

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 982 of 2022

[Arising out of order dated 20.06.2022 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench, Bench-IV in CP (IB) No.127(ND)2021]

IN THE MATTER OF:

**Shivam Agriols Pvt. Ltd.
Through its Authorized Representative
Mr. Puneet Agarwal,
1/22, 2nd Floor, Asaf Ali Road,
New Delhi – 110 002**

...Appellant

Versus

**Shree Krishna Vanaspati Industries Pvt. Ltd.
221, 2nd Floor, Munish Plaza,
20, Ansari Road, Daryaganj,
New Delhi – 110 002**

...Respondent

Present:

**For Appellant: Mr. Gaurav Mitra, Mr. Akash Bajpai and Mr. Ishan Roy
Chowdhury, Advocates**

**For Respondent: Mr. Aadhar Nautiyal and Mr. Prashant Kumar,
Advocates**

J U D G M E N T

[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 20.06.2022 (hereinafter referred to as “**Impugned Order**”) passed by the

Adjudicating Authority (National Company Law Tribunal, New Delhi Bench-IV) in CP (IB) No. 127(ND)/2021. By the Impugned Order, the Adjudicating Authority dismissed the application filed under Section 7 of the IBC by the applicant (Appellant herein). Aggrieved by this impugned order, the present appeal has been preferred by the Appellant.

2. The Learned Counsel for the Appellant has submitted that Shree Krishna Vanaspati Industries Pvt. Ltd. - the present Respondent/Corporate Debtor had taken a loan from SBI mortgaging their factory premises (hereinafter referred to as '**subject property**'). The Corporate Debtor having defaulted in payment of the said loan, the possession of the subject property was taken over by SBI. The Appellant agreed to repay the loan on behalf of the Corporate Debtor for which the Corporate Debtor had assured that the physical possession and title of the subject property would be transferred to the Appellant. The Appellant and Corporate Debtor executed a Memorandum of Understanding ('**MoU-1**' in short) on 25.11.2014. The MoU-1 had noted that the subject property was under charge and mortgaged with the SBI which the Corporate Debtor was willing to sell with due permission from State Industrial Development Corporation of Uttarakhand Limited ('**SIDCUL**' in short) to the Appellant subject to the Appellant making payment of certain sums of money on behalf of the Corporate Debtor to SBI towards loan repayment. Following execution of the MoU-1, the Corporate Debtor sent a one-time settlement ('**OTS**' in short) proposal dated 11.12.2014 which proposal was accepted by the SBI on 12.01.2015. It was submitted that in terms

of OTS, it was agreed that Rs.29.70 cr was owed to SBI of which Rs.4.5 cr was received by SBI from the Corporate Debtor. It was submitted that to meet the balance amount of Rs.25.20 cr, it was agreed that the Appellant was to contribute Rs.15 cr and the Corporate Debtor was to contribute Rs.10.21 cr.

3. It was further claimed by the Learned Counsel for the Appellant that Rs.10.46 cr had been paid by the Appellant to SBI on behalf of the Corporate Debtor during the period 13.12.2014 to 08.01.2016 and that SBI had initially released physical possession of the subject property to the Appellant. However, since the Corporate Debtor had failed to contribute their part of the commitment, a fresh OTS dated 31.03.2015 was issued by SBI by which the Corporate Debtor would make payment of Rs.10.21 crore as their part of the contribution. It was contended that a fresh MoU (**'MoU-2'** in short) was therefore entered between the Appellant and the Corporate Debtor again on 02.03.2016 wherein the Corporate Debtor agreed to pay their part of contribution on or before 31.03.2016 to enable transfer of subject property in the name of the Appellant.

4. It has been further submitted that with a view to complete the process of sale of the subject property, an Agreement to Sell (hereinafter referred to as **'A2S'**) was entered into between the Appellant and Respondent on 19.03.2016 which superseded both the MoUs. In terms of the provisions of the A2S, the Corporate Debtor had agreed to sell the subject property to the Appellant for Rs.15 cr besides agreeing to comply to requisite procedural formalities including obtaining of

necessary approval of SIDCUL to enable sale of the subject property and corresponding transfer of title and possession.

5. However, the Corporate Debtor failed to discharge their end of the agreement by failing to contribute their part of loan repayment and failure to secure necessary approvals from SIDCUL. Hence SBI took back the possession of the subject property from the Appellant. It is stated that subsequently on 08.04.2019, the SBI again released the charge of the subject property to the Corporate Debtor on the basis of an Amnesty Scheme. However, in spite of release of property by SBI, the Corporate Debtor failed to conclude the sale/purchase transaction of the subject property in favour of the Appellant. Furthermore, though the balance sheet of the Corporate Debtor evidences debt to the tune of Rs.10.46 cr payable to the Appellant, the Corporate Debtor neither returned the money to the Appellant nor transferred the subject property. It was also submitted that in terms of Clause 10 of the A2S, the Corporate Debtor had admitted liability to compensate the Appellant if the sale of subject property did not get effectuated. Since the Appellant was not compensated, hence a Section 7 application was filed by the Appellant to initiate Corporate Insolvency Resolution Proceedings (**'CIRP'** in short) against the Corporate Debtor.

