NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

Company Appeal(AT) (Ins) No.589 of 2021

& I.A. No.1739/2021 & 753/2022

IN THE MATTER OF:

Budhpur Buildcon Pvt. Ltd
6th floor, 601, Hallmark Business,
Opp. Guru Nanak Hospital
Bandra East Mumbai ...Appellant

Vs.

Mr. Abhay Narayan Manudhane,
Resolution Professional of
Corporate Debtor
Housing Development and Infrastructure Limited
1204, Maker Chamber V,Jamnalal
Bajaj road, Nariman Point
Mumbai – 400 021 ...Respondent

Present:

For Appellant : **Mr. Zal Andhyarujini, Sr. Advocate and Mr. Karan Bhide, Mr Nitesh Ranawat, Mr. Aman Raj Gandhi, Ms Disha Shetty, Ms ApoorvaKaushik, Mr Mustaqueen Bagsaria, Advocates**

For Respondents : **Ms Meghna Rao, Ms Prerna Wagh, Mr Shahdab Jan Advocates for RP**
Mr Subir Kumar, advocate in IA No.1739/2021
Mr. Abhinav Vasisht, Sr. Advocate, Ms Priya Singh, Mr Deepayan Manda, Advocates for Intervenor for Majestic Consumer Welfare Association.
Mr Soumya Roop Sanyal, Advocate for Intervenor.

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The Appeal has been filed by the Appellant under Section 61 of the 'Insolvency and Bankruptcy Code 2016' (the Code) against the impugned order dated 02.08.2021 passed by the 'National Company Law Tribunal, Mumbai Bench, Mumbai (the Adjudicating Authority) in I.A No. 2129 of 2020 in C.P. No. 27 of 2019.

   The Appellant has sought the followings reliefs:

   - To quash and set aside the impugned order passed by the Adjudicating Authority in IA No. 2129 of 2020, in the matter of Budhpur Buildcon Pvt. Ltd. (for short 'BBPL') Vs. Mr. Abhay Narayan Manudhane;
   - To quash and set aside the impugned letter dated 28.09.2020 issued by the Respondent to the Appellant rejecting the Appellant's claim for 'financial debt';
   - To stay the effect and operation of the impugned order etc.

2. The Adjudicating Authority, while passing the impugned order dated 02.08.2021 has observed the followings:

   "6. We have heard the parties at length. We have also perused the documents submitted by them. Both the

parties in IA 2129/2020 have raised various allegations and counter allegations against each other. The intervenors in IA 2300/2020 have also advanced their arguments. In the light of the rival contentions on both the sides the following issues fall for consideration:

1. Whether the amount claimed by the applicant is a financial debt within the definition of the Code?

2. Whether the RP has committed any illegality in rejecting the claim of the petitioner as a Financial Debt?

The observations and findings on the first issue is an answer to the second issue also. In order to decide the first issue, it is important to look at the definition of 'Financial debt' in Section 5(8) of the Code. The definition of Financial debt cannot be read in isolation without considering some other relevant definitions particularly the definition of 'claim' in Section 3(6) and the definition of creditor in Section 3(10) and the definition of 'Financial Creditor' and

'Financial Debt' under the Code which are extracted hereunder:

Section 5(8) Financial debt: "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 the acceptance credit facility or its de-materialised equivalent;

c. Any amount raised pursuant to any purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

d. The amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

e. Receivables sold or discounted other than any receivables sold on non-recourse basis;

f. Any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing. [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 or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

Section 5(7) Financial Creditor: "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;

Section 3(6) Claim:

"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;

Section 3() creditor: "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;

7. It is very clear from the above definition that a mere right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed,

legal, equitable, secured or unsecured; and a 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 is enough to qualify as an Operational Debt. However, a mere right to recovery or entitlement does not qualify as a Financial Debt unless the debt falls within any one of the categories mentioned under the definition 'Financial Debt'.

8. It is very clear from the submissions of both sides as well as from the record that the applicant is claiming the interest amount as a Financial Debt as a penalty for the alleged breach of the various terms and conditions of number of agreements entered into between the applicant M/s Budhpur Buildcon Pvt. Ltd. and the Corporate Debtor HDIL which is a mere right for the alleged breach by the Corporate Debtor. It is appropriate to mention here that the Corporate Debtor is denying any breach on its part and on the

other hand raised various lapses on the side of the applicant. Therefore, the respondent RP has rightly rejected the claim of the applicant as Financial Debt as it is a mere claim. This Bench did not find any illegality or irregularity committed by the RP.

