NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT)(Insolvency) No.198/2020

(Arising out of order dated 31.12.2019 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench II at Mumbai in CP No.1347/MB/C-II/2019)

In the matter of;

Nishit B Patel
Shareholder of
Peacock Construction Pvt Ltd,
F-606, Abhishek apartment,
ESIC Nagar, Four Bunglows
Versova, Mumbai 400053 Appellant

Vs

Good Value Financial Services Pvt Ltd
1301, 13th Floor, Peninsula Business Park,
Tower b, Senapati Bapat Marg,
Lower Parel West, Mumbai 400013

Peak Construction Pvt Ltd
Through RP
Shop No.10, Mithila Shopping Centre,
Ground Floor, VM Road, Juhu Scheme
Vile Parle (WEST), Mumbai 400049 Respondent

Present:

Mr. Rahul Chitnis, Mr. Nitin Mishra, Mr. Nivit Srivastava and Mr. Santosh Pathak, Advocates for Appellant.

Mr. Aman Verma and Mr. Kunal Tandon, Advocates for R1.

Mr. Himrit Singh Wadhwa, Advocate for R2.

JUDGEMENT
VIRTUAL MODE

JUSTICE M. VENUGOPAL, MEMBER (J)

PREFACE

The Appellant/Shareholder of the 'Corporate Debtor' has filed the instant Comp App (AT)(Ins) No.198 of 2020 as an Aggrieved Person being

dissatisfied with the order d12.2019 in CP No.1347/MB/C-II/2019 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Mumbai Bench II).

2. The 'Adjudicating Authority) (NCLT Mumbai Bench II) while passing the impugned order dated 31.12.2019 in CP NO.1347/MB/C-II/2019 (Filed by the 1st Respondent/Applicant/Financial Creditor under Section 7 of the I&B Code, 2016) at paragraph 4 to 10 had observed the following

> *"4.1 The Financial Creditor had advanced on 28.10.2009 Rs.5,25,22,000/- and on 18.12.2010 Rs.10,00,000/- vide two different cheques a loan aggregating to Rs. 5,35,00,000/-.*
>
> *4.2 The Financial Creditor submits that the Corporate Debtor had falsely alleged that Rs.5,35,00,000/- was not provided as a loan but as an advance for acquiring from the Corporate Debtor, floor space index of 15,500 square metres to be consumed on portion of the larger Property.*
>
> *4.3 The Financial Creditor thereafter addressed a letter dated 28.03.2019, reiterating that the amount of Rs.5,35,00,000/- was an advance by way of a loan and that the same was repayable on demand along with interest at the rate of 18% interest on quarterly interest. Vide said letter dated 28.03.2019 the Financial Creditor has demanded the loan back and refuted all other excuses of the Debtor, as claimed by the Petitioner.*

4.4 The Applicant has also in its Petition enclosed a copy of the "Recall and Demand" Notice to the Respondent dated 13.04.2018 addressed for making payment of dues.

4.5 The Applicant in furtherance of his case has enclosed copies of Bank Certificate and bank Statement issued by Bank of India, Malad (West) which clearly testifies the "Debt" and also "Default" on the part of the Corporate Debtor as existed in the books of the Applicant affirming the Loan advanced.

5. The copy of the Petition was served on the Corporate Debtor vide letter dated 02.04.2019. Necessary Proof of service in this regard have been placed on record by the Petitioner.

6. Submission by the Respondent/Corporate Debtor:

6.1 The Financial Creditor has not produced document on record which would record charging of any interest as well as there is no contract between the parties for charging the rate of interest. There is no contract for compounding of interest.

6.2 The document placed on record evidence contrary to the claim, the ledger confirmation relied upon by the Applicant only records and reflect principal amount and not any amount towards interest. Inspite of that, no objection was raised by the Applicant at any stage.

6.3 The Financial Creditor has provided its own account which is contrary to the actual account. The Applicant never debited interest in its own account. The Applicant's accounting is on accrual basis, therefore,

they were required to debit interest in the account of Respondent maintained with the Applicant and accordingly treat the same as income. The Applicant has never done that. In fact, they have produced false and fabricated accounts of its own.

6.4 The Financial Creditor's contention of loan, if it has to be accepted then there is no term defined or produced which would signify that when the payment was required to be made. Therefore, there is no contract or agreement produced on record which would show when the default has taken place. In view thereof, it is respectfully submitted that it is not possible to ascertain from Applicant's pleading that debt exist and default occurred.

6.5 The Financial Creditor's case is that interest is payable quarterly. Admittedly, no payment is ever made towards interest by the Respondent. Assuming Applicants case to be true and correct, in that event that default took place on non-payment of interest which as per Applicant is due and payable since 2010. Accordingly, the cause of action accrued in 2010.

6.6 The Financial Creditor's claim therefore on face of it is barred by law of limitation. The Financial Creditor's claim proceed on the basis that default occurred on 13.04.2018 i.e. absolutely false and bogus and clever attempt to bring the claim within limitation.

Findings:

7. The Bench heard the arguments of the Financial Creditor and perused the records.

8. It is established that debt is due on part of the Corporate Debtor which is corroborated from Confirmation of Accounts dated 01.04.2011, 01.04.2017 and 01.04.2018, Bank certificate issued by Bank of India, Malad (West) dated 30.03.2019 and Bank statement issued by Bank of India evidencing a sum of Rs.5,35,00,000/- credited to the Corporate Debtor.

9. It is claimed that on the date of default the total debt due was Rs.28,62,55,961/-, however, the charging of interest was contested. At this juncture it worth to place on record the definition of "Financial Debt' as prescribed u/s 5(8) and (f) of the Code wherein a Financial Debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes any amount raised under any transaction having commercial effect of a borrowing. The term 'if any' has been adjudicated upon by Hon'ble Courts and held that in case of absence of Interest the Debt is still qualifies as defined under this Section, if it contains commercial effect of the borrowing. Therefore, under the fitness of circumstances we hereby hold that the principal amount in question is the Financial Debt, however, the question of quantum of interest is to be verified and ascertained by the Resolution Professional on the basis of the verification of the accounts of both the parties.

10.On going through the facts and submissions of the petitioner and upon considering the same, the Financial Creditor has established beyond doubt that the loan was duly sanctioned and duly disbursed to the Corporate Debtor and that there has been default in payment of the Debt by the Corporate Debtor."

and admitted the Company Petition by ordering the initiation of CIRP against the 'Corporate Debtor'/Peacock Construction Pvt Ltd etc.

Appellant's Submissions:

3. Challenging the impugned order dated 31.12.2019 in CP No.1347/MB/C-II/2019 passed by the 'Adjudicating Authority', the Learned Counsel for the Appellant submits that the 'Claim' of the 1st Respondent/Financial Creditor is not 'Debt' in any manner, as the transaction is not a 'Loan Transaction'.

4. Advancing his argument, the Learned Counsel for the Appellant contends that there is no document to show that the fact that the loan in question was given by the 1st Respondent/Financial Creditor to the Company. Furthermore, there is no agreement or basis which evidences that the transaction is 'Loan Transaction'.

5. The Learned Counsel for the Appellant takes a stand that the claim made by the 1st Respondent/Financial Creditor is only an 'Advance' for acquiring the 'Floor Space Index' and not a 'Financial Debt'.

6. The Learned Counsel for the Appellant points out that no payment was ever made towards interest by the Company and that the entire story of 'default' is without any basis.

7. Moreover, it is the contention of the Learned Counsel for the Appellant that there is nothing to show on record that the money was payable on 'Demand' and even assuming without admitting that the 'Default' took place on 'payment of interest' which is allegedly due and payable from 2010, the claim is on the face of it, is barred by limitation, by virtue of Article 137 of the Limitation Act.