6. It was contended that the Adjudicating Authority erroneously dismissed the Section 7 application on the grounds that there was no interest component payable on the loan advanced by the Appellant to the Corporate Debtor; that the loan was not lent for time value of money and that in the absence of a tripartite

agreement between the Appellant, Corporate Debtor and SBI, there was no financial debt.

7. Advancing arguments on behalf of the Corporate Debtor, the Learned Counsel for the Respondent admitted that the subject property obtained from SIDCUL in 2007 was mortgaged with the SBI on account of credit facilities extended by them. To liquidate their liabilities with the SBI, admittedly an OTS had been entered into with SBI on 12.01.2015. It was pointed out that the Appellant had agreed to repay the loan on behalf of the Corporate Debtor in return of acquiring the subject property for which purpose MoU-1 was entered into between the Appellant and the Corporate Debtor. However, the consideration amount was Rs.27.16 cr and not Rs.15 crore as claimed by the Appellant. Further, since the Appellant could not fulfil the various condition precedent as contemplated in the MoU-1, a second MoU-2 had to be entered into on 02.03.2016 with revised terms and conditions. It was contended that Clause 3.1 of the MoU-2 clearly provided that the covenants of the MoU-1 shall be performed by the Appellant by or before 31.03.2016. However, the MoU-2 also could not be implemented on account of failure on the part of the Appellant, hence liabilities of SBI remained unpaid and proceedings under SARFAESI Act were initiated by the SBI.

8. It has also been submitted that an application under Section 7 of IBC can be invoked only if the alleged default is within a period of 3 years. In view of the fact that payments were made by the Appellant between 2014 and 2016, and also

that the Appellant had admitted that the date of default had arisen on 19.04.2016, in their own complaint made before RoC, it was contended that the instant proceedings were barred by limitation having been filed beyond the period of three years. It was also contended that the Appellant had deliberately failed to mention the date of default in its application under Part IV to escape the fact that the present default was hit by limitation.

9. It has been further submitted that one of the essential ingredients for initiation of proceedings under Section 7 of IBC is that the applicant must be a Financial Creditor. To buttress their contention, it was pointed out that in the present case the Appellant had paid only a sum of Rs.10.46 cr against the requirement to pay Rs.27.16 cr in terms of the MoU-1. Further as per MoU-2, the remaining sum of Rs.16 cr had to be paid by the Appellant which they failed to pay. Alleging that the Appellant had failed to perform the terms and conditions of MoU-2 of paying the agreed consideration amount in a time bound manner, the MoU-2 stood frustrated and no further MoUs having been executed thereafter between the two parties, there was no justified cause of action on the part of the Appellant to claim the status of being a financial creditor.

10. It has also been contended that the Appellant has tried to create a misconception that the sale consideration amount agreed between the two parties was Rs.15 cr of which Rs.10.46 cr had already been paid by them. It was asserted that the correct fact is that in terms of both the MoUs as agreed upon by both parties, the sale consideration was 27.16 cr of which Rs.16 cr was not yet paid by

the Appellant. In the instant case, there is no payment of the debts due on the part of the Corporate Debtor as the MoU had got frustrated due to breach of obligation on the part of the Appellant. It was only on account of their failure to abide by the terms of the MoU that SBI took re-possession of the subject property. The subject property was subsequently released only after the Corporate Debtor paid an exorbitant sum and entered into an Amnesty Scheme with the lender bank. Since the Appellant had failed to abide by the terms of the agreements, the Appellant is disentitled from seeking any equities.

11. It has also been contended that the amount of Rs.10.46 cr paid by the Appellant is not a financial debt as it does not contain the essential ingredients of being a debt along with interest and a disbursal against time value of money as stipulated in terms of Section 5(8) of the IBC. It was asserted that the Hon'ble Supreme Court in **Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. Vs. Axis Bank Limited & Ors. (2020 8 SCC 401)** ('Anuj Jain' in short) has also laid down that disbursal of funds should be done against the consideration of time value for money which is not met out in the present case. It has also been contended that the consideration amount paid by the Appellant is not covered by the definition of financial debt under IBC as the transaction is a simpliciter sale/purchase of subject property. The transaction was a pure sale agreement for the transfer of subject property and does not fall under the definition of Section 5(8) of IBC and does not fulfil the pre-requisite of commercial effect of borrowing.

12. It was vehemently contended by the Learned Counsel for the Respondent that the Appellant had initiated the proceedings purely with the intention of recovery of debt. The Appellant has thus been coercing the respondent to release the subject property after having paid a mere Rs.10.46 cr as against an agreed sum of Rs.27.16 cr. It was further submitted that the Appellant had been allowed to take possession of the subject property and that profits were reaped by them for almost two years. Hence, the debt in dispute is liable to be set off against the profits so made by the Appellant and that such set offs cannot be adjudicated and ascertained either by the Adjudicating Authority or in the exercise of appellate jurisdiction. It was also contended that the alleged dispute raised by the Appellant are in the nature of contractual disputes for which remedy lies in the civil law or arbitration mechanism and cannot be adjudicated under Section 7 of the IBC in summary proceedings.