9. The Applicant has contended that the Respondent caused delay in the assessment of the claim of the Applicant. We believe that this contention of the applicant is untenable as it was the Applicant who submitted its claim four months after the cut-off date. Keeping in mind the size of the Applicant's claim, the Respondent merely discharged its functions in accordance with the Code with regard to the verification of the claim. Here, it is important to refer to Regulation 13 which specifies that the Interim Resolution Professional must verify the claims within 7 days of its receipt. But it is settled that this timeline of 7 days is merely directory and not mandatory. The contention that the time period of 7 days is not mandatory is buttressed by the fact that neither the Code nor the Regulations provide for any

consequence in case the timeline is not adhered to by the Interim Resolution Professional. This proposition is supported by the verdict of the Hon'ble Supreme Court in State of Bihar v. Bihar Rajya Bhumi Vikas Bank Samiti (2018) 9 SCC 472, para nos. 25, 26 affirmed that a procedural provision shall be directory and not mandatory when no consequence has been provided in the said provision for non-compliance thereof.

10. The respondent proceeded with the verification as per the provisions of the Code. However, the said verification was further delayed by the onset of the COVID-19 pandemic. Therefore, it cannot be said that it was the respondent RP who had caused any delay. It is to further mention that Regulation 13 also empowers the Resolution Professional to decide the amount to be admitted, which implies that the Resolution Professional has the power to 'not admit' any sum under a claim. Therefore, from this it is clear that the Resolution Professional is expected to apply its mind to the facts and nature of the claim filed, and

thereafter, reject the same in case the categorization is wrong or incorrect. However, the Applicant's interpretation of Regulation 13 i.e., that the Resolution Professional has to merely collate claims without application of mind and thereafter proceed to admit the claim regardless, is contrary to the intent of the Code as well as the regulations framed thereunder to govern the functions of an Insolvency Professional. The said interpretation would lead to unintended consequences and absurd result.

"Further the applicant had also contended that it would be in a better position to assess the viability of any proposed Resolution Plan to be submitted by the Prospective Resolution Applicants and the impact thereof on the rights and entitlements flowing from the said Project. He submitted that the applicant lies in a much better position to assess possible revival of the Corporate Debtor than most of the members of the CoC, especially owing to the fact of its being intrinsically interested and interwoven in the

performance of the obligations by the Corporate Debtor under the Project Agreements and in light of the rejection of claim by the respondent, the prospective resolution applicant would also not be in a position to competently deal with the claims of the financial creditors as admittedly, the applicant is the largest Financial Creditor of the Corporate Debtor. But as the debt owed is not a financial debt, the applicant cannot be termed to be a financial creditor. Thus, this argument of the applicant holds no water and is hereby rejected. 14. Considering the facts and circumstances in the matter at hand, we are in total agreement with the contentions of the respondent RP and the steps taken by him while dealing with the applicant's claim. Therefore, with the above directions, IA 2129/2020 is hereby dismissed.

15. IA 2300/2020 was filed by the ex-promoters and directors to intervene in IA 2129/2020 filed by the applicant M/s Budhpur Buildcon Private

Limited and we have heard the intervenors also irrespective of merits in their above application IA 2129/2020 even though the RP has well presented their cause. In view of the above, the grievance of the petitioner in the above IA 2300/2020 stands resolved and accordingly, the above application is also disposed of. 16. The CIRP of the Corporate Debtor is at an advanced stage. When the present application was filed by the applicant. There were prospective Resolution Applicants willing to submit their Resolution Plans. Since the outcome of the present application has direct bearing on the Prospective Resolution Applications, this Bench orally directed the CoC not to take any action till the disposal of this application. In view of dismissing the above application filed by the applicant M/s Budhpur Buildcon Private Limited, the above oral direction is no longer necessary and accordingly the CoC is at liberty to take a call about the further course of action."

3. The submission made by the Learned Senior Counsel for the Appellant/ Pleadings and Written Submission available on record are stated herein below in a summarized manner:

a) It is the case of the Appellant that 'Letters of intents' were issued by the Slum Rehabilitation Authority in favour of the Corporate Debtor (CD) -Housing Development and Infrastructure Limited /Respondent and the Respondent was undertaking the development of various parcels of lands.

b) The Ld Sr. Counsel for the Appellant has stated that the CD/Respondent was in need of funds for development of the said project. Accordingly, the Appellant and the CD/Respondent entered into various agreements which is enumerated herein below:

- Development Agreement dated 24th February, 2007 executed between the CD and Adani Developers Pvt. Ltd (subsequently de-merged into the Appellant) ADPL.
- Development Agreement dated 01.03.2008 executed by and between the CD and ADPL, registered vide a Deed of Confirmation dated 04.11.2009 with the office of sub-Registrar of Assurances under Serial No. BDR-15/10226/2009.

- Supplemental Development Agreement dated 14.10.2008 executed between the CD and ADPL.
- Supplemental Agreement dated 20.03.2012 executed by and between the CD and ADPL.
- Development Agreement dated 05.04.2018 executed by and between the CD and the Appellant
- Agreement dated 09.04.2018 executed by and between the CD and the Appellant.