8. The Learned Counsel for the Appellant takes a stand that the 1st Respondent by filing a Section 7 Application under the I&B Code, before the 'Adjudicating Authority', under the garb of a 'Debt' is arm twisting and coercing the payment against the spirit of the I&B Code.

9. The Learned Counsel for the Appellant proceeds to point out that the Company during September, 2009 was negotiating with the Directors of one Lok Housing and Constructions Ltd and Lok Holding Ltd (Lok Group) for the acquisition from Lok Group certain immovable properties admeasuring 2,30,209 sq mtrs, situated at Ambernath Village, Thane Distt.

10. It is represented on behalf of the Appellant that the Directors of the Financial Creditors/1st Respondent knew that the Directors of the Company in a personal manner and expressed an interest in acquiring from the Company a Floor Space Index of 15,500 sq mtrs to be consumed on a portion admeasuring 8800 sq mtrs or thereabout out of a large property that was mutually earmarked between the Financial Creditors and the Company pursuant to the conclusion of the transaction with the Lok Group. As a matter of fact, the Directors (Hemang Jadhavji Shah and Mr. Mehul Jadhavji Shah) of the Financial Creditors are common Directors in the Company "Krushmi Developers Private Ltd'. The Directors of the Company and the

Financial Directors had jointly undertook projects together and successfully completed the projects through 'Krushmi Developers Pvt Ltd'.

11. The Learned Counsel for the Appellant brings it to the notice of this Tribunal that the total consideration agreed to be paid for by the Financial Creditors towards the purchase, the Floor Space Index and his entitlement to consume the same on the said portion was Rs.10 crores only, of which only a sum of Rs. 5,35,00,000/- was paid by the Financial Creditors to the Company on 28.10.2009 to enable the Company to acquire Floor Space Index, on behalf of the 'Financial Creditors'. Further, an understanding (MOU) was executed on 29.10.2009 between the Company and Lok Group, whereby the larger property was agreed to be sold by Lok Group to the Company Group, whereby the larger property was agreed to be sold by the Lok Group to the Company.

12. The Learned Counsel for the 'Appellant' comes out with a plea that it was mutually agreed between the 'Financial Creditor' (1st Respondent) and the Company that only on completion of the transaction as contemplated and recorded in the 'Memorandum of Understanding' with Lok Group would the Company assign the 'Floor Space Index' of 15,500 sq. mts. In fact, the said transaction was contingent upon and was to be completed upon the transaction between the Company and 'Lok Group' being completed.

13. The Learned Counsel for the 'Appellant' contends that a suit against again Lok Group is filed in Special Suit No. 8/2015 before the Learned Civil Judge in Kalyan and the same is pending adjudication. Also, that the 'Financial Creditor' was aware that a 'Lis pendens' notice was registered by the Company with the Sub Registrar of Assurances at Ulasnagar – 3 under serial No. 4835.

14. The Learned Counsel for the 'Appellant' submits that the 'claim' is not 'debt' in any manner, as the transaction is not a loan transaction. As a matter of fact, the 'claim' is not a 'Financial Debt', but an advance for acquiring the 'FSI' in a project.

15. The Learned Counsel for the 'Appellant' contends that the 'Claim' is barred by limitation and in fact, the Application before the 'Adjudicating Authority' (under Section 7 of the Code) was filed in April, 2019 after the expiry of more than 6 years from payment of the alleged due and it is barred by 'Limitation'.

16. According to the Learned Counsel for the 'Appellant' the alleged default had occurred from the time interest was not paid i.e., 2010 to 2011 and no action was taken, no claim was made from the Company or no steps for recovery of interest by the 'Financial Creditor' were taken for 8 years and till 2018, when the first letter was issued to the company.

17. The Learned Counsel for the 'Appellant' projects an argument that the 'Balance Sheet' for the year 2009-10 to 2018-19 do not show the said amount the head 'Loan on the liability side of the Balance Sheet'. However, the said amount are shown under the head 'Current Liabilities- Long Term Liabilities (Advance for property) and not as Loan sum. Indeed, there is not reflection of 'Debt' in the 'Balance Sheet' and hence, cannot be an 'Acknowledgment of Debt' within the meaning of Section 18 of the Limitation Act.

18. The Learned Counsel for the 'Appellant' submits that the 'Debt' was time barred as on 31.03.2014 and that the confirmation of Accounts for the period 01.04.2016 to 31.03.2017 and 01.04.2017 to 31.03.2018 are not

'Acknowledgments of Debt' within the meaning Section 18 of the Limitation Act, 1963. Likewise. 'Trial Balance' for the period 01.04.2017 to 31.12.2019 are also not valid 'Acknowledgements' within the meaning of Section 18 of the Limitation Act, 1963, because, the 'Debt' was time barred as on 31.03.2014.

19. The Learned Counsel for the 'Appellant' contends that there is no time value of money in the transfer and the said amount was never received by the Company as a 'Loan' sum but only as 'Advance' consideration for acquiring FSI from a Lok Group and cannot construed as a 'Debt' in any manner.

20. The Learned Counsel for the 'Appellant' takes a plea that at the time of issuing the letter terminating the alleged understanding, the 'Debt' was barred by Limitation.

APPELLANT'S CITATIONS:

21. The Learned Counsel for the 'Appellant' refers to the Judgment dated 24.09.2019 of this 'Tribunal' in ***"Prayag Polytech Pvt. Ltd. Vs. Gem Batteries Pvt. Ltd."*** (vide Comp. App(AT)(INS) No. 713 of 2019) wherein at paragraphs 3, 4 & 7 it is observed under:

> *"3. The Adjudicating Authority heard the Appellant and in the impugned order dated 7th May, 2019 observed in paragraph-9 and 11 as under:*
>
> *…*
>
> *"9. In the present case, no document has been produced on the part of the petitioner by way of any loan agreement or demand promissory note or such other document to establish that the money is payable on demand and the there has been default and that Corporate Debtor is also bound to pay interest on the loan*

amount made available by the Financial Creditor. It is also noteworthy to mention that it is stated that there is only an oral agreement between the parties regarding the loaned amount.

11. …. It is stated in the recall notice filed as "Annexure-5" of the petition and also I the 'Page 9" of the typed set of the petition that till 5.11.2018 interest of Rs. 1,3,40/- was received by tee Financial Creditor. However, the payment of such interest is not reflected in the document submitted by the Petitioner."

….

Adjudicating Authority also found that no Financial Contract was there.

4. Learned Counsel for the Appellant submits that the Corporate Debtor deducted TDS on the interest paid by the Corporate Debtor while returning the loan which is sufficient to show that there was financial debt. Regarding there being no agreement or demand promissory note or such other document etc., leaned Counsel for the Appellant submits that Section 10 of the Contract Act, 1872 shows that agreement could be even oral.

5. Learned Counsel for the Appellant further submits that 'financial contract" as defined in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 does not debar oral contract and financial contract can be oral in terms of Section 10 of the Contract Act. According to him Section 7 application under IBC should not have been rejected.

6. We have gone through the records and the impugned order. Merely pointing out that TDS was deducted would not

be sufficient to conclude that there was financial debt. TDS can be deducted for various reasons.

7. As regards relying on Section 10 of the Contract Act, 1872, in our view IBC is a complete code in itself. Section 238 of IBC has overriding effect on provisions inconsistent with IBC. The 'Financial contract' is defined in "Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016" Rule 3(1)(d) requires setting out the terms of the financial debt including tenure etc. We find that Appellant has failed to show any record showing financial debt to be there. As such, we are unable to find any fault in the impugned order while rejecting Section 7 Application."

22. The Learned Counsel for the 'Appellant' relies on the Judgment of the Hon'ble Supreme Court dated 11.10.2018 in "***B K Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates"*** (vide Civil Appeal No. 23988 of 2017) wherein it is observed at paragraph-27 as under:

27. "It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act get attracted. "The right to sue", therefore, accrues when a default occurs, if the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to conde the delay in filing such application."