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

14. The points which merit consideration are as outlined below:

(a) Whether the payment of Rs.10.46 crore by the Appellant to the SBI on behalf of the Corporate Debtor during 2014-2016 in terms of the two MoUs and OTS qualifies to be a 'financial debt' within the meaning and scope of Section 5(8) of the IBC; and

(b) Whether there was debt, if any, which had become due and payable on the part of the Corporate Debtor and default thereof qua the Appellant.

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

Sections

3(6) "**claim**" means—

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

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

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

3(10) "**creditor**" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

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

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

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

5(8) **“financial debt”** means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

- (a) money borrowed against the payment of interest;
 - (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
 - (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
 - (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
 - (e) receivables sold or discounted other than any receivables sold on nonrecourse basis;
 - (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
- [Explanation. -For the purposes of this sub-clause,-
- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
 - (ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
 - (h) 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;

16. Now coming to answer the first question, we need to notice in precise terms the sequence of events and nature of transaction which has taken place between the Appellant and the Respondent pursuant to the two MoUs which have been

entered into between them in the background of OTS proposal as well as the contemporaneous execution of A2S.

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

MoU of 25.11.2014 (MoU-1)

WHEREAS:

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

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

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

1. DEFINITIONS AND INTERPRETATION

1.1.1. "Advance Consideration" shall mean the amount of Rs.5,00,00,000/- (Rupees Five Crore Only) will be deposited by the Buyer to Seller's account with State Bank of India.

1.1.10. "Purchase Price" means the aggregate price payable by the Buyer to the Seller in consideration of the sale and transfer of the Unit by the Seller to the Buyer which shall be the sum of Rs. 27.16 crore (Rupees Twenty Seven Crore Sixteen lacs only). The purchase price can be segregated as below:

Land	:	Rs.9.16 Crore
Building	:	Rs.4.00 Crore
Plant & Machinery:		Rs.14.00 Crore
Total	:	Rs.27.16 Crores

3. CONDITIONS PRECEDENT

1.1 This MoU shall be conditional on the fulfillment or accomplishment of the conditions precedent set out in this Clause 3.1 within 240 days from the execution hereof or such other extended period, unless any of the following are waived in writing by the Buyer ("Conditions Precedent"):

4. SALE AND TRANSFER OF THE UNIT

1.1 Sale and Purchase

1.1.1. Subject to satisfactory fulfillment or accomplishment of the Conditions Precedent, the Seller agree to sell and transfer to the Buyer, and the Buyer agrees to purchase from the Seller, on the Completion Date, the Unit, free from all Encumbrances.

1.1.2 With effect from the Completion Date, the Buyer shall be fully and legally entitled to carry on business in the Unit in its own name and for its sole benefit and shall have the ability to run and operate the business and provide any services it may deem necessary in its own name and for its own account.

5. PURCHASE PRICE AND PAYMENT

1.3 That within 120 days from the date of signing of this MoU, the Buyer agrees to pay a sum of Rs.5,00,00,000/- (Rupees Five Crore Only) to Seller

towards Advance Consideration, which shall directly deposited by the Buyer to the Seller's account with State Bank of India's.

1.4 Balance Consideration as defined above shall be paid by the Buyer to Seller in following manner as agreed:

1.4.1 Within 240 days after obtaining approval from the SIDCUL and Bank (State Bank of India) for transfer of the Property the Buyer shall pay a sum of Rs.20,00,00,000/- (Rupees Twenty Crore Only) to the Seller which shall be directly deposited by the Buyer in seller's Account with State Bank of India.

1.4.2 Within ten days from the date of Registration of Lease Deed in favor of Buyer a sum of Rs.2,16,00,000/- (Rupees Two Crore Sixteen Lacs Only) shall be paid by the Buyer to the Seller.

MoU of 02.03.2016 (MoU-2)

In continuation with the previous Memorandum of Understanding's clause 17 sub-clause 1.2 dated 25th November 2014

WHEREAS

C. That however, the previous memorandum of understanding as was entered between the parties, as per clause 3 sub-clause 1.1, has expired and the parties are desirous to enter into new Memorandum of Understanding in continuation of the previous Memorandum of Understanding with revised terms and condition as are mentioned hereto as per clause 17 sub-clause 1.2.

SALE AND TRANSFER OF THE UNIT

4.1 Sale and Purchase:

4.1.1. The Second Party agrees to sell and transfer to the First Party and the First Party agrees to purchase from the Second Party, on the Completion Date, the Unit, free from all Encumbrances.

4.1.2. With effect from the Completion Date, the First Party shall be fully and legally entitled to carry on business in the Unit in its own

name and for its sole benefit and shall have the ability to run and operate the business and provide any services it may deem necessary in its own name and for its own account.