  The aforesaid Agreements are hereinafter collectively referred to as the 'Project Agreements'.

c) The Ld Sr. Counsel for the Appellant has also stated that the total consideration payable by the Appellant to the CD is Rs. 1192 Crore which was structured as payable periodically to finance the CD in order to enable the CD/Respondent to construct and develop the rehabilitation component of the said project. The agreements have stated above provides full *modus operandi* for the business deal including the Lease of instalments/ advances to be released by the Appellant to the CD and CD was to inter-alia procure and provide the saleable area for Rs.12,12,171 Sq. feet or so.

d) The Ld Sr. Counsel for the Appellant took the Bench through various agreements as stated above starting from Exhibit A – the

Supplement Agreement dated 20.03.2012 executed by and between the CD and Adani Developers Pvt. Limited. They have also presented briefly the list of dates and events. The Appellants also briefly touched upon the issue that the impugned order is passed on surmises and conjectures without consideration of relevant material and is contrary to law, findings are based on extraneous grounds, failure to follow due process of law as also the impugned order is not backed by adequate reasons. They were also much insistent that it is a Financial Debt as Section 5(8)(f) of the Code is a catch all provisions and is residuary in nature. They have also relied upon the judgment of Hon'ble Supreme Court Pioneer Urban Land and Infrastructure Ltd & Anr vs. Union of India & Ors., (2019) 8 SCC 416, para 70, wherein the Hon'ble Court, *while dealing with transactions of real-estate development agreements interalia held that "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.".*,

The judgment of Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors., 2019 SCC OnLine SC 73, *inter-alia determined the following characteristics of „financial debt" and „financial creditors", which are present in the instant case:*

(a) „Financial debt" for the purposes of Section 5(8) of the Code is categorized as one that enables the Corporate Debtor to either set up and/ or operate its business. In the present case, as is clear from the aforesaid facts, the said Consideration payable under the Project Agreements was so structured so as to provide periodical finances to the Corporate Debtor for undertaking the construction and development of the rehabilitation component of the said Project and served to enable the Corporate Debtor to carry on its business.

(b) Even at the time of providing such advance payments as aforesaid to the Corporate Debtor, the Appellant in fact undertook detailed enquiry and study into the viability and feasibility of undertaking the said Project and the consequences flowing from the Corporate Debtor"s inability to complete the same. Owing to the aforesaid, it is submitted that it is also demonstrable that the Appellant is in a good position to evaluate successful resolution of the Corporate Debtor"s business especially owing to it being intrinsically involved in the Corporate Debtor"s well-being and ability to complete the said Project.

(c) „Financial creditor" for the purposes of Section 5(7) of the Code is one whose stakes are intrinsically inter-woven with the well-being of the Corporate Debtor. It is submitted that in the present case, as is manifest from the transaction undertaken by the Corporate Debtor and the Appellant, in order for the Appellant to successfully construct and develop the free sale component of the said Project, the Corporate Debtor was obligated to perform certain crucial and fundamental roles and for it to be able and capable to undertake the said Project. To this end, the Appellant financed the Corporate Debtor at each stage of the said Project solely with the aim and intent to enable the Corporate Debtor to construct and develop the rehabilitation component of the said Project, in pursuance of which the Appellant"s rights and entitlements in the said Project would flow, in the form of the said free sale component."

4. The submission made by the Respondent/Resolution Professional is stated herein below in a summarized manner:

    a. The Ld counsel for the Respondent/RP has stated that the claims of creditors received from the CD was published on 28.08.2019. The cutoff date as per Regulation 12(2) of the IBBI (CIRP) Regulations, 2016 would have been filed on or before 90 days of the insolvency commencement date i.e. before

20.11.2019. However, the Appellant has submitted its claim for a sum of Rs. 14,391 Crore on 08.01.2020 after months of the cut off date.

b. The Ld. Counsel for the Respondent on this standalone ground averts that the claim was liable to be rejected. However, the Respondent sought through the email dated 28.03.2020 certain additional information/Clarification. However, the global pandemic /Covid 19 resulted into difficulties to the Resolution Professional (RP) and its team non-access of the respective offices, as a result he commenced verification of claim from 24.08.2020 and finally rejected the same on 28.09.2020. It is the duty of Resolution Professional to verify the claim from records of the CD and thereafter, the claim is accepted or rejected.

c. The Ld Counsel for the Respondent has stated that no part of the claim has actually been disbursed and the claim is solely in the nature of interest/ penal interest for breach of the main contract and the entire claim is merely an accretion of Penal interest as per clause 4 of the Supplemental Agreement 20.03.2012.