23. The Learned Counsel for the 'Appellant' cites the Judgment of the Hon'ble Supreme Court dated 25.09.2019 in ***"Jignesh Shah & Anr. Vs.***

Union of India" (vide Writ Petition (Civil) No. 455 of 2021) wherein in paragraphs – 30 & 31 it is observed as under:

> *30. " In the Winding up Petition itself, what is referred to is the fall in the assets of La-Fin to being worth approximately INR 200 crores as of October, 2016, which again does not correlate with 3rd November, 2015, being the date on which the statutory notice was itself issued. This again is only for the purpose of appointing an Officer of the Court as Official Liquidator in order to manage the day-to-day affairs and otherwise secure and safeguard the assets of the Respondent company. There is no averment in the petition that thanks to these or other facts the Company's substratum has disappeared, or that the Company is otherwise commercially insolvent. It is clear therefore that even on facts, the company's substratum disappearing or the commercial insolvency of the company has not been pleased. Whereas, in Form-1, upon transfer of the winding up proceedings to the NCLT, whet is correctly stated is that the date of default is 19th August, 2012; making it clear that three-years from that date had long since elapsed when the Winding up Petition under Section 433(e) was filed on 21st October, 2016."*
>
> *31. "We therefore allow Civil Appeal (Diary No. 16521 of 2019) and dispose of the Writ Petition (Civil) No.455 of 2019 by holding that the Winding up Petition filed on 21st October, 2016 being beyond the period of three-years mentioned in Article 17 of the Limitation Act s time-barred, and cannot therefore be proceeded with any further. Accordingly, the impugned judgment of the NCLAT and the judgment of the CL is set aside.*

24. The Learned Counsel for the 'Appellant' places reliance on the Judgment of the Hon'ble Supreme Court dated 18.09.2019 in ***"Gaurav***

Horgovindbhai Dave Vs. Asset Reconstruction Company (India) Ltd. & Anr. (vide Civil Appeal No. 4952 of 2019) wherein at paragraph-6 it is observed as under:

> *6. "Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being 'an application" which is filed under Section7, would fall only within the residuary article 137. As rightly pointed out by the learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21.07.2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr. Banerjee's reliance on para 7 of B.K. Educational Services Private Limited (supra), suffice it to say that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred."*

25. The Learned Counsel for the 'Appellant' contends that the Judgment of the Hon'ble Supreme Court in "***Consolidated Construction Consortium Limited Vs. Hitro Energy Solutions Private Limited" (2022) SCC online 142*** is not applicable to the facts of the present case because of the fact that the letter was issued on 28.03.2019 terminating the alleged understanding and there is no single document issued by the 'Corporate Debtor' to the 'Financial Creditor' acknowledging the after 31.03.2011 and the 'Claim' was barred after 31.03.2014.

FIRST RESPONDENT'S CONTENTIONS:

26. Conversely, it is the submission of the Learned Counsel for the 1st Respondent that an agreement was entered into between the 'Corporate

Debtor' and 1st Respondent/'Financial Creditor' for a loan of Rs 5.35 Cores and that the 'Financial Creditor' had disbursed a total sum of Rs. 5.35 Crores to the 'Corporate Debtor' by two cheques, the 1st cheque dated 28.10.2009 for a sum of Rs. 5.25 Crores and the 2nd cheque dated 18.10.2010 for a sum of Rs. 10 lakhs and the dispersal of the amount was admitted by the 'Corporate Debtor'. Further, no repayment was made by the 'Corporate Debtor' towards the principal or interest.

27. The Learned Counsel for the 1st Respondent contends that the total sum in default is Rs. 5,35,00,000/- along with interest @ 18% per annum totalling a sum of Rs. 28,62,55,961/- as on 28.03.2019 and that the date of default in the instant case is 13.04.2018 when the 'Demand Notice' was sent by the 1st Respondent/'Financial Creditor' and under the criteria under Section 4 of the I &B Code is fulfilled.

28. The Learned Counsel for the 1st Respondent takes a plea that the 'Limitation' does not commence when the 'debt' becomes due but only when the default occurs. Further, as the default took place on 13.04.2018, as mentioned in Section 7 Application, the Application is not a time barred one.

29. The Learned Counsel for the 1st Respondent points out that there are continuous acknowledgments in the 'Confirmation letters and 'Balance Sheets' and under the acknowledgement letters and 'Balance Sheets' are admitted for an extension of time under Section 18 of the Limitation Act.

FIRST RESPONDENT'S DECISIONS:

30. The Learned Counsel for the 1st Respondent refers to the decision of the Hon'ble Supreme Court in ***Innoventive Industries Vs. ICICI Bank & Anr.'***

(2018) 1 SCC 407 at Spl. Pg. 437, 438 & 439 wherein in paragraphs 27,28 & 30 it served observed as under:

> *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 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 o*

31. The Learned Counsel for the 1st Respondent adverts to the decision of the Hon'ble Supreme Court in ***"Pioneer Urban Land and Infrastructure Ltd & Anr. Vs. Union of India & Ors.***" , (2019) 8 SCC 416 at Spl. Page 510 to 514 wherein at paragraph 67 to 77, it is observed as under:

"67. First and foremost, a financial debt is defined as meaning a "debt". "Debt" is defined by Section 3(11) of the Code as follows:

> *"**3. Definitions.-** In this Code, unless the context otherwise requires, -*
> *xxx xxx xxx*
> *(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;*

This definition in turn takes us to the definition of "claim" in Section 3(6) and "default" in Section 3(12) of the Code which read as follows:

> *"(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;*
> *xxx xxx xxx*
> *(12) "default" means non-payment of debt when whole or any part of the 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;"*

*68. Thus, in order to be a "debt", there ought to be a liability or obligation in respect of a "claim" which is due from any person. "Claim" then means either a right to payment or a right to payment arising out of breach of contract, and this claim can be made whether or not such right to payment is reduced to judgment. Then comes "default", which in turn refers to non-payment of debt when whole or any part of the debt has become due and payable and is not paid by the corporate debtor. Learned counsel for the Petitioners relied upon the judgment in **Union of India v. Raman Iron Foundry** (1974) 2 SCC 231, and, in particular relied strongly upon the sentence reading:*

> *"**11.**...Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority."*

*69.It is precisely to do away with judgments such as **Raman Iron Foundry** (supra) that "claim" is defined to mean a right to payment or a right to remedy for breach of contract whether or not such right is reduced to judgment. What is clear, therefore, is that a debt is a liability or obligation in respect of a right to payment, even if it arises out of breach of contract, which is due from any person, notwithstanding that there is no adjudication of the said breach, followed by a judgment or decree or order. The expression "payment" is again an expression which is elastic enough to include "recompense", and includes repayment. For this purpose, see **Himachal Pradesh Housing and Urban Development Authority and Anr. v. Ranjit Singh Rana** (2012) 4 SCC 505 (at paragraphs 13 and 14 therein), where the Webster's Comprehensive Dictionary (International Edn.) Vol. 2 and the Law Lexicon by P. Ramanatha Aiyar (2nd Edn., Reprint) are quoted.*

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 ed.) 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' (Second edition) 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).