COMPLETION ARRANGEMENTS

5.1 The Second Party at the earliest opportunity available from the final payment made to the account of the Second Party as is maintained with State Bank of India, shall: -

5.1.1. Provide consent form duly signed by Second Party and First Party to SIDCUL for transfer of the Unit.

5.1.2 Send the title documents directly to SIDCUL.

5.1.3 Arrange for cancellation of the Existing Lease Deed and execution and registration of a lease deed by SIDCUL in respect of the Land in favour of the First Party for period of remaining term of the Lease Deed; in addition, the Second Party shall arrange for execution and registration of the factory buildings in favour of the First Party.

PURCHASE PRICE AND PAYMENT

5.4 The First Party has agreed to purchase the unit at a price of Rs.27,16,00,000/- (Rupees Twenty seven Crores and Sixteen Lakhs Only)

5.5 The First Party as per the terms and conditions agreed between the First Party and Second Party under the Memorandum of Understanding dated 25th November 2014 has made a payment of Rs.10,46,00,000/- (Rupees Ten Crores and Forty six Lakhs Only)

5.7 The First Party, under no circumstances unless otherwise agreed in written, shall make any payment directly to the Second Party. All the payments made by the First Party shall be deposited in State Bank of India.

5.8 The balance consideration, which as of today is Rs.16,70,00,000/- (Sixteen Crores Seventy Lakhs Only), shall also be paid by the First Party

to the State Bank of India, by or before 31st March, 2016 as per the terms and conditions of the One Time Settlement agreement entered by and between the Second Party and the State Bank of India.

SPECIFIC PERFORMANCE

19.6.2 In the event that either party fails or refuses to consummate the transactions contemplated by this Memorandum of Understanding or if any default under, or breach of, any representation, warranty or covenant of this Memorandum of Understanding by either Party (the “Defaulting Party”) shall have occurred that results in the failure to consummate the transactions contemplated hereby, then in addition to the other remedies provided in this Memorandum of Understanding, the non-Defaulting Party may seek to obtain an order of specific performance thereof against the Defaulting Party from a court of competent jurisdiction. In addition, the non-Defaulting Party shall be entitled to obtain from the Defaulting Party court costs and reasonable attorney’s fees incurred by it in enforcing its rights hereunder.

Agreement to Sell/Assignment Dated 19.03.2016

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS

That the ASSIGNORS shall assign and transfer the said Industrial Property in favour of the ASSIGNEE for a total consideration of R.15,00,00,000/- (Fifteen Crore Only) as per & within rules of concerned authorities.

1. That the aforesaid consideration amount shall be paid/ deposited by the ASSIGNEE to/ in the account of ASSIGNOR as maintained with its secured creditor i.e. State Bank of India.
5. The ASSIGNORS shall be responsible to complete all the requirements and formalities necessary for obtaining transfer order / permission of SIDCUL for transferring the said industrial plot in favour of Assignee.
10. That the ASSIGNORS also represents and assure as under:

h) That the ASSIGNOR accepts hereby its Liabilities in respect of this deal to compensate the ASSIGNEE i.e. M/s Shivam Agriols Private Limited in case of non-completion of this deal for any reason whatsoever.

17. All the parties are entitled for specific performance of this Agreement to sell in the court of law for the safe guard of their interests.

24. All the parties hereto agree that if there is any dispute between them about this Agreement the same shall be settled as per provisions of the Indian Arbitration and Conciliation Act, 1996 by appointment of the arbitrator who may be mutually agreed upon.

18. Coming to the admitted facts, we notice that the Corporate Debtor had been allotted land by SIDCUL on lease on which it was running its edible oil factory referred to as subject property. The Corporate Debtor secured a loan facility from SBI and had mortgaged the subject property. The Corporate Debtor admittedly defaulted in loan repayment to SBI and lost physical possession over the subject property to SBI. To service the loan repayment, the Corporate Debtor entered into a MoU with the Appellant on 25.11.2014. In terms of this MoU-1, the Appellant agreed to pay certain consideration amount in advance and balance consideration later in return of transfer of title of subject property in their favour. The MoU-1 terms also provided that the consideration amount would be paid by the Appellant in the Corporate Debtor's account with SBI towards loan repayment. It is also an undisputed fact that following this MoU, the Corporate Debtor entered into an OTS with SBI on 12.01.2015 which entailed total payment of Rs.25.21 crore by 31.03.2015 to SBI for release of subject property under mortgage. Initial payments having been received; the physical possession of the subject property was released

to the Appellant. However, as the terms of the MoU-1 had run aground, a fresh MoU was signed between the Appellant and the Corporate Debtor on 02.03.2016 in continuation of the earlier MoU. The MoU-2 of 02.03.2016 also got grounded leading to frustration of the OTS proposal following which SBI initiated SARFAESI proceedings and the Appellant got divested of the physical possession of the subject property. It is an undisputed fact that the Appellant had paid an amount of Rs.10.46 crore on behalf of the Respondent to the SBI by the time the OTS collapsed. It is also an accepted fact that shortly after the MoU-2 was signed, an A2S was executed between the two parties on 19.03.2016. In terms of the A2S, the Corporate Debtor had agreed to sell to the Appellant the subject property after clearance of charge from the SBI and requisite permission from SIDCUL. The Appellant in turn had agreed to buy the subject property for a total consideration of Rs.15 crore to be paid in the account of the Corporate Debtor in SBI. In June 2019, the Corporate Debtor entered into an amnesty scheme with SBI and after paying certain sum to SBI got the possession of the subject property released to themselves.