d. It was amply made clear by the Respondent/RP that parties to a Joint Developmental Agreement cannot be a Financial Creditor. The Ld counsel for the Respondent went on to further elaboration by explaining that the Appellant is not an 'allottee' under the Code. Clause 6 of the Development agreement dated 05.04.2018 explicitly records that the appellant/Developer would alone be considered as Promoter under the Real Estate Regulations and Development Act, 2016 (RERA) for the real estate project so being developed. He further went on to clarifying that there is no commercial effect of borrowing involved in the present case.

e. The Ld Counsel for the Respondent even went on to say that the Respondent fails to perform its obligation and has forfeited the security deposit of Rs. 340 crores, which was advanced in return for free sale and saleable area. However, the construction of rehabilitation & purchase of free sale component has not taken place within the said timeline and the Appellant has forfeited security deposit and as a result, they assumed the rights/obligations of the CD to construct the rehabilitation component and purchase saleable area.

f. All this reflects as per the Ld counsel for the Respondent that a routine commercial transaction between the parties without having any commercial effect of borrowing and hence it justified the order passed by the Adjudicating Authority.

5. We have carefully gone through the pleadings of the parties and extant provisions of the Code including their written submissions and we are having the following observations:

a. Let us first deal with IA No. 1739/2020 wherein Ld counsel for the Applicant in IA No. 1739/2020 intended to argue on behalf of the Intervener but was not allowed to argue at the final stage of hearing. However, he was permitted to file Note of Written Submissions on question of law for providing assistance in adjudicating the matter. The Applicant/Intervener of the above IA has stated that he is privy to the nature of obligations and transactions basis on which BBPL claims to be a Financial Creditor. It is emerging from his written submission that the Appellant has been defined as 'Developer' arose out of Slum Rehabilitation Scheme, wherein the 'saleable area' to be transferred to BBPL was dependent upon reciprocal promises to be fulfilled by both, BBPL and the Corporate Debtor. In addition to this, numerous other factors including rehabilitation of slum dwellers and amalgamation of SR scheme, MCGM and SRA

approvals etc. affected the transfer of such 'saleable area'. In fact, the Applicant/Intervener has handed over the saleable area to BBPL, which is presently being used by BBPL. In fact, an amount of approximately Rs. 340 Crores given by the Corporate Debtor towards the security deposit has been forfeited by the Appellant. Even otherwise, as far as the Applicant/ Intervener in 2018 a fresh agreement was executed wherein new timelines were provided. Before the said timeline could be achieved, the Corporate Debtor itself went into Insolvency, and hence, the Agreement in question can never be implemented to seek claim based on delay and penalty. The agreement of 2018 as far as Applicant/Intervener remembers, does not contain any clause in relation to consequences that will flow, in case either of the party goes into insolvency nor does it make any provisions in case of default.

It has also been pointed by the ld counsel for the Applicant that at no point of time prior to Insolvency of the Corporate Debtor, any legal proceedings were initiated or a dispute claiming interest was brought to the notice of the Corporate Debtor. The alleged claim has submitted by BBPL and is a time barred Operational Debt and needs adjudication by a trial court based on collection of evidences. The Agreement in question is a Development Agreement with reciprocal

promises and is in the nature of damage which requires adjudication by a trial court. It has also been submitted that the nature of transactions was contingent upon enumerable factors and the BBPL was never entitled for any payment from the Corporate Debtor except the development rights after the corporate debtors had developed the land. The payments made by the BBPL wherein fact requires to be adjusted against the land provided by the Corporate Debtor. It has also been pointed out by the Applicant that the debt is time barred. The amount even if it is assumed otherwise it is resulting from delayed fulfilment of reciprocal promise and is merely in the nature of penalty.

b. At the very outset, this Tribunal made it clear that the IA No. 1557 of 2021 in present appeal was filed before this Appellate Tribunal by inter alia seeking for staying the operation of the impugned order dated 02.08.2021 under challenge by submitting almost all the issues that has been raised herein as also restraining the Respondent from proceedings in furtherance of the impugned order etc. and the same was heard by this Appellate Tribunal on 27.08.2021 where they have touched upon all the relevant issues raised by the Appellant herein and the only issue that was left open

i.e. para 15 of the order dated 27.08,2021 and the same is reproduced below .

> *"15. Considering the averments being made and the findings recorded by the Adjudicating Authority read with part of Appeal reproduced above, prima facie it appears that there is an issue to be dealt with and decided in this Appeal. The observations of the Adjudicating Authority also cannot be out right ignored. Whether or not the Appellant could be treated as the Financial Creditor looking to the Agreements which are more of Development Agreements, would require consideration."*

The issue was also accordingly mentioned while hearing the appeal on 19.07.2022 to the counsels representing the parties.

c. In order to bring brevity and clarity, it is imperative that the order passed in IA No. 1557/2021 as heard and disposed of on 27th August, 2021 by this Tribunal are to be reproduced and the same is accordingly depicted below:

> *"27.08.2021: Heard Learned Senior Counsel for the Appellant. Certified Copy of Impugned Order which was*

not earlier available has been filed with Dy. No. 29052. The same is taken on record.