72. Shri Krishnan Venugopal took us to the ACT Borrower's Guide to the LMA's Investment Grade Agreements by Slaughter and May (Fifth Edition, 2017). In this book "financial indebtedness" is defined thus:

*"**Definition of Financial Indebtedness (Investment Grade Agreements)***

***"Financial Indebtedness"** means any indebtedness for or in respect of:*

(a) moneys borrowed;

(b) any amount raised by acceptance under any acceptance credit facility or dematerialised 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 would, in accordance with GAAP, be treated as a balance sheet liability [(other than any liability in respect of a lease or hire purchase contract which would, in accordance with GAAP in force [prior to 1 January 2019] / [prior to [ ]] /[ ] have been treated as an operating lease)];

(e) receivables sold or discounted (other than any receivables to the extent they are sold on a non -recourse basis);

(f) any amount raised under any other transaction (including any forward sale or purchase agreement) of a type not referred to in any other paragraph of this definition having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit form fluctuation in any rate or price (and, when calculating the value of any derivative transaction, only the marked to market value (or, if any actual amount is due as a result of the termination or close- out of that derivative transaction, that amount) shall be taken into account);

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, standby or documentary letter of credit or any other instrument issued by a bank or financial institution; and

(i) the amount of any liability in respect of any guarantee or indemnity for any of the items referred to in paragraphs (a) to (h) above."

73. When compared with Section 5(8), it is clear that Section 5(8) seems to owe its genesis to the definition of "financial indebtedness" that is contained for the purposes of Investment Grade Agreements. Shri Venugopal argued that even insofar as derivative transactions are concerned, it is clear that money alone is given against consideration for time value of money and a transaction which is a pure sale agreement between "borrowers" and "lender" cannot possibly be said to fit within any of the categories mentioned in Section 5(8). He relied strongly on the passage in Slaughter and May's book which are extracted hereinbelow:

> *"**Any amount raised having the "commercial effect of a borrowing"***
>
> *A wide range of transactions can be caught by paragraph (f), including for example forward purchases and sales of currency and repo agreements. Conditional and credit sale arrangements could also be covered here as could certain redeemable shares.*
>
> *The precise scope of this limb can be uncertain. Ideally, from the Borrower's perspective, if there are additional categories of debt which should be included in "Financial Indebtedness", these should be described specifically and this catch- all paragraph, deleted. A few strong Borrowers do achieve that position. Most, however are required to accept the "catch-all" and will therefore need to consider which of their liabilities might be caught by it, and whether specific exclusions might be required."*

74. What is clear from what Shri Venugopal has read to us is that a wide range of transactions are subsumed by paragraph (f) and that the precise scope of paragraph (f) is uncertain. Equally, paragraph (f) seems to be a "catch all" provision which is really residuary in nature, and which would subsume within it transactions which do not, in fact, fall under any of the other sub-clauses of Section 5(8).

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 (Second Edition, 2000) for the meaning of the expression "borrow" and the meaning of the expression "commercial". They are set out hereinbelow:

*"**borrow**-vb **1.** to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. **2.** to adopt (ideas, words, etc.) from another source; appropriate. **3.** Not*

standard. to lend. ***4.*** *(intr) Golf. To putt the ball uphill of the direct path to the hole: make sure you borrow enough."*
xxx xxx xxx
"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 home buyers to a real estate developer for "temporary use" i.e. for use in the construction project so long as it is intended by the agreement to give "something equivalent" to money back to the home buyers. The "something equivalent" in these matters is obviously the flat/apartment. Also of importance is the 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."

32. The Learned Counsel for the 1st Respondent refers to the dicision of the Hon'ble Supreme Court in ***Babulal Vardharji Gurjar V. Veer Gurjat Aluminium Industries Pvt. Ltd.*** 2020 SCC online SC 647 wherein at paragraph-30 it is mentioned as under :

"30. Thereafter, in paragraph 22, the Appellate Tribunal extracted the relevant passages from the decision in ***Innoventive Industries*** *(supra) wherein this Court has explained as to how the CIRP is triggered in the scheme of IBC; and has underscored the requirement of existence of "default" on the part of the corporate debtor wherefor and whereby a financial creditor could maintain an action under Section 7 of the Code as also the essential elements of the process of such an action, including the form and manner of moving the application in conformity with the Rules of 2016 and initial enquiry by the Adjudicating Authority on the question as to whether a default has occurred. Then, in paragraph 23 of the impugned order, the Appellate Tribunal also took note that in*

> ***Innoventive Industries**, this Court has further held that during such consideration by the Adjudicating Authority, the corporate debtor is entitled to point out that default has not occurred in the sense that the "debt" is not due; and that a debt 'may not be due if it is not payable in law or in fact'.*

33. The Learned Counsel for the 1st Respondent refers to the decision of the Hon'ble Supreme Court in '***AV Murthy V. BS Nagabasavanna,'* (2002) 2 SCC 642 as Spl. Page 644** wherein at paragraph-5 it is observed as under:

> ***5.** As the complaint has been rejected at the threshold, we do not propose to express any opinion on this question as the matter is yet to be agitated by the parties. But, we are of the view that the learned Sessions Judge and the learned Single Judge of the High Court were clearly in error in quashing the complaint proceedings. Under Section 118 of the Act, there is a presumption that until the contrary is proved, every negotiable instrument was drawn for consideration. Even under Section 139 of the Act, it is specifically stated that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for discharge, in whole or in part, of any debt or other liability. It is also pertinent to note that under sub-section (3) of Section 25 of the Indian Contract Act, 1872, a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits, is a valid contract. Moreover, in the instant case, the appellant has submitted before us that the respondent, in his balance sheet prepared for every year subsequent to the loan advanced by the appellant, had shown the amount as deposits from friends. A copy of the balance sheet as on 31-3-1997 is also produced before us. If the amount borrowed by the respondent is shown in the balance sheet, it may amount to acknowledgment and the creditor might have a fresh period of limitation from the date on which the acknowledgment was made. However, we do not express any final opinion on all these aspects, as these are matters to be agitated before the Magistrate by way of defence of the respondent.*

34. The Learned Counsel for the 1st Respondent relies on the decision of the Hon'ble Supreme Court in "Usha Rectifier Corporation (India) Limited [presently known as ***M/s Usha Rectifier Corporation India Limited] v. Commissioner of Central Excise, New Delhi"*** (2011) 11 Supreme Court

Cases 571 at Spl. Pg 574 to 575 wherein at paragaraph-10 to 13 it is observed as under:

> *"10. The aforesaid position is further corroborated by the Director's report appearing at page no. 2 of the Annual Report for the year ending December, 1988, wherein it was mentioned that during the year the company developed a large number of testing equipments on its own for using the same for the testing of semi-conductors. Once the appellant has themselves made admission in their own balance sheet, which was not rebutted and was further substantiated in the Director's report, the appellant now cannot turn around and make submissions which are contrary to their own admissions. (See: Calcutta Electric Supply Corpn. v. CWT, (1972) 3 SCC 222 para 8). Moreover, they have also clearly taken a stand in their reply to the aforesaid show cause notice that they bought various parts and components to develop the testing equipments for use within the factory and that such steps were undertaken to avoid importing of such equipments from the developed countries with a view to save foreign exchange.*
>
> *11. From the aforesaid own admission of the appellant and from the facts brought out from the records it is clearly proved and established that the appellant had manufactured machines in the nature of testing equipments worth Rs. 31.26 lacs to test the final products manufactured by them. Even if such equipments were used for captive consumption and within the factory premises, considering the fact that they are saleable and marketable, we are of the view that duty was payable on the said goods. The fact that the equipments were marketable and saleable is also an admitted position as the appellant has admitted it in their reply to the show cause notice that they had undertaken such manufacturing process of the testing equipments to avoid importing of such equipments from the developed countries with a view to save foreign exchange. Such a statement confirms the position that such testing equipments were saleable and marketable.*
>
> *12. The provision of Explanations to Rule 9 and 49 of the Central Excise Rules are very clear as it provides that for the purpose of the said rules excisable goods manufactured and consumed or utilized as such would be deemed to have been removed from the premises immediately for such consumption or utilization. Therefore, the contention that no such duty could be levied unless it is shown that they were taken out from the factory premises is without any merit.*
>
> *13. Submission was also made regarding use of the extended period limitation contending inter alia that such extended period of limitation could not have been used by the respondent. The aforesaid contention is also found to be without any merit as the appellant has not obtained L-4 licence nor they had disclosed the fact of manufacturing of the aforesaid goods to the department. The aforesaid knowledge of manufacture came to be acquired*

by the department only subsequently and in view of non-disclosure of such information by the appellant and suppression of relevant facts, the extended period of limitation was rightly invoked by the department.