19. Given this conspectus of above facts, it is clear that the MoU-2 was in continuation of the MoU-1. The MoU-2 provided that the Corporate Debtor had agreed to sell and transfer the subject property to the Appellant on fulfillment of conditions precedent. From the clauses of the MoU-1 under the caption 'Definitions and Interpretations', we find that purchase price has also been defined. Further, the clauses under the caption 'Purchase Price and Payment' in

MoU-2 stipulates that Appellant had agreed to purchase the subject property at a price of Rs.27.16 cr and that the Appellant has made a payment of Rs.10.46 crore. It is also clear that the above payment made by the Appellant has been deposited in SBI under the account maintained by the Corporate Debtor and that a balance consideration of Rs.16.70 cr was yet to be paid by 31.03.2016. The MoU-2 under the heading “Completion Arrangements” also stipulated that on final payment being made to the account of Corporate Debtor, the latter would arrange for cancellation of existing lease deed and register a lease deed in favour of the Appellant with SIDCUL for the remaining lease term besides arranging for execution and registration of factory buildings in favour of the Appellant.

20. This now brings us to the rival contentions of the two parties as to whether the present transaction of disbursal of Rs 10.46 cr is in the nature of financial debt. The contention of the Learned Counsel of the Respondent is that the amount of Rs.10.46 cr paid by the Appellant does not fulfil the two tests laid down under Section 5(8) of IBC to qualify as financial debt. It has been strongly argued that the two essential ingredients, namely, debt along with interest and disbursal against time value of money is absent and that this transaction is only the outcome of a simpliciter sale/purchase agreement. Reliance has been placed on the judgment laid down by the Hon’ble Supreme Court in **Anuj Jain** (supra), in support of their contention.

21. It is the case of the Appellant that payment was made to the SBI in the account of the Corporate Debtor in pursuance to the OTS proposal. It was also

contended that the Appellant had agreed to finance the OTS of the Corporate Debtor with the SBI since the Corporate Debtor had agreed to transfer the title and possession of the subject property on completion of OTS proposal. It was therefore argued that this transaction squarely satisfied the three-fold criteria of financial debt of disbursal, time value of money and commercial effect of borrowing as laid down in the judgment of this Tribunal in **Kolla Koteswara Rao v. Dr. S.K. Srihari Raju in CA (AT) (Ins.) No.717/2020** (“Kolla” in short).

22. For a proper appreciation of the matter at hand, we therefore need to examine as to what are fundamental and essential conditions for treating a debt to be a financial debt. Since the Hon’ble Supreme Court has had the occasion to consider this matter at length, we feel it would be opportune to be illumined by those judgments.

23. One such relevant judgment delivered by the Hon’ble Supreme Court is in **Pioneer Urban Land and Infrastructure Ltd. v. Union of India (2019) 8 SCC 416**, (“Pioneer Urban” in short) where the concept of ‘financial debt’ has been elaborately discussed in the light of several earlier judgments including **Innoventive Industries Ltd. v. ICICI Bank (2018) 1 SCC 407** and **Swiss Ribbons (P) Ltd. v. Union of India (2019) 4 SCC 17**. The relevant excerpts are as extracted under:

“70. The definition of “financial debt” in Section 5(8) then goes on to state that a “debt” must be “disbursed” against the consideration for time value of

money. “Disbursement” is defined in Black's Law Dictionary (10th Edn.) to mean:

“1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose.”

71. In the present context, it is clear that the expression “disburse” would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression “disbursed” refers to money which has been paid against consideration for the “time value of money”. In short, the “disbursal” must be money and must be against consideration for the “time value of money”, meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money. Thus far, it is clear that an allottee “disburses” money in the form of advance payments made towards construction of the real estate project. We were shown the Dictionary of Banking Terms (2nd Edn.) by Thomas P. Fitch in which “time value for money” was defined thus:

“present value : today's value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the time value of money. Today's value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis.”

That this is against consideration for the time value of money is also clear as the money that is “disbursed” is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).

75. And now to the precise language of Section 5(8)(f). First and foremost, the sub-clause does appear to be a residuary provision which is “catch all” in nature. This is clear from the words “any amount” and “any other transaction” which means that amounts that are “raised” under “transactions” not covered by any of the other clauses, would amount to a financial debt if they had the commercial effect of a borrowing. The expression “transaction” is defined by Section 3(33) of the Code as follows:

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

As correctly argued by the learned Additional Solicitor General, the expression “any other transaction” would include an arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay instalments at various stages of construction, so that they themselves then fund the project either partially or completely.

76. Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing. We were referred to Collins English Dictionary & Thesaurus (2nd Edn., 2000) for the meaning of the expression “borrow” and the meaning of the expression “commercial”. They are set out hereinbelow:

“borrow.—vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard. to lend. 4. (intr) Golf. To putt the ball uphill of the direct path to the hole : make sure you borrow enough.”

“commercial.—adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser : commercial television. 3. having profit as the main aim : commercial music. 4. (of chemicals, etc.) unrefined and produced in bulk for use in industry. 5. a commercially sponsored advertisement on radio or television.”

77. A perusal of these definitions would show that even though the petitioners may be right in stating that a “borrowing” is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression “borrow” is wide enough to include an advance given by the homebuyers to a real estate developer for “temporary use” i.e. for use in the construction project so long as it is intended by the agreement to give “something equivalent” to money back to the homebuyers. The “something equivalent” in these matters is obviously the flat/apartment. Also of importance is the expression “commercial effect”. “Commercial” would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is “raised” under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the “commercial effect” of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have “commercial” interests in the same—the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even without adverting to the Explanation introduced by the Amendment Act.

(Emphasis supplied)

24. Next, we note that Section 5(8) of the IBC which deals with financial debt has also been exhaustively discussed in **Anuj Jain case** (supra) by the Hon'ble Apex Court and the relevant paragraph is to the effect:

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

25. Expanding further on the ambit and scope of financial debt in terms of Section 5(8) of IBC, we notice that the Hon’ble Supreme Court in **Orator Marketing (P) Ltd. v. Samtex Desinz (P) Ltd., (2023) 3 SCC 753** (‘Orator’ in short) has observed:

“21. The definition of “financial debt” in Section 5(8) IBC has been quoted above. Section 5(8) defines “financial debt” to mean “a debt along with interest if any which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest, as per Section 5(8)(a) IBC. The definition of “financial debt” in Section 5(8) includes the components of sub-clauses (a) to (i) of the said Section.

22. NCLT and NCLAT have overlooked the words “if any” which could not have been intended to be otiose. “Financial debt” means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLAT and NCLT have failed to notice clause (f) of Section 5(8), in terms whereof “financial debt” includes any amount raised under any other transaction, having the commercial effect of borrowing.

23. Furthermore, sub-clauses (a) to (i) of sub-section (8) of Section 5 IBC are apparently illustrative and not exhaustive. Legislature has the power to define a word in a statute. Such definition may either be restrictive or be extensive. Where the word is defined to include something, the definition is prima facie extensive.

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 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) 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.”

(Emphasis supplied)

26. Briefly stated, we see that in **Pioneer Urban** (*supra*) it has been held that any debt to be treated as financial debt, there must happen disbursement of money and the disbursement must be against consideration for time value of money. The concept of time value of money has been further explained to also include a transaction which does not necessarily culminate into money being returned to the lender or interest being paid in respect of money that has been borrowed. Holding Section 5(8) as a residuary provision which has a catch-all nature, it held that it can include anything which is equivalent to the money that has been loaned as long as commercial effect of borrowing or profit as the aim is discernible. In the

matter of **Anuj Jain** (supra), the Hon'ble Supreme Court articulated that the essential condition of financial debt is disbursement against the consideration for time value of money. Further in the most recent judgment of Hon'ble Supreme Court in **Orator** (supra), it has been clearly held that financial debt does not expressly exclude an interest free loan. It has also emphasized that financial debt includes any amount raised under any other transaction having the commercial effect of borrowing.

27. With the derivatives of the above seminal judgments as guiding lights, we next come to the findings of the Adjudicating Authority on how it has treated the loan advanced by the Appellant. The impugned order has observed that the disbursal made by the Appellant is not in the nature of financial debt on the grounds that there is no interest payable on the loan advanced by the Appellant and that there is no time value of money since there is no time fixed for repayment of the loan. The relevant portions of the impugned order is reproduced below:

“10. It is also settled position that the amount to be constituted under 'financial debt' should be disbursed against time value of money and must have commercial effect as per the law laid by the Hon'ble Supreme Court in the matter of Innoventive Industries Ltd. v. ICICI Bank and Another, AIR 2017 SC 4084. The definition of Financial Debt as laid down under the code and the above case laws relied upon by the Corporate Debtor makes it clear that a debt will not become financial debt, if it was not advanced for time value money. MoUs entered between the parties on two occasions i.e. 25.11.2014 and 02.03.2016 and various other documents and balance sheets relied upon by the Applicant makes it abundantly clear that there is no interest payable on the loan advanced by the Applicant. Apart from

the above, no time is fixed for repayment in the absence of which it cannot be said that the loan was lent for time value money. Further, the applicant himself failed to fulfil its own obligation and did not make the payment of the amount as settled.”

