail: account@meckgroup.co.in

.... Appellant

Versus

M/s Accurate Infrabuild Pvt. Ltd.

CIN: U70101GJ2009PTC058972

Having registered office at:

202, Cama Commercial Centre,

Opp. Mirzapur Court, Mirzapur,

Ahmedabad, Gujarat - 380001,

Also having address at:

Madina Heights

Next to Rajiv Gandhi Bhavan

(G. P. C. C) Ellisbridge,

Ahmedabad - 380006, Gujarat, India

E-mail: sikandardosani@gmail.com

.... Respondent

Present:

For Appellant : Mr. Jaimin K. Dave, Mr. Karan Valecha and Ms. Hirva
Dave, Advocates.

For Respondent : Mr. Gaurav Mitra, Ms. Honey Satpal, Mr. Nipun Singhvi,
Ms. Pooja Singh, Ms. Aarushi Mishra and Mr. Akash
Agarwalla, Advocates.

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

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 (**'IBC'** in short) by the Appellant arises out of the Order dated 17.01.2024 (hereinafter referred to as **'Impugned Order'**) passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench-II) in Company Petition (IB) No. 122 of 2022. By the impugned order, the Adjudicating Authority dismissed the Section 7 application. Aggrieved by the impugned order, the present appeal has been preferred by the Appellant.

2. Introducing the facts of the present case, Shri Jaimin K. Dave, Ld. Counsel for Appellant, the Ld. Counsel for the Appellant submitted that the Respondent/Corporate Debtor-M/s Accurate Infrabuild Pvt. Ltd. had undertaken to construct a project named "Madina Heights" (hereinafter referred to as the **"project"**) and for this purpose had approached M/s Meck Pharmaceuticals and Chemicals Ltd. (**"Meck"** in short) for advancing a sum of Rs 1 Cr. only. The Corporate Debtor-Respondent had purportedly assured to repay the advance with interest @ 18% p.a. besides offering 15% share in the profit of the project. The amount of Rs 1 Cr. was given by Meck to the Corporate Debtor on 19.02.2010. Though the Corporate Debtor was to repay the outstanding loan on completion of the project, they did not release payments to Meck as per the terms even though the project was purportedly completed. Meck issued a Legal Notice on 03.11.2020 claiming repayment of the outstanding amount from the Corporate Debtor. On not receiving the outstanding amount

from the Corporate Debtor, the Appellant-Meck issued a Demand Notice on 01.07.2021. Realizing that their Demand Notice of 01.07.2021 was erroneous, another Legal Notice was issued on 25.03.2022 demanding repayment of Rs 6.30 Cr. which included Rs 1 Cr. towards principal component and interest amount of Rs 5.30 Cr. Since payments were still not forthcoming from the Corporate Debtor, the Appellant filed a Section 7 petition on 13.04.2022 seeking the admission of the Corporate Debtor into Corporate Insolvency Resolution Proceedings (“**CIRP**” in short) which was rejected by the Adjudicating Authority on 17.01.2024 as non-maintainable. Aggrieved by the impugned order, the present appeal has been preferred by the Appellant.

3. Making further submissions on behalf of the Appellant, it was stated that on the request of the Respondent-Corporate Debtor, they had issued a cheque amounting Rs. 1 Cr dated 18.02.2010 to the account of the Corporate Debtor for construction of the Madina project. The Appellant has claimed that the bank certificate issued by ICICI Bank on 04.05.2021 indicating disbursal of Rs 1 Cr. to the Corporate Debtor; audited accounts for the year ending 31.03.2010, 31.03.2011 and 31.03.2021 acknowledging the receipt of this sum; TDS Form 26AS showing deduction of TDS on Interest other than Interest on Securities all go to substantiate that the sum had been advanced to the Corporate Debtor as a loan. Submission was further pressed that the disbursal of Rs 1 Cr. was made with the consideration of time value of money which was substantiated by the fact that there was an oral understanding between the Appellant and the Corporate Debtor that the sum would be repaid by Corporate Debtor on completion of the project alongwith interest of 18% p.a. and 15% share in the

profits of the project and hence it met the twin ingredients of disbursal with consideration of time value of money as required for a debt to qualify as a “financial debt” as defined under Section 5(8) of the IBC. It was contended that the Corporate Debtor has not given any evidence to show that the outstanding amount had been paid by them. There was clear default on the part of the Corporate Debtor in the repayment of the debt which had become due and payable on and from 01.09.2019 which was the date of completion of project construction. The Section 7 application having been filed on 18.04.2022, it was very much within the three years period of the debt becoming due and hence was within the limitation period. Assailing the impugned order, it was further stated that the Adjudicating Authority had erred in holding that there is no case of debt and default.