35. The Learned Counsel for the 1st Respondent cites the Judgment of this Tribunal in ***"Shobhnath and Others V. Prism Industrial Complex 2019 SCC OnLine NCLAT 1095"*** dated 06.08.2019 (vide Comp Apo (AT)(INS) 557 of 2018]wherein at paragraphs-10 and 12 it is observed as under:

"10. Thus, it is clear that once the record is complete, Code is to be triggered if there is a default of more than Rs. 1 lakh. The 'Corporate Debtor' can only point out that the debt may not be due in a sense it is not payable in law or in fact.

12. It is a settled law that the Adjudicating Authority is only required to ensure whether there is a debt and default on the basis of record (Form 1). It cannot take into consideration any other facts which are irrelevant. The 'Corporate Insolvency Resolution Process' not being a litigation much less adversarial litigation or a recovery proceeding or a money suit, has been held by this Appellate Tribunal in "Binani Industries Limited vs. Bank of Baroda & Anr.— Company Appeal (AT) (Insolvency) No. 82 of 2018 etc.". For the said reason, we hold that the Adjudicating Authority cannot notice to hold that owing to the financial fraud the amount was not paid by the 'Corporate Debtor'."

36. The Learned Counsel for the 1st Respondent seeks in aid of the Judgment of this 'Tribunal' dated 26.09.2019 (vide Com App (AT)(INS) 68 of 2019) in ***B. Prashant Hegde V. State Bank of India & Anr. (2019 SCC online NCLAT 608*** wherein at paragraph 31 it is observed as under:

"31. The right to apply under Section 7of the I&B Code, accrued to the Bank only since 1st December, 2016, i.e., when I&B Code came into force. From the aforesaid provision, we find that the application under Section 7 is not barred by limitation."

37. The Learned Counsel for the 1st Respondent relies on the Judgment of this Tribunal dated 30.01.2019 in ***"Shailesh Sangani V. Joel Cardoso & Anr." 2019*** SCC OnLine NCLAT 52 (vide Comp. App(AT)(INS) 616 of 2018) wherein at paragraphs- 6,8,9, 11 and 12 it is observed as under:

"6. A plain look at the definition of 'financial debt' brings it to fore that the debt alongwith interest, if any, should have been disbursed against the consideration for the time value of money. Use of expression 'if any' as suffix to 'interest' leaves no room for doubt that the component of interest is not a sine qua non for bringing the debt within the fold of 'financial debt'. The amount disbursed as debt against the consideration for time value of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (i) of Section 5(8) embody the nature of transactions which are included in the definition of 'financial debt'. It includes money borrowed against the payment of interest. Clause (f) of Section 5(8) specifically deals with amount raised under any other transaction having the commercial effect of a borrowing which also includes a forward sale or purchase agreement. It is manifestly clear that money advanced by a Promoter, Director or a Shareholder of the Corporate Debtor as a stakeholder to improve financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the part of Corporate Debtor notwithstanding the fact that no provision is made for interest thereon. Due to fluctuations in market and the risks to which it is exposed, a Company may at times feel the heat of resource crunch and the stakeholders like Promoter, Director or a Shareholder may, in order to protect their legitimate interests be called upon to respond to the crisis and in order to save the company they may infuse funds without claiming interest. In such situation such funds may be treated as long term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money. The interests of such stakeholders cannot be said to be in conflict with the interests of the Company. Enhancement of assets, increase in production and the growth in profits, share value or equity enures to the benefit of such stakeholders and that is the time value of the money constituting the consideration for disbursement of such amount raised as debt with obligation on the part of

Company to discharge the same. Viewed thus, it can be said without any amount of contradiction that in such cases the amount taken by the Company is in the nature of a 'financial debt'.

8. The confirmation of accounts for the period between 1st April, 2015 to 31st March, 2016 forming 'Annexure C' to the reply affidavit reflects an amount of Rs.1,45,36,475/- as balance in the book of accounts in the name of Respondent No. 1….etc.

9. The balance sheet as on 31st March, 2017 at page 83 of the reply affidavit filed by Respondent No.1, inter alia, reflects a non-current liability of Rs.4,72,76,182/- treated as 'long term borrowings' and not treated as shareholder's funds. Same factual position is reflected in the communication made by the Company Auditor 'Ganesh Mehta', Partner 'Ganesh and Rajendra Associates' addressed to Respondent No.1 in his communication dated 5th December, 2017 forming Annexure D to the reply affidavit of Respondent no.1 .

11. In the face of this documentary evidence it is abundantly clear that the amount disbursed by Respondent No.1 to the Corporate Debtor was in the nature of debt treated as long term loan and not as an investment in the nature of share capital or equity. Such disbursement cannot either be treated as largesse. We are convinced that the aforesaid amount outstanding as against Corporate Debtor, default whereof is not in issue, has all the trappings of a 'financial debt' and falls within the purview of Section 5(8)(f) of the I&B Code and Respondent No.1 is covered by the definition of 'Financial Creditor'.

12. Learned counsel for the Appellant relied upon judgments of this Appellate Tribunal rendered in 'Dr. B. V. S. Laxmi Vs. Geometrics Laser Solutions Pvt. Ltd.', Company Appeal (AT) (Insolvency) No. 38 of 2017 decided on 22nd December, 2017 and 'Macksoft Tech Pvt. Ltd. & Ors. Vs. Quinn Logistics India Ltd.', Company Appeal (AT) (Insolvency) No. 143,175 & 176 of 2017 decided on 21st May, 2018 to buttress his point that the Respondent No.1 is not a 'Financial Creditor'. We have carefully gone through the aforesaid judgments in 'Dr. B. V. S. Laxmi (Supra)', wherein this Appellate Tribunal noticed that there was nothing on record to suggest that the Corporate Debtor borrowed the money and the creditor failed to establish that the Corporate Debtor had raised the amount under any other transaction having commercial effect of borrowing. The judgment relied upon, on facts, is distinguishable and is not attracted to the facts of instant case. In 'Macksoft Tech Pvt. Ltd. & Ors. (Supra)', this Appellate Tribunal held as under:-

> *"37. Grant of loan and to get benefit of development is object of the Respondent - ('Financial Creditor'), as apparent from their 'Memorandum of Association'. Thus, we find that there is a 'disbursement' made by the Respondent - ('Financial Creditor') against the 'consideration for the value of money'. The investment was made to derive benefit of development of 'Q-City', which is the consideration for time value of money. Thus, we find that the Respondent – ('Financial Creditor') come within the meaning of 'Financial Creditor' and is eligible to file an application under Section 7, there being a 'debt' and 'default' on the part of the 'Corporate Debtor'."*

38. The Learned Counsel for the 1st Respondent cites the decision of the Hon'ble Supreme Court in "***M/s Mahabir Cold Storage v. CIT Patna"*** 1991 Supp (1) SCC 402 at Spl. Pg 409 wherein at paragraph-12 it is observed as under:

> ***"12.*** *The entries in the books of accounts of the appellant would amount to an acknowledgement of the liability to M/s Prayagchand Hanumanmal within the meaning of Section 18 of the Limitation Act, 1963 and extend the period of limitation for the discharge of the liability as debt. Section 2(47) of the Act defines 'transfer' in relation to a capital asset under clause (i) the sale, exchange or relinquishment of the asset or (ii) the extinguishment of any right thereof or — [clauses (iii) to (vi) are not relevant hence omitted]. Unfortunately the assessee did not bring on record the necessary material facts to establish that he became owner by any non-testamentary instrument acquiring right, title and interest in the plant and machinery nor the point was argued before the High Court and we do not have the benefit in this regard either of the Tribunal or of the High Court. In this view we decline to go into the question but confine to the first question and agree with the High Court answering the reference in favour of the revenue and against the assessee that the appellant is not entitled to the development rebate under Section 33(1) of the Act. The appeal is accordingly dismissed with costs quantified at Rs 5000."*