2. I.A. No. 1789 of 2020 has been filed for leave to the Appellant to urge additional grounds in view of the impugned order which subsequent to the filing of Appeal became available. The Application is allowed.

3. The Appellant has filed Amended Memorandum of Appeal vide Dy. No. 29191. The same is taken on record and will be treated as the Amended Memorandum of Appeal

4. Heard Counsel for the parties. Perused Impugned Order. Considering the disputes being raised, issue notice. Counsel for the Resolution Professional dispenses with service of formal notice.

5. Learned Counsel for the Appellant seeks interim reliefs as claimed in I.A. No. 1557/2021. The Learned Counsel submits that the impugned order deserves to be stayed as the Committee of Creditors may proceed to take a decision with regard to liquidation and the Appellant who claims to be Financial Creditor will be deprived of its right to participate in the CIRP.

6. Counsel for the Appellant submits that the Resolution Professional rejected the claim of the Appellant to be a Financial Creditor and the Appellant had filed I.A. No. 2129 of 2020 before the Adjudicating Authority. Reference is made to the impugned order Annexure A-1 (Page 63) of the Amended Memorandum of Appeal, where the Appellant had prayed to quash letter dated 28th September, 2020 of the Resolution Professional. The Corporate Debtor is 'Housing Development and Infrastructure Limited', who had taken up development of various parcels of lands and had applied to the Slum Rehabilitation Authority (SRA) in Mumbai for amalgamation of the slum rehabilitation schemes. The Corporate Debtor wanted to appoint a third party developer/ financier/ investor to assist the Corporate Debtor to develop the said project and construct the free sale component. It is claimed that with such intention various agreements as recorded in Para 7.2 of Amended Appeal were entered into and the material clause is reproduced in Para 7.3 of the Amended Memo of Appeal, which reads as under:

"4. Without prejudice to any other right which the Developer may have under this Agreement or under the Project Agreements or any other agreement/deeds entered into between the Parties or under law or otherwise, in the event of default by the Transferor to perform the Transferor's Obligations in accordance with the Timelines, then in such a case, the Transferor shall cure such breach/default within the period of 60 days from the date of occurrence of such event of default, failing which the Transferor shall be liable to pay interest to the Developer at the rate of 2% per month on all amounts (including the Paid Consideration)." [Emphasis supplied]"

7. Relying on such clause, the Learned Counsel for the Appellant submits that status of the Appellant is that of the Financial Creditor.

8. Learned Senior Counsel for the Appellant submitted that when the I.A. was filed by the Appellant before the Adjudicating Authority, the Adjudicating Authority had orally directed the Committee of Creditors not to consider the Agenda Item regarding liquidation. Learned Counsel for the Appellant referred to Agenda Item No. 6 and No. 7

of 7th Meeting of the CoC which was issued for the meeting of 7th August, 2021, copy of which is at page 328 of Dy. No. 28665. The relevant portion referred to by the Learned Counsel from Item No. 6 and 7 may be reproduced:

SL No.	*Agenda item*
6.	***To note the status of application filed by M/s. Budhpur Buildcon Private Limited before Hon'ble NCLT.*** *As the CoC Members are aware that M/s Budhpur Buildcon Private Limited (BBPL) (An Adani group company) had filed a claim of Rs.14,391 crores as Financial Creditor. The said claim was not admitted by the Resolution Professional (RP) giving detailed reasons for the same. Aggrieved by the RP's decision on the said claim, BBPL had filed an application with the Hon'ble National Company Law Tribunal (NCLT) challenging decision of the RP. Mr. Rakesh Wadhawan & Others had also filed Intervention Application in the matter.* *As informed to the CoC from time to time various hearings took place before Hon'ble NCLT from December 2020 to April 2021 in the matter wherein the Bench orally directed not to consider the agenda item regarding liquidation. Further on 28th April, 2021, the Hon'ble NCLT directed not to consider liquidation till the order on application filed by M/s BBPL and also other applications are decided. Further, at the hearing held on 30th April, 2021, the Hon'ble NCLT had directed all the parties to submit their written submissions within a week's time and the matter was reserved for orders and the order was awaited.*