4. Shri Gaurav Mitra, Ld. Advocate representing the Respondent rebutted the contentions made by the Appellant and stated that the Appellant was not a Financial Creditor in terms of Section 5(7) of IBC. The sum advanced by them was not in the nature of ‘financial debt’ in terms of the statutory provisions of IBC as it was bereft of the commercial effect of borrowing. The Appellant had failed to place on record any document executed between the parties regarding the tenure of loan given, terms of repayment or rate of interest and has not been able to establish that the disbursal had taken place against consideration for time value of money. It was asserted that the Adjudicating Authority had rightly held that when money given by the Appellant to the Corporate Debtor was without an end tenure but linked to the completion of Madina project, this was clearly a case of investment for speculative profit and not for time value of money.

It was vehemently contended that the primary obligation of making out a case of default lies on the Financial Creditor. In the facts of the present case, from the time of disbursal till 2020, no proof has been submitted which shows that any demand for payment of an amount due and payable was raised on the Corporate Debtor by Meck. It was also asserted that the Appellant had taken a wrong stand that payment had become due since the Madina project was complete. The Appellant had acquired incorrect information that the project stood completed. The Madina project was still in progress and not yet completed and hence there was no occasion for default to have occurred. Further attention was drawn to the fact that the Demand Notice served by the Appellant mentioned the date of default as 18.02.2010. In the absence of any proof of acknowledgment of debt liability having been given by the Corporate Debtor after 2011, the limitation period would have come into play on the expiry of three years from the purported date of default. The three years period having expired long back, the Section 7 application filed in 2022 was clearly hit by limitation.

5. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

6. The short question before us is whether the sum of Rs 1 Cr. advanced by the Appellant to the Corporate Debtor satisfied the ingredients of financial debt of disbursal, time value of money and commercial effect of borrowing.

7. For a proper appreciation of the matter at hand, at this stage it may be proper to notice the relevant statutory provisions of IBC which are as reproduced below:

*"3(6) **"claim"** means— (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, un matured, disputed, undisputed, secured or unsecured;

*3(11) **"debt"** means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;*

*3(12) **"default"** means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;*

*5(7) **"financial creditor"** means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;*

*5(8) **"financial debt"** means a debt 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 nonrecourse basis;

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

[Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) 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;"

8. It would also be instructive to glance at one of the landmark judgments of the Hon'ble Supreme Court which has lucidly explained the concept of financial debt. We may notice the judgment of the Hon'ble Supreme Court in **Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Ltd. & Ors. (2020) 8 SCC 401** where the Hon'ble Supreme Court while examining the definition of Financial Debt under Section 5(8) of the IBC emphasised that the essential elements of financial debt is disbursement against time-value of money. These key ingredients of Financial Debt were noticed in para 46 of the said judgment which read as follows:-

"46. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become 'financial debt' for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursement against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which

is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/ dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said sub- clauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money.”

(Emphasis supplied)

9. Thus, for any debt to be treated as financial debt there has to take place disbursal of money against consideration for time-value of money. It may be pertinent to add here that the Hon’ble Supreme Court in **Orator Marketing (P) Ltd. Vs Samtex Desinz (P) Ltd. (2023) 3 SCC 753** also clarified that the definition of financial debt in Section 5(8) of the IBC does not expressly exclude an interest free loan. Thus, for a transaction to be treated as financial debt under the statutory framework of IBC, it is not necessary that interest has to be paid in respect of money that has been borrowed. As long as the commercial effect of borrowing is decipherable in the disbursal, the transaction can always qualify to be treated as financial debt.

10. Another relevant judgment delivered by the Hon'ble Apex Court wherein it has been explained as to when a Financial Creditor can invoke the provisions of Section 7 against the Corporate Debtor is the ***Innoventive Industries Ltd. Vs ICICI Bank (2018) 1 SCC 407*** wherein it has been observed:

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

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30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise”.

(Emphasis supplied)

11. When we peruse the above judgment of the Hon'ble Apex Court, we find that it has laid down the guiding principles for admission or rejection of an application filed under Section 7 of the IBC. Under the ambit of Section 7 of the IBC, the Adjudicating Authority is only required to determine whether a default has occurred and whether the debt, which may still be disputed, was due and remained unpaid. It is a well settled proposition of law that only two alternative courses of action are available to the Adjudicating Authority under Section 7(5) of the IBC which is to either admit the application under Section 7(5)(a) or reject the petition under Section 7(5)(b). The moment the Adjudicating Authority is satisfied that a default has occurred, the Application is to be admitted unless it is incomplete.