(Emphasis supplied)

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

29. We now proceed to examine whether in the present case, disbursement of money has taken place against the consideration for time value of money and whether commercial effect of borrowing is found to underpin the transaction. At the outset, we acknowledge that the concept of time value of money has not been expressly defined in the IBC. Undoubtedly, the most typical illustration of time value is in the form of interest on the principal amount that has been borrowed. However, it is now a well settled proposition of law that interest on loan is not the only binding criterion for determining time value of money. The Insolvency Law

Report, 2018 has also held time value of money to mean compensation or the price paid for the length of time for which money has been disbursed. Thus, time value of money is not only a regular or timely return received for the duration for which the amount is disbursed as an amount in addition to the principal, but also covers any other form of benefit or value accruing to the creditor as a return for providing money for a long duration.

30. We also notice that the Adjudicating Authority in the impugned order has held that in the absence of time fixed for repayment, it cannot be said that the loan was advanced for time value of money. Even if the loan extended was not interest-bearing and no time was fixed for repayment, it would be both skewed and misconstrued to hold that the loan was disbursed without time value of money. The Appellant had advanced the payment with an intent to gain from the land, plant and machinery and factory building changing hands from the Corporate Debtor to the Appellant as borne out from Clause 4.1.2 of MoU-2. The expectation to benefit from acquiring the entire right, title and interest over the subject property at a lesser rate compared to the market value has to be factorized as time value of money. As long as the lender visualizes an element of profit and enhancement of economic prospect in return for the money advanced for certain time period, the loan in question entails time value of money and acquires the colour of commercial borrowing which is clearly borne out from the facts of the present case. It has all the trappings of a financial debt and squarely falls within the purview of Section 5(8) of IBC.

31. In view of the above, we answer the first question in the affirmative in holding that the disbursal made by the Appellant in the present case is in the nature of a financial debt and to that extent disagree with the Adjudicating Authority.

32. This now brings us to the second question as to whether the financial debt qua the Appellant had become due and payable and whether a default in payment had arisen on the part of the Corporate Debtor.

33. It is trite law that under the IBC once a debt which becomes due or payable, in law and in fact, and 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. It is also well accepted that debt means a liability in respect of a claim and claim means a right to payment even if it is disputed. Viewed against this broad backdrop of the IBC framework, we now dwell upon the facts of the present case to find out whether in this case debt was due and payable.

34. There is sufficient material on record to prove that there was disbursal of funds by the Appellant to the Corporate Debtor in their account with SBI towards loan repayment. Admittedly the amount so disbursed is Rs.10.46 crore and this fact finds clear mention at Clause 5.5 of MoU-2. The bank transaction details are at Annex-A/6 of the Appeal Paper Book (“**APB**” in short) besides Balance Sheet of

the Corporate Debtor for FY 2016-17 till 2020-2021 at Annex-A/11 of APB acknowledging receipt of this disbursal as “other long term liabilities”.

35. The modality of payment by the Appellant by way of direct deposit to the Corporate Debtor’s account with SBI was clearly laid down in Clause 5.7 of the MoU-2. There is also no dispute that Appellant had complied to these modalities and routed the disbursal by depositing the same in the Corporate Debtor’s account in the SBI. Receipt of this amount has not been controverted by the Corporate Debtor thereafter. Neither has any claim been made that any part of this sum was repaid by the Corporate Debtor. That being the case there arises no doubt in our mind that there was a debt on the part of the Corporate Debtor qua the Appellant for an amount of Rs.10.46 crore.

36. It is however the case of the Appellant that the Corporate Debtor had neither returned the money nor did they transfer the possession of the property even after it was discharged by the SBI pursuant to an Amnesty Scheme. Further the Corporate Debtor had failed to obtain prior permission of SIDCUL which led to failure of the A2S. It was contended that in terms of the A2S, the Corporate Debtor was therefore liable to compensate the Appellant. Further it has been contended that in **Kolla** (supra), this Tribunal had held that the lender was entitled to claim repayment of debt even though full payment was not yet made and given the identical facts herein, it is therefore squarely covered by the said judgment of this Tribunal. It was pointed out that in that case the approval of the competent authority (TSIIC) could not be secured and hence the debt had become payable.

37. This therefore brings us down to the question as to whether the debt had actually become due and payable on the part of the Corporate Debtor. To find the answer, we notice the recitals of the MoU-2 at Clauses 5.4, 5.5 and 5.8 which clearly stipulate that the purchase price of the subject property is Rs.27.16 crore. The Appellant having already paid Rs.10.46 crore was still required to pay the balance consideration of Rs.16.70 crore by or before 31.03.2016. Further, it is significant to note that Clause 5.1 of the “Completion Arrangements” in MoU-2 expressly provided that only after final payment is made by the Appellant to the Corporate Debtor’s account in SBI that Corporate Debtor was to take further steps for execution of lease deed in respect of land and registration of factory building in favour of the Appellant. The recitals of the MoU make it amply clear that the Appellant was required to remit the full payment of Rs.27.16 crore and until then he was not entitled to acquire rights and title over the subject property. In other words, the debt qua the Corporate Debtor would have become payable only on the full amount having been remitted to the Corporate Debtor’s account and this stage was yet to be reached.