	Since no order was passed by Hon'ble NCLT subsequent to 30th April, 2021, the RP requested his legal advisors to move Hon'ble NCLT. Accordingly, the advocates or FP, M/s Crawford Bayley & Co., filed a praecipe in Hon'ble NCLT on 20th July, 2021 with a request for necessary clarifications and further orders. The Hon'ble NCLT pronounced order on 2nd August, 2021 dismissing the application filed by M/s BBPL. *The Hon'ble NCLT also pronounced that the oral directions passed during the course of hearing stand vacated. The written order in the matter is awaited.* *The CoC Members are requested to take note of the same.*
7.	***To discuss and consider the filing of application with the Hon'ble National Company Law Tribunal, Mumbai Bench under Section 33(2) of Insolvency and Bankruptcy Code, 2016, (Code) for the initiation of liquidation and/or dissolution of Corporate Debtor.*** *As members of the Committee of Creditors (CoC) are aware that after considering the extension granted by Hon'ble NCLT for 90 days, CIRP period comes to an end on 28th April, 2021.* *CoC Members are also aware that the RP had filed an application with Hon'ble NCLT seeking exclusion of the period from 14th April, 2021 to 28th April, 2021 (period of commencement of lockdown due to COVID-19) and from 28th April, 2021 till date of disposal of Application filed by M/s BBPL from the CIRP period for the CD and to allow the RP to conduct the corporate insolvency resolution process of the Corporate Debtor. The matter is pending with Hon'ble NCLT till date.* *Since the Hon'ble NCLT has dismissed application of BBPL, the CoC members are requested to consider initiation of liquidation proceedings of the Corporate Debtor (CD). Thus,*

	the Resolution Professional (RP) seeks permission of the members of the CoC to apply before the Hon'ble NCLT, Mumbai Bench, for the initiation of liquidation proceedings against the CD under Section 33(2) of the Code. *The Members of the CoC are requested to take note and vote on the same which is put up for e-voting as specified in Item B-1 below.*

9. Referring to the same the Learned Counsel submits that when the Adjudicating Authority was considering the I.A. filed by the Appellant it had orally directed the CoC not to take up the Agenda of liquidation. Learned Counsel submits that same direction needs to be given to CoC now in the Appeal when the Appellant has carried the dispute in Appeal as impugned order had rejected the claim of the Appellant to be Financial Creditor.

10. It is argued that in view of the discussion in Agenda Item 7, the Resolution Professional moved the Adjudicating Authority and by an order dated 16th August, 2021 has excluded certain period. The Learned Senior Counsel submitted that in view of the exclusion, period of 270 days would expire on 30th September, 2021. Counsel for the Resolution Professional, however, submits that the 90 days period expired much earlier and he has to take instructions as according to him by 30th September, 2021, 330 days would expire.

11. We have perused the impugned order and the findings recorded at Para 6 to 16. The Adjudicating Authority extensively heard and has in details dealt with the matter. In Para 7 and 8

of the impugned order the Adjudicating Authority observed as under:

> *"7. It is very clear from the above definition that a mere right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured; and a 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 is enough to qualify as an Operational Debt. However, a mere right to recovery or entitlement does not qualify as a Financial Debt unless the debt falls within any one of the categories mentioned under the definition 'Financial Debt'. 8. It is very clear from the submissions of both sides as well as from the record that the applicant is claiming the interest amount as a Financial Debt as a penalty for the alleged breach of the various terms and conditions of number of agreements entered into between the applicant M/s Budhpur Buildcon Pvt. Ltd. and the Corporate Debtor HDIL which is a mere right for the alleged breach by*

the Corporate Debtor. It is appropriate to mention here that the Corporate Debtor is denying any breach on its part and on the other hand raised lapses on the side of the applicant. Therefore, the respondent RP has rightly rejected the claim of the applicant as Financial Debt as it is a mere claim. This Bench did not find any illegality or irregularity committed by the RP."

12. At this stage we note Amended Appeal Para 7.11 which reads as under:

"7.11.That in the aforesaid circumstances, the Appellant submitted the said Claim for 'financial debt' whereby it claimed an amount of Rs.14,391,00,00,000/- (Rupees Fourteen Thousand Crore Three Hundred and Ninety-One Lac Only) as due and payable by the Corporate Debtor towards the said Interest Stipulation under Clause 4 of the said 2012 Agreement at the rate of 2% on the amount of Rs.721, 03,00,000/- (Rupees Seven Hundred and Twenty One Crore and Three Lakhs Only) disbursed by the Appellant to the Corporate Debtor under the Project Agreements as aforesaid ("said claim"). It is relevant to note that in accordance with the terms of the said Project Agreements, the said Claim did

not contemplate repayment of any principal amounts disbursed under the Project Agreements and that the said Claim was restricted to amounts payable towards interest due and payable under the said 2012 Agreement. A copy of the Form 'C' dated 08.01.2020 submitted by the Appellant to the Respondent is annexed hereto and marked as EXHIBIT-D."