12. Having taken cognizance of the above-cited statutory provisions of IBC and the two landmark judgements of the Hon'ble Apex Court, we can safely conclude that for any debt to be treated as financial debt, the pre-requisite is disbursement of money to the borrower for utilization by the borrower and that the disbursement must be against consideration for time value of money even if it is not interest-bearing. As to when a Financial Creditor who has disbursed money to a Corporate Debtor against consideration for time value of money can trigger the insolvency resolution process against the Corporate Debtor, as per the scheme of IBC, that stage arises when a default arises in that a debt which has become due, in fact and in law, but has not been paid in whole or part thereof.

13. Submission has been made by the Appellant that an amount of Rs 1 Cr. had been disbursed to the Corporate Debtor which is validated by the certificate issued by ICICI Bank on 04.05.2021 which clearly states that Rs 1 Cr. had been

credited to the account of the Corporate Debtor from the current account of the Appellant on 19.02.2010 as placed at page 98 of the Appeal Paper Book (**APB** in short). It was also pressed that the disbursal of the above loan amount to the Corporate Debtor was substantiated by the fact that the Corporate Debtor had acknowledged the receipt of this amount in their balance sheets of 31.03.2010 and 31.03.2011 as placed at pages 140 and 155 of the APB respectively and is duly reflected as “Loan from Directors and Shareholders”. It was further added that this sum had been disbursed with time value of money on the understanding with the Corporate Debtor that they would repay the amount with interest @ 18% p.a. That TDS was deducted by the Corporate Debtor on the interest amount payable to the Appellant as is evident from the TDS Certificate placed at page 99 of APB for the month of March 2010 shows that disbursal had been made against consideration for time value of money.

14. It was contended that there is no need of a written contract to prove the existence of a financial debt and in support of their contention reliance has been placed on the judgment of this Tribunal in ***Agarwal Polysacks Ltd. Vs K.K. Agro Foods and Storage Ltd. in CA(AT)(Ins) No. 1126 of 2022*** and ***Pradeep Tayal Vs Essbert Fashion Pvt. Ltd. in CA(AT)(Ins) No. 950 of 2022*** which have held that written contract is not mandatory nor a necessary precondition for the purpose of proving existence of financial debt. Submission was pressed that the terms and conditions of the loan including the period of loan and the purpose of the loan was not documented but rested on an oral understanding mutually arrived at between the two parties that the loan amount advanced would be returned by the Corporate Debtor on completion of the Madina Project.

Since this project was already completed and yet no payment was forthcoming from the Appellant, a legal notice was served upon them claiming repayment of the amount financed by them. Thus, this was a case where a default had been committed by the Corporate Debtor which the Adjudicating Authority failed to appreciate. It was therefore contended that the Adjudicating Authority had committed a grave error by holding that the Appellant was not a financial creditor and that the amount advanced by the Appellant to the Corporate Debtor did not qualify as financial debt.

15. Per contra, it was contended by the Corporate Debtor that the Appellant has failed to show that any default had occurred on the part of the Corporate Debtor. Even if it is accepted that the right to payment arose on the completion of the Madina Project, the said project was not yet complete as procedural compliances were still in the pipeline. It was also submitted that since it is for the Appellant as Financial Creditor to substantiate that the project stood completed and until such substantiation is done, the claim made by the Appellant under Section 7 was pre-mature. Further as there was no tenure of the loan, it shows that the amount advanced was in the nature of an investment and not a loan. The Adjudicating Authority had therefore correctly held that the Appellant had invested money for speculative purposes and such a speculative investor cannot file a Section 7 petition.

16. It was emphatically asserted that the primary obligation of making out a case of default lies on the Financial Creditor. It was contended that the burden of proof to show non-payment of a legally recoverable debt which is not time-barred lay on the Financial Creditor as settled by the Hon'ble Apex

Court in ***Rajendra Narottamdas Sheth Vs Chandra Prakash Jain (2022)***

5 SCC 600. It was also submitted that the present Section 7 petition was not maintainable as it was barred by limitation. There is no acknowledgment of the alleged debt which has been given by the Corporate Debtor after 2011. No document has been produced after 2011 by the Appellant which establishes that the Corporate Debtor had acknowledged their liability qua the Appellant. If the date of default is 18.02.2010 and the Section 7 petition was filed in 2022, it was barred by limitation in the absence of any acknowledgement of liability having been placed on record. Thus, the Section 7 petition being time-barred, in such circumstances, the Appellant cannot be allowed to revive a stale claim.