39. The Learned Counsel for the 1st Respondent refers to the judgement of this Tribunal dated 14.09.2020 in Comp App (AT)(Ins) 236/2020, 2020(SCC) OnLine NCLAT 636 wherein at paragraph 30 and 36 it is observed as under:

> *"30. An acknowledgment of debt interrupts the running of prescription. An acknowledgement only extends the period of limitation as per decision 'P.Sreedevi' V. 'P.Appu' AIR 1991 ker page 76. It is to be remembered that a mere denial will not take sheen off the document and the claim of creditor remains alive within the meaning of Section 18 of the Limitation Act. Besides this, an acknowledgement is to be an*

'acknowledgement of debt' and must involve an admission of subsisting relationship of debtor and creditor; and an intention to continue it and till it is lawfully determined must also be evident as per decision 'Venkata' V. 'Parthasarathy' 16 Mad page 220. An acknowledgement does not create a new right.

36. The Present case centres around mixed question of 'Facts' and 'Law'. The 1st Respondent/Bank, as per the format, as mentioned at para 20 of this judgement, had given the date of 'Default' / 'NPA' as 01.01.2016 and that the Section 7 of the application of 'I&B' Code was filed before the Adjudicating Company Appeal (AT) (Insolvency) No. 236 of 2020 32 Authority 01.04.2019, by the 1st Respondent / Bank. Prima facie, the Appeal needs to be allowed, if this is the single ground. However, in the instant case, the 1st Respondent/Bank had obtained balance confirmations certificate, the last one being 31.03.2017 as mentioned elaborately in Para 21 of this judgement. Although, this Appellate Tribunal had largely held in 'Rajendra Kumar Tekriwal' Vs. 'Bank of Baroda' in Company Appeal (AT) (Ins) No. 225 of 2020 and in Jagdish Prasad Sarada Vs. Allahabad Bank in Company Appeal (AT) (Ins) No. 183 of 2020, (both being three Members Bench) had taken a stand that the Limitation Act, 1963 will be applicable to all NPA cases provided, they meet the criteria of Article 137 of the Schedule to the Limitation Act, 1963, the extension of the period can be made by way of Application under Section 5 of the Limitation Act, 1963 for condonation of delay; however, the peculiar attendant facts and circumstances of the present case which float on the surface are quite different where the 1st Respondent / Bank had obtained Confirmations/Acknowledgments in writing in accordance with Section 18 of the Limitation Act periodically. As a matter of fact, Section 18 of the Limitation Act, 1963 is applicable both for 'Suit' and 'Application' involving 'Acknowledgment of Liability', creating a fresh period of limitation, which shall be computed from the date when the 'Acknowledgment' was so signed."

40. The Learned Counsel for the 1st Respondent cites the decision of the Hon'ble High Court of Bombay in Sun N Sand Hotel Ltd Vs. M/s V.V. Kamat HUF reported in 2003(3)Mh.L.J. 932, 944 wherein at paragraph 29, 30, 39 and 40 it is observed as under:

> *"29. The balance confirmation letters do not contain expression identical to those in the above judgment. But their effect in fact and in law is the same. After setting out the principal amount and giving credit for the amounts paid, it was stated by the plaintiff and confirmed by the defendant that the "closing balance" was Rs. 3,57,00,000/-. This is a commonly and widely used expression to indicate the balance amount due after setting the account between parties. It is an unconditional acknowledgement of its liability by the defendant. It contains an implied promise that the amount stated to be the closing balance would be paid by the defendant. To hold to the contrary would be contrary to common sense, the law well established in the above authorities and would rid such accounts of their commercial efficacy.*
>
> *30. The question really is whether the present suit filed on the balance confirmation letters is maintainable as a Summary Suit?*
>
> *The above judgments furnish an answer to this question. They hold that an account stated or accepted, implies a promise to pay. Thus, the cause of action is based on a written agreement containing an implied promise to pay.*
>
> *39. I would view the matter differently. While adjusting accounts the parties acknowledged without any reservation that with effect from 1st January, 1997 interest was paid and received at 18% per annum. That the confirmation of the balance in the plaintiff s account implied an agreement to pay interest upto the date on which it was paid is not disputed. Indeed it cannot be disputed. It would be stretching thing to suggest that the defendant paid interest without there being any agreement to do so.*
>
> *40. There is nothing, apart from the Counsels submission, that this agreement to pay interest was restricted to the period for which it was to be paid. If interest has been paid in the past and the balance is confirmed by the debtor and the creditor, then subject to anything to the contrary it would imply a promise to continue to pay interest at that rate on the balance confirmed. It is not necessary in such circumstance for an express and independent stipulation that the balance therein would be paid with interest. This must be implied. To hold to the contrary would run counter to the basis on and the purpose for which parties have accounts stated and deprive such documents of any commercial efficacy.*
>
> *A catena of judgments of various Courts has affirmed the principle that implied in an account stated or accepted or settled is a promise to pay. The Privy Council in Bishun Chand v. Girdhari Lal , (affirmed by the Supreme Court in Cordon*

Woodroffe's case (supra) observed that an account stated gave rise to a promise to pay and was one of the most ordinary business facilities which has been common to everybody who carries on business under any system which incorporates any of the ordinary principles of English Contract Law. To hold that when an account stated contains intrinsic evidence of the rate at which interest has been paid and received without demur does not imply a promise to continue to pay interest at that rate would render this facility otiose and denude the commercial efficacy of such documents recognized by these judgments.

41. The Learned Counsel for the 1st Respondent cites the decision of the Hon'ble Supreme Court in Ram Rattan Gupta V. Director of Enforcement, Foreign Exchange Regulation and Another reported in (1966) 1 SCR 651 wherein at paragraph 5 it is observed as under:-

5. "What is the meaning of the expression "lend" ? It means in the ordinary parlance to deliver to another a thing for use on condition that the thing lent shall be returned with or without compensation for the use made of it by the person to whom it was lent. The subject-matter of lending may also be money. Though a loan contracted creates a debt, there may be a debt created without contracting a loan; in other words, the concept of debt is more comprehensive than that of loan. It is settled law 'that tie relationship between a banker and a customer qua moneys deposited in the bank is that of debtor and creditor. This Court in Shanti Prasad fain v. Director of Enforcement(1) restated the principle in the following words:

> *"Now the law is well settled that when moneys are deposited in a Bank, the relationship that is constituted between the banker lad the customer is one of debtor and creditor and not trustee and beneficiary. The banker is entitled to use the monies without being called upon to account for such user, his only liability being to return the amount in accordance with the terms agreed upon between him and the customer."*

But this Court qualified that general statement with the remark that "there might be special arrangement under which a Banker might be constituted a trustee, but apart from such an arrangement, his position qua Banker is that of a debtor, and not trustee". It follows that ordinarily a deposit of an amount in the current account of a bank creates a debt; but it need not necessarily involve a contract of loan. Whether a deposit amounts to a loan depends upon the terms of the contract whereunder the deposit is made. In the context of s. 4(1) of the Act, can it be said that the depositor in the present case lent money to the Bank ? When a person deposits free currency in the current account of a bank in order to draw it whenever necessary for the _purpose for which it was given, it is not possible to hold that he enter% into a contract of loan with the bank within the meaning of S. 4(1) of the Act. He only deposits the money for the said purpose. Should we hold that such a transaction is a loan, many an honest man who deposits foreign exchange in a bank in a foreign country where he is staying for a short time to draw it for his requirements will be committing an offence. That could not have been the intention of the Legislature. If such a deposit is not a loan, it follows that the appellant cannot be held to have contravened the provisions of S. 4(1) of the Act."