38. The Learned Counsel for the Appellant however stated that the balance consideration amount beyond Rs.10.46 crore was to be paid by the Corporate Debtor and not by the Appellant. Secondly, it was asserted that the A2S which was a sequel to the MoUs had superseded the MoUs. It was asserted that the A2S provided the total consideration amount at Rs.15 crore for assignment and transfer of the subject property.

39. Even if we agree with the contention of the Appellant that the A2S had subsumed the MoUs and therefore the consideration amount for the subject property was Rs.15 crore and not Rs.27.16 crore, it still remains undisputed that the balance consideration amount was yet payable by the Appellant. We also cannot overlook that both the A2S at Clause 1 and MoU-2 at Clause 5.8 stipulated that the consideration amount was entirely payable by the Appellant. The Learned Counsel for the Appellant has failed to adduce any material on record to establish that this amount was payable by the Corporate Debtor and not the other way around. Hence the submission advanced on behalf of the Appellant that Corporate Debtor having not paid his part of the contribution to the SBI and therefore committed a default does not inspire our confidence as it is a mere assertion not supported by evidence. We are therefore of the considered view that both in terms of the MoU and A2S, the payment of full consideration amount not having been made by the Appellant, he was not entitled to stake claim either for subject property or to seek repayment.

40. It was also contended by the Learned Counsel for the Appellant that Clause 10(h) of the A2S clearly provided that the Corporate Debtor was to accept all liabilities to compensate the Appellant in case of non-completion of deal by the Corporate Debtor. It was also contended that the Corporate Debtor was responsible for completion of all formalities for obtaining permission of SIDCUL for transfer of the subject property as per Clause 5 of the A2S which it had failed to perform. There is no quarrel over this proposition that the A2S unquestionably

provided these safeguards. But what needs to be analyzed at this stage is whether the Corporate Debtor can be squarely held responsible for the non-completion of deal and whether the Corporate Debtor had breached in its obligation to obtain prior permission of SIDCUL to enable transfer of subject property.

41. We notice that 'Conditions Precedent' as laid down in MoU-1 and 'Completion Arrangements' laid down in MoU-2 clearly laid down that the Corporate Debtor was obligated to take up with SIDCUL for transfer of subject property. Be that as it may, this obligation was made conditional upon the receipt of final payment from the Appellant. Without going into the controversy as to whether the consideration amount was Rs.15 crore or Rs. 27.16 crore, we find that even the lesser amount of Rs. 15 crore had remained unpaid. Both the MoUs and A2S clearly provided that only on full payment of consideration amount by the Appellant that the Corporate Debtor was liable for cancellation of existing lease deed and registration of fresh lease deed by SIDCUL. Breach of obligation on the part of the Corporate Debtor would arise only after the Appellant fulfilled the pre-condition of making final payment and that having not taken place, the Corporate Debtor cannot be held liable for any breach of obligation and to provide for attendant compensation. Thus, the MoUs and A2S had been frustrated due to non-payment by the Appellant of the agreed consideration amount contained therein and for this breach the Corporate Debtor cannot be held responsible as that would tantamount to allowing the Appellant to take advantage of his own wrong. The full payment had clearly not been made by the Appellant having

admittedly paid only Rs.10.46 crore, we agree with the finding of the Adjudicating Authority that unless the entire payment was made, no right would accrue to the Appellant to enter into the shoes of SBI and have right to title and possession of the subject property.

42. At this juncture, it would be appropriate to add that the applicability of the ratio of **Kolla** (supra) in the present case as claimed by the Learned Counsel for the Appellant also fails since in the present case, the distinguishing fact is that SIDCUL had held back permission to allow lease transfer of subject property not on their own, but it was occasioned by non-payment of final consideration amount by the Appellant. On the other hand, in **Kolla** case, CIRP had to be initiated because the permission granted by the appropriate authority (TSIIC) was *suomotu* cancelled. Hence the **Kolla** ratio cannot help the case of the Appellant.

43. Thus, to answer the second question, we are of the considered view that under the given facts and circumstances, the debt had not become due and therefore was not payable. The Corporate Debtor is entitled to point out that a default has not occurred in the sense that the debt is not due. In the present facts, the debt had not become due in the sense that it was payable only after receipt of full agreed amount of Rs.27.16 crore and which not having occurred, there was no event of default and that being so the debt had not become payable and hence Section 7 of the IBC does not get attracted. While we agree with the impugned order that the Section 7 application deserves to be dismissed, we would like to

clarify that our basis for affirming this decision is differently grounded from the reasons cited by the Adjudicating Authority.

44. Having recorded our findings on both the questions, we would like to emphasize the oft repeated tenet that the primary legislative intent behind the IBC is insolvency resolution so as to bring the corporate debtor to its feet. It would militate against this legislative fiat if we allow the IBC forum to be used as a substitute for money recovery proceedings. Having said that we also affirm the impugned order in that the Appellant shall have the liberty to move the appropriate forum of law to seek remedial action as permissible in law to recover their debt and it would be open for them to them to raise these pleas and contentions.

45. In view of the foregoing discussions, the appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi

Date: 22.05.2023

PKM