17. Coming to our analysis and findings, we would like to first address the question of limitation. We notice that in Form 4 of the Demand Notice dated 30.06.2021 at page 123-124 of the APB, it has been shown that the unpaid operational debt “*fell due from 18.02.2010 @18% interest per annum as a running interest till 30.06.2021*”. In Form 3 of the Demand Notice dated 01.07.2021 at pages 116-118 of the APB, it has been stated that the “*debt fell due from the date of finance being 18.02.2010 and when on completion of the project in August 2019 when the amount with interest is not paid*”. The Appellant has however contended that they had submitted this notice under wrong legal advice. In Form 1 in Part IV of Section 7 application at page 69 of the APB, we notice that the Appellant has linked the date of default to the date of completion of the Madina Project which has been held to be 01.09.2019. The relevant part is as reproduced below:

Part – IV

PARTICULARS OF THE FINANCIAL DEBT		
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED	<u>Amount claimed to be in default:</u> As on 30.06.2021, a total amount of Rs. 6,30,07,982/- (<i>Rupees Six Crores Thirty Lacs Seven Thousand Nine Hundred and Eighty-Two Only</i>), which is inclusive of principal amount of Rs. 1,00,00,000/- (<i>Rupees One Crore Only</i>) and an interest amount of Rs. 5,30,07,982/- (<i>Rupees Five Crores Thirty Lacs Seven Thousand Nine Hundred and Eighty-Two Only</i>) calculated at the rate of 18% <i>per annum</i>, however, exclusive of the agreed share in profit at the rate of 15%, is outstanding and payable by the Corporate Debtor to the Financial Creditor. (<i>A copy of the interest calculation sheet is marked and annexed hereto as <u>ANNEXURE-N</u></i>) <u>Date on which the default occurred:</u> The default occurred when the Corporate Debtor failed to repay the principal amount along with a share in profit at the rate of 15% as well as running interest of 18% <i>per annum</i> on completion of the project "Madina Heights", i.e., on and from August 2019. Under the circumstances, the default occurred on and from 01.09.2019.

18. The Respondent has drawn attention to the fact that in the Demand Notice served by the Appellant on 01.07.2021, the date of default mentioned therein was 18.02.2010. In the absence of any proof of acknowledgment of debt liability given by the Corporate Debtor after 2011, it was asserted by the Respondent that the limitation period of three years period having expired long back, the Section 7 application filed in 2022 was clearly hit by limitation. However, keeping in view that the Appellant has contended that they had submitted this notice under wrong legal advice and thereafter corrected the same, if we then compute the

limitation from 01.09.2019 as claimed in Part IV, the Section 7 application having been filed on 18.04.2022 fell within the period of limitation.

19. We now proceed to examine whether in the present factual matrix, disbursement of money took place and, if so, whether the disbursal was made against the consideration for time value of money and whether commercial effect of borrowing is found to underpin the transaction.

20. When we look at the facts of the present case, there is no dispute to the fact that the Appellant had disbursed Rs 1 Cr. to the account of the Corporate Debtor in 2010. The fact that the above sum of money was also received by the Corporate Debtor has not been controverted by the Corporate Debtor. Further, this fact of disbursal gets reinforced when we find that the financial statements of the Corporate Debtor ending financial years 2010 and 2011 clearly reflects receipts of Rs 1,01,07836/- from Meck Pharma and Chem. Pvt. Ltd. In view of the above, we entertain no doubts in our mind that there exists sufficient proof that disbursal had taken place. Having satisfied ourselves that there was a disbursal of Rs. 1 Cr to the Corporate Debtor by the Appellant sans any written contract or agreement between them, we next would like to see whether there was a disbursal with the consideration of time value of money.

21. It is an admitted fact that there was no written contract or agreement between the Appellant and the Corporate Debtor governing the terms and conditions by which the sum was advanced by the Appellant and disbursed to the account of the Corporate Debtor. Be that as it may we are guided by the decision of this Tribunal in ***Agarwal Polysacks judgement supra*** wherein it has been held by that requirement of written financial contract between parties

is not a pre-condition for determining whether any amount disbursed is financial debt or not. When there are no written agreements or financial contract between the parties as in the present case, the real nature of transaction becomes the key to decide as to whether the transaction is in nature of financial debt or not. Thus, even if there is no agreement/contract between the parties, nothing precludes the Adjudicating Authority or this Tribunal from looking into the real nature of transaction to determine whether the transaction in question is in the nature of financial debt in terms of the statutory construct of IBC.