13. The Adjudicating Authority after Para 7 and 8 of the Impugned Order dealt with the allegation with regard to delay in the assessment of the claim made by the Appellant by Resolution Professional and in Para 14 observed as follows:

> *"14. Considering the facts and circumstances in the matter at hand, we are in total agreement with the contentions of the respondent RP and the steps taken by him while dealing with the applicant's claim. Therefore, with the above directions, IA 2129/2020 is hereby dismissed."*

14. In para 16 the observations are:

> *"16. The CIRP of the Corporate Debtor is at an advanced stage. when the present application was filed by the applicant. There were prospective Resolution Applicants willing to submit their Resolution Plans. Since the outcome of the present*

application has direct bearing on the Prospective Resolution Applications, this Bench orally directed the CoC not to take any action till the disposal of this application. In view of dismissing the above application filed by the applicant M/s Budhpur Buildcon Private Limited, the above oral direction is no longer necessary and accordingly the CoC is at liberty to take a call about the further course of action."

15. Considering the averments being made and the findings recorded by the Adjudicating Authority read with part of Appeal reproduced above, prima facie it appears that there is an issue to be dealt with and decided in this Appeal. The observations of the Adjudicating Authority also cannot be out right ignored. Whether or not the Appellant could be treated as the Financial Creditor looking to the Agreements which are more of Development Agreements, would require consideration.

16. As regards staying further progress before the CoC, we take note that CIRP started on 20th August, 2019 and already two years are over. Senior Counsel, Mr. Krishnendu Datta, intervened to submit that the intervenor wanted to file a Resolution Plan for part resolution of the Corporate Debtor with regard to one of the projects of SRA. The application on that count

is also pending with the Adjudicating Authority. The Learned Counsel for the Resolution Professional submitted that the CoC did not agree to accept the resolution of the Corporate Debtor in parts. It is stated that the Corporate Debtor had about 70 projects in hand and thus there were applicants who wanted to give offers of Resolution Plans project-wise, which CoC did not find practicable.

17. When the application of Appellant was pending before the Adjudicating Authority, the Adjudicating Authority had only orally asked the CoC to delay taking decision on the question of liquidation. Now, the Adjudicating Authority has applied its mind and taken a conscious decision not accepting the Appellant as the Financial Creditor and observed in Para 16 of the impugned order that CIRP is at an advance stage and reason why it had earlier given oral direction. If for an individual person claiming to be Financial Creditor the progress of CIRP is to be stayed, it would be counter-productive according to us considering the objects of the IBC. Now, when we already have decision not in the favour of the Appellant, it is all the more reason for us to not to grant any interim orders to stay the proceedings which are taking place before the CoC.

18. It is stated that although extension has been granted by the Adjudicating Authority vide order dated 16th August, 2021, that

order also has not been uploaded. Such order has been passed is not disputed by the Resolution Professional. Fact remains that there is time available in the CIRP till 30th September, 2021. The present Appeal will not come in the way of the CoC for either rejecting or accepting any Resolution Plan or from taking any other decisions including decision with regard to liquidation, as per law, when period prescribed under Section 12 of IBC is coming to an end, if Resolution Plan is not there.

19. We are not convinced that interim orders as are being sought by the Appellant should be passed as we do not find that any prima facie case is made out which will justify further holding up of the progress of CIRP. I.A. No. 1157 of 2020 is rejected.

20. Respondent to file reply within two weeks. Rejoinder, if any, may be filed within one week thereafter. Parties to file brief Written Submissions, not more than three pages, and copies of the judgments on which they want to refer or rely on, within three weeks. List the Appeal 'For Admission (After Notice)' Hearing on 25th October, 2021."

d. What is being observed that the issue left open is only one i.e. whether or not Applicant could be treated as the 'Financial Creditor' looking to the Agreements which are more of Development Agreements. Accordingly, would require consideration? We have gone through the Supplemental

Agreement dated 20.03.2012 (appearing at page no. 51 of the Appeal paper book) executed by and between the CD/ Respondent and Adani Developer Pvt. Ltd (ADPL).

(i) From the perusal of the above agreement, it is very much clear that these are all business agreements where each party has a role and there is a mechanism to release payment at various stages and the recoupment of such payments including the management of project land in consideration, failure of which will result into forfeiture of deposit, penal interest, liquidated damages etc.

(ii) Clause 4 of the Supplemental Agreement dated 20.03.2012 leads largely to this claim. Hence, for reiterating the same are specifically mentioned herein below:

"Clause 4 – Without prejudice to any other right which the Developer may have under this Agreement or under the Project Agreements or any other agreement/deeds entered into between the Parties or under law or otherwise, in the event of default by the Transferor to perform the Transferor's Obligations in accordance with the Timelines, then in such a case, the Transferor such cure such breach/default within the period of 60 days from the date of occurrence of the such event

of default, failing which the Transferor shall be liable to pay interest to the Developer at the rate of 2% per month on all the amounts (including the Paid Consideration).”