41. The Learned Counsel for the 1st Respondent refers to the Indian Accounting Standard (Ind AS)107 requiring the entities to provide disclosures in their Financial Statements etc.

ASSESSMENT:

42. Before the 'Adjudicating Authority' (National Company Law Tribunal, Mumbai Bench), the 1st Respondent/Applicant/ 'Financial Creditor' had filed

an Application in CP No. 1347 of 2019 to initiate CIRP (under Section 7 of the I & B Code, r/w Rule 4 of the Insolvency & Bankruptcy Code (Application to 'Adjudicating Authority) Rules, 2016). In Form-1 under part –IV 'Particulars of Financial Debt' it was mentioned that the total amount of Debt granted was Rs.5,35,00,000/- and the cheque dated 28th October, 2009 (bearing No.000018) and the amount was Rs.5,25,00,000/- and the other cheque dated 18.12.2010 (vide cheque No.0000488) for Rs.10,00,000/- and both the cheques were issued from Bank of India (Malad West) Branch. Further, it was mentioned that the aforesaid sum of Rs.5,35,00,000/- was advanced as a loan on the condition that the Corporate Debtor shall pay the loan sum on demand alongwith interest @ 18% on quarterly rests from the date of facility.

43. Apart from that, the Corporate Debtor, according to the 1st Respondent/Financial Creditor, had through a letter dated 7.6.2018 had falsely alleged that Rs.5,35,00,000/- was not provided as a loan but as an advance for acquiring from the Corporate Debtor Floor Space Index of 15,500 sq mtrs to be consumed on a portion of the larger property (as defined in the letter dated 7th June, 2018) admeasuring 8800 sq mtrs or thereabouts. The 1st Respondent/Financial Creditor had addressed a letter dated 28.03.2019 reiterating that the amount of Rs.5,35,00,000/- was advance by way of loan and the same was repayable on demand with interest at 18% on quarterly rests.

44. In the letter dated 28th March, 2019, the 1st Respondent/Financial Creditor had stated that the alleged understanding stood terminated because of the Corporate Debtor's default and called upon the 'Corporate Debtor' to

pay the sum of Rs.5,35,00,000/- together with all the amounts accrued thereunder, including interest amounting to a sum of Rs.28,62,55,961/- as on 28.03.2019. The date of default was mentioned as 13.04.2018.

45. Under part IV of Form-1 "particulars of Financial Debt (Documents, records and Evidence of Default) , in serial No. 8, it was mentioned that the copy of the Bank Statement issued by Bank of India, Malad West Branch was attached to the application evidencing a sum of Rs.5,35,00,000/-. Further, the copy of the confirmation of accounts dated 01.04.2011, 01.04.2017, 01.04.2018 Peacock Constructions Pvt Ltd acknowledging the sum due to 'the 1st Respondent/Good Value Financial Services Pvt Ltd' was annexed with the application. Moreover, the copy of reminder letter dated 13.04.2018 issued by the 1st Respondent to Peacock Construction Pvt Ltd was also enclosed, together with the application.

46. The 'Corporate Debtor' in its reply to CP No. 1437 of 2019 had averred that the 1st Respondent/Applicant/Financial Creditor is not a 'Financial Creditor as the claims is not of 'Financial Debt' and the transaction is not a loan transaction. Further, the 'Corporate Debtor' took a stand that there was no contract for charging the rate of interest and for claiming the compound interest. The 1st Respondent/Financial Creditor had never debited interest in its own account. There is no term defined or produced which would signify that when the payment was required to be made, there is Agreement or Contract produced on record which would show that when the default took place.

47. The 'Corporate Debtor' before the 'Adjudicating Authority' in its reply had stated that the 1st Respondent's claim proceeding on the basis that default occurred on 13.04.2018 is a cleaver attempt to bring the claim within Limitation.

48. According to the 'Corporate Debtor', the 1st Respondent/Financial Creditor was aware that sum of Rs. 5,35,00,000/- was paid by the 'Financial Creditor' as per the understanding between the 'Financial Creditor' and 'Corporate Debtor' and pursuant to that understanding, the MOU was entered into with the Lok Group and they had requested for the papers and proceedings from the 'Corporate Debtor'.

49. It is the stand of the 'Corporate Debtor' that a sum of Rs. 5,35,00,000/- was never repayable by 'Corporate Debtor' to the 'Financial Creditor' since the same was paid for acquisition of the Floor Space Index' to be consumed on the said portion out of the larger property.

50. In the Reply in CP No. 1347 of 2019, before the 'Adjudicating Authority' paragraph 7.3 had averred as under:

> *7.3 "The total consideration agreed to be paid for by the Financial Creditor towards the purchase of the FSI and its entitlement to consume the same on the said portion was Rs. 10,00,00,000/- (Rupees Ten Crores Only), of which only a sum of Rs. 5,35,00,000/-(Rupees Five Crores Thirty Five Lacs) was paid by the Financial Creditors to the Corporate Debtors."*

51. Before the 'Adjudicating Authority' the 1st Respondent/Financial Creditor had filed a Rejoinder stating that it is a Financial Creditor of the

'Corporate Debtor' and that the 'Corporate Debtor' and the 'Financial Creditor' had entered an oral transaction to which the 'Financial Creditor' had advanced a loan aggregating to Rs. 5,35,00,000/- on 28.10.1009 and 18.12.2010 on the condition that the 'Corporate Debtor' shall repay the loan amount on demand along with interest @ 18% interest on quarterly rest.

52. The Stand of the 1st Respondent/Applicant/Financial creditor is that it demanded the loan amount with interest from the 'Corporate Debtor' through a letter dated 13.04.2018 and that the 'Corporate Debtor' had failed and neglected to repay the amount. Further, the understanding between the 'Financial Creditor' and Corporate Debtor' was terminated through a letter dated 28.03.2019 by the 'Financial Creditor' and the 'Corporate Debtor' was called upon by the Financial Creditor to pay the amount due along with interest.

DEFINITIONS UNDER I & B CODE

53. CLAIM

Section 3(6) of the Code defines claim meaning

(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"

54. Corporate Debtor

Section 3(8) of the Code defines 'Corporate Debtor' meaning a corporate person who owes a debt to any person. As a matter of fact, 'Debt' means an obligation or liability in regard to a claim due from any person and includes i) a 'Financial Debt' ii) an Operational Debt

55. CREDITOR

Section 3(10) of the Code defines 'Creditor' meaning 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. The definition under Section 3(10) of the Code 'Creditor' is an inclusive definition and does not exclude the possibility of their being other forms of 'Creditors'.

56. DEBT

Section 3(11) of the Code defines 'debt' meaning a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

57. DEFAULT

Section 3(12) of the Code defines 'default' meaning non-payment of debt when the 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.

58. FINANCIAL CREDITOR

Section 5(7) of the Code defines 'financial creditor' meaning 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.

A 'Financial Creditor' can either be a secured creditor or an unsecured creditor as per decision AkshayJhunjhunwala V. Union of India reported in AIR 2018 Cal 139. A 'Financial Creditor' is an individual who has a right to the 'Financial Debt'

59. FINANCIAL DEBT

Financial Debt meaning 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.

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60. BALANCE SHEET

A 'Balance Sheet' is an acknowledgement of a subsisting liability as per decision 'Rampur Engineering Company Ltd. V. Syed Raza Ali Khan Bahadur reported in 1966 ALJ 385 at Spl page 388. Further, a 'Debt' shown in a Balance Sheet is an acknowledgement and in order to be so, a Balance Sheet in which such an acknowledgement is made, it need not be addressed to the creditor as per decision in the matter Ambika Mills Ltd V. I.T. Commissioner reported in AIR 1964 Gujarat Page 208 at Spl Page 211.