22. Though the expression ‘time value of money’ finds mention in Section 5(8) of the IBC, the term has not been defined in the said enactment. It is well recognised that the most typical example of ‘time value of money’ is in the form of interest charged on the principal amount that has been borrowed. In the present case, the Appellant has claimed that there was an oral understanding between the two parties that the loan was interest-bearing @ 18%p.a., and that being so, the sum was disbursed with the intent of extending a financial debt to the Corporate Debtor.

23. To substantiate the fact that the loan was actually interest-bearing, the Appellant has contended that the TDS certificates placed on record corroborate that interest amount had been paid by the Corporate Debtor. Secondly, the Corporate Debtor had acknowledged the receipt of this amount in their balance sheets of 31.03.2010 and 31.03.2011 which is duly reflected as “Loan from Directors and Shareholders”.

24. Even though it has been held by this Tribunal in ***Prayag Polytech Pvt. Ltd. Vs Gem Batteries Pvt. Ltd. in CA(AT)(Ins) No. 713 of 2019*** and in ***Pawan***

Kumar Vs Utsav Securities Pvt. Ltd. in CA(AT)(Ins) No. 251 of 2020 that TDS deduction does not prove a debt, it does not restrain us from noticing that TDS deductions were actually made which have corroborative value in substantiating the element of time value of money. When we see the material available on record, we notice that the Appellant has been able to show TDS certificates on interest payment for only two financial years ending 2010 and 2011. For the subsequent years, the Appellant has not been able to submit any proof or evidence of TDS deductions to substantiate that interest liability was being enforced. We do not find any proof to show that any reminders were sent to the Corporate Debtor seeking interest payment. For the transaction to have been interest-bearing in the true sense, the interest payment should have been paid annually and by logical corollary corresponding TDS deductions ought to have been reflected. This does not seem to have happened. Thus, we are of the view that deduction of TDS for only two years is insufficient to determinatively conclude that interest liability was a quintessential adjunct of the sum disbursed by the Appellant.

25. Coming to the balance sheets of the Corporate Debtor, we notice that for financial years ending 2010 and 2011, the amount of loan of the Corporate Debtor qua the Appellant in both the years is shown as Rs. 1,01,07,836/-. However, no other balance sheets of subsequent years have been placed on record thereafter to show that the debt and interest amount continued to be reflected in their balance-sheets. Though the Appellant has claimed that the 2021 balance sheet of the Corporate Debtor also mentions unsecured loans from Director and other related parties, on a pointed query made by this Bench, it

was admitted that the balance sheet ending 2021 had not been produced before the Adjudicating Authority. Hence, we are of the view that when this document was not placed before the Adjudicating Authority, we cannot rely on this contention raised at the appellate stage. We are therefore of the view that the Appellant has failed to muster clinching proof and evidence in terms of financial records to show that the sum advanced by them was indisputably interest-bearing and that interest had continued to accrue and was being realised as consideration for time value of money.

26. We now come to another averment made by the Appellant that the Corporate Debtor had agreed to repay the outstanding amount alongwith 15% share of profits on the Madina project. Prima facie, investment made to derive profit on the completion of the Madina Project can be viewed as a transaction having consideration for time value for money thus reflecting commercial effect of borrowing. However, this share of profit has not been made part of the claim in the petition filed under Section 7 of IBC. The present Section 7 application was only limited to the principal and the interest amount. When the Appellant on their own volition have chosen not to exclude share in profit from Part-IV of Section 7 application, the Appellant cannot be seen to claim that the disbursal of Rs 1 Cr. had been made by them with a view to have a share in the profits arising out of the Madina Project. We now come to the contention whether the default had actually arisen. The basis of arriving at the occurrence of default by the Appellant has been the purported completion of Madina Project. This unilateral fixing of date of default has been vehemently contested by the Respondent by stating that the Madina project was not complete. It was

contended that the Appellant merely by adverting reference to the agenda item of a Board Meeting called by Corporate Debtor *inter alia* inviting Meck to participate regarding execution of Sale Deeds in favour of the allottees of the said project cannot substantiate that the project was complete. It has been contended by the Corporate Debtor that the Madina project was still in progress and compliances, both procedural and regulatory, were still pending and hence we are inclined to agree that no occasion for default can be said to have occurred as the debt was not due or payable.

27. For the reasons discussed, debt and default not having been clearly established, we are of the considered opinion that there is no infirmity in the impugned order rejecting the Section 7 application. We are, therefore, of the considered view that no grounds have been made out to interfere with the order passed by the Adjudicating Authority. There is no merit in the Appeal. The Appeal is dismissed. No costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**Place: New Delhi
Date: 29.10.2025**

Abdul