61. ACKNOWLEDGEMENT IN WRITING

An acknowledgment of liability involves an admission of subsisting jural relationship between the parties and consciousness and an intention of continuing such relationship till it is lawfully terminated. An acknowledgment to come within Section 18 of the Limitation Act, 1963 must satisfy the requirements:

i) There must be an acknowledgement of liability in respect of the property or right in question.

ii) It ought to be the person against whom such property or right is claimed.

iii) An acknowledgment is to relate to a current subsisting liability. An acknowledgement must be clear and unambiguous one, especially admitting liability in respect of the debt claimed in this regard. An acknowledgement must be prior to the expiry to the period prescribed for a suit or an application of such property or right as per decision 'Bank of India V. James Fernandez' reported in AIR 1988 Ker at page 89

iv) An acknowledgment under Section 18 of the Limitation Act means an admission of the truth of the concerned person's liability and the same may be either expressed or implied as the case may be.

v) An acknowledgement of liability need not be accompanied by promise to pay either expressly or even by an implication as per

decision Food Corporation of India V. Assam State Co-op Marketing and Consumers Federation Ltd 2005 (1) JCR 49 (SC)

62. If before the lapse of the prescribed period for a suit in respect of any property or right, there is a written acknowledgement of liability as regards such property or right in writing against whom such right or property is claimed, then a fresh period of limitation is to be computed from the time when the acknowledgement was so signed, as per decision Vijay Tractors Corporation M/s V. M/s Haryana Agro Industries Corporation, AIR 2006 P&H 86 at Pg 89.

LIMITATION STATUTE

63. To be noted, the Law of Limitation bars a remedy and not rights as per decision in the matter of Smt Sonia Devi Pugalia V. Calcutta Iron, Steel and Non-Ferrous Metals Works, AIR 1966 Cal.281 at p. 283.

64. It cannot be gain said that 'Debt' must exists, at the date of admission. In Law, a mere acknowledgement amounts to a promise, which means that there is an implied promise to pay even in a just acknowledgement. The rider is that certain acknowledgement is to be an unconditional one and unconditional acknowledgement implies a promise to pay and can be made the basis of the suit as per decision Jevraj V. Lalchand, reported in AIR 1969 Raj 192 at Pages 204, 205 (Full Bench).

65. REQUIREMENTS FOR ADMISSION OF APPLICATION

An 'Adjudicating Authority' is subjectively satisfied as to the existence of 'Default' and in the event of the Section 7 application being complete in all respects, then no other criteria can be looked into by the 'Adjudicating Authority' for admitting an application under the I&B Code. To put it precisely, the function of the 'Adjudicating Authority' is to decide whether the application is complete, whether there is any 'Debt' or 'Default'. An 'Adjudicating Authority' as a first step is to take necessary steps for 'resolution' of the 'Corporate Debtor'. An 'Adjudicating Authority' is not a Court of Law. The proceedings under I&B Code are summary in nature.

66. A Financial Creditor is to establish the existence of the 'Debt' and the 'Corporate Debtor's Default'. A cumulative reading of Section 7 of the Code alongwith Rule 4(1) of the Insolvency & Bankruptcy (Adjudicating Authority) Rule, 2016 exhibits that the form and manner of the application has to be the one specified.

67. In the instant case on hand, the Corporate Debtor in its reply to CP No.1347/2019 had admitted that the 'Financial Creditor' had paid a sum of Rs.5,35,00,000/- on 27.10.2009 to it but the 'Corporate Debtor' had taken a stand that no payment was ever made towards interest by it. Further, the claim of the 1st Respondent/Financial Creditor is repudiated by the 'Corporate Debtor' by stating that the total consideration agreed to be paid for by the 1st Respondent/Financial Creditor towards the purchase of FSI and its entitlement to consume the same on the said portion was Rs.10 crores only of which only a sum of Rs.5,35,00,000/- was paid by the Financial Creditor to it.

68. The fact that a sum of Rs.5,35,00,000/- was paid by the Financial Creditor to the Corporate Debtor through two cheques (one cheque dated 28.10.2009 for Rs.5,25,00,000/-) and another cheque dated 18.12.2010 for Rs.10,00,000/-is not disputed. Hence, a sum of Rs.5,35,00,000/- is a 'Financial Debt' coming under Section 5(8)(f) of the I&B Code, in the considered opinion of this Tribunal. The 1st Respondent/Applicant is a 'Financial Creditor' as per Section 5(7) of the Code. Even though the rate of interest @ 18% for Rs.5,35,00,000/- is disputed on the side of the 'Corporate Debtor' because of the fact that the sum paid was not provided as a 'loan' etc, the Corporate Debtor is clearly in 'Default' of the 'Debt' due and payable in law.

69. Before the 'Adjudicating Authority' the 1st Respondent/Financial Creditor through the Bank Statement issued by the Bank of India and through its Bank certificate dated 30.3.2019 had shown that a sum of Rs.5,35,00,000/- was credited to the 'Corporate Debtor'. From the confirmation of accounts dated 01.04.2011, 01.04.2017 and 01.04.2018 the 'Debt' due of the Corporate Debtor is established.

70. Even though pleas are advanced on behalf of the Appellant that for the alleged 'Default' which occurred from the time the interest was not paid viz 2010 or 2011 and from 2009 till date the interest accrued every quarter was not paid by the 'Corporate Debtor' and further that no action was taken, no claim was made from the company or no steps for recovery of interest was made by the 1st Respondent/Financial Creditor till 2018 when the 1st letter was issued to the 'Corporate Debtor' demanding the amount with interest. In

the instant case, the 'Debt' of the Corporate Debtor is supported from the confirmation of accounts dated 01.04.2011, 01.04.2017 and 01.04.2018. Further, on 13.04.2018 the 1st Respondent/Financial Creditor had called upon the 'Corporate Debtor' to repay the facility availed and that the Corporate Debtor had through a Reply dated 07.06.2018 had mentioned that the sum of Rs.5,35,00,000/- was only provided as an 'advance' for acquiring from the Corporate Debtor Floor Space Index of 15,500 sq mtrs etc. and not as loan. The 1st Respondent/Financial Creditor through its letter dated 28.03.2019 had reiterated that the sum in question was an advance as and by way of loan and that the same was repayable on demand alongwith interest @ 18% on quarterly rests. As such, the Section 7 application filed before the 'Adjudicating Authority' in CP No. 1347/MB/CII/2019 (NCLT Mumbai Bench II) is well within the period of limitation. Moreover, the acknowledgements through confirmation letters on 01.04.2011, 01.04.2017, 01.04.2018 and balance sheets beginning from 3103.2010 till 31.12.2019 will extend the period of limitation as per Section 18 of the Act. Viewed in that perspective, the contra pleas taken on behalf of the Appellant on the aspect of limitation are unworthy of acceptance by this Tribunal.

71. In the light of the foregoing discussions, keeping in mind the attendant facts and circumstances of the instant case in a conspectus fashion and also this 'Tribunal' on going through the impugned order passed by the 'Adjudicating Authority' dated 31.12.2019 in CP No.1347/MB/C-II/2019 (National Company Law Tribunal, Mumbai Bench II, Mumbai) comes to a

resultant conclusion that the admission of Section 7 application by the 'Adjudicating Authority' is free from any flaws. Consequently, the Appeal fails.

RESULT

In fine, the Company Appeal (AT)(Insolvency) No.198 of 2020 is dismissed. No costs. IA No.500/2020 (for Stay) is closed.

(Justice M. Venugopal)
Member Judicial

(Mr. Kanthi Narahari)
Member (Technical)

14th February, 2022
Bm/akc