(iii) Based on above input, now we have looked at the provisions of Section 5(7) & (8) of the Code, which is depicted below:

“Section 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;

Section 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"

(iv) It is not in dispute that this is an inclusive definition of "financial debt" but certain conditions must be complied with to be a financial debt i.e the CD must have borrowed the money from the Creditor against the payment of interest /time value of money. It means, the transactions require to be purely in borrowing nature. This does not cover the business transaction between the Creditor and Debtor which is applicable in business organization where either sale or purchase involved or construction activities involved or in Real Estate Project, multiple agencies with multiple terms and conditions are involved and each is supposed to gain or lose

based on the performance of the business. In order to meet the time schedule whether in purchase or sale or development agreement or in any Real Estate project, there is always a clause for liquidated damages and the same may be either in the percentage form or sometime even other form of penal interest. Even in the international business scenario to ensure timely completion of the business deal/ the project, some type of monetary punishments in the form of liquidated damages by way of deduction from bill or payment or by way of interest is incorporated. The ultimate objective of any business deal, time is the essence and each party is to meet that time schedule. What we have observed in this case is that the element of interest which has been put as 2% interest p.m after 60 days from the date of occurrence of such event of default to perform and the obligation is purely in the form of liquidated damages or compensation.

e. In this context, it is prudent to refer Section 74 of the Indian Contract Act,1872 which is extracted below:

"Section 74 in The Indian Contract Act, 1872

Compensation for breach of contract where penalty stipulated for:-

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. Explanation.— A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

(Exception) — When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the [35] [Central Government] or of any [36] [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein. Explanation.— A person who

enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested. Illustrations…"

The above already implies that this section provides for damages where the contract fixes the amount to be paid in case of its breach or provides for a penalty.

f. Hence, by any stretch of imagination, the Code, nowhere in Section 5(8) of the Code provides for such eventuality to be considered as 'Financial Debt'. Hence, in terms of the provisions of the Code, we are not in a position to sustain the claim of the Appellant to consider its case as a Financial Debt.

g. Now let us examine the case with reference to cited judgment by the parties:

1) Both the parties have cited - Pioneer Urban Land and Infrastructure Pvt. Ltd & Anr. Vs. Union of India & Ors. (2019) 8 SCC 416, para 68, 69, 70, 74 to 79 of this judgment and the same are *reproduced below:*

"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."

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:

(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." 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.

78. However, Dr. Singhvi strongly relied upon the report of the Bankruptcy Law Reforms Committee of November, 2015 and in particular paragraph 3 of 'Box 5.2 – Trigger for IRP' which states that financial creditors are persons where the liability to the debtor arises from a "solely" financial transaction. This Committee report, which led to the enactment of the Code, is an important guide in understanding the provisions of the Code. However, where the provisions of the Code, as construed in the light of the objects of the Code, are clear, the fact that from a huge report one word is picked up to indicate that all financial creditors must have debtors who owe money "solely" from financial transactions cannot possibly have the effect of negating the plain language of Section 5(8)(f) of the Code. In fact, what is important is that the threshold limit to trigger the Code is purposely kept low – at only one lakh rupees – making it clear that small individuals may also trigger the Code as financial creditors (as financial creditors include debenture holders and bond holders), along with banks and financial institutions to whom crores of money may be due.

79. That this amendment is in fact clarificatory is also made clear by the Insolvency Committee Report, which expressly uses the

word "clarify", indicating that the Insolvency Law Committee also thought that since there were differing judgments and doubts raised on whether home buyers would or would not be included within Section 5(8)(f), it was best to set these doubts at rest by explicitly stating that they would be so covered by adding an explanation to Section 5(8)(f). Incidentally, the Insolvency Law Committee itself had no doubt that given the 'financing' of the project by the allottees, they would fall within Section 5(8)(f) of the Code as originally enacted."

h. The Respondent has also cited the same judgment i.e. Pioneer Urban Land and Infrastructure Pvt. Ltd & Anr. Vs. Union of India & Ors. (2019) 8 SCC 416, in which they have referred para 71.

> *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)."

What it is abundantly clear that the claim is an accretion of penal interest emerging from clause 4 of the Agreement dated 20.03.2012.

i. The Appellant also cited the Judgment in Mahammad Raja Mia Vs. Naderjjama Mia, AIR1932 Cal 53 last para of this judgment is reproduced below:

"For the reason given, I am of opinion that the rate of interest sued for in this case comes within section 74 of the Contract Act and must be held to be penal notwithstanding the fact that only one rate of interest is mentioned in the bond. An ingenious argument was advanced on behalf of the Appellant with the object of showing that, in the particular circumstances of this case, that rate ought not to be deemed to be penal. It is true, it is said, that 150 per cent or even 75 per cent p.a may at first sight appear to be exorbitant and, therefore, penal, but if the circumstances are taken into consideration, it will be apparent that in reality it was not so. The terms of the loan were generous providing for repayment of the principal in equal instalments extending over a period of no less than six years without any interest if payment was made on the due dates. Interest was only to be paid in the event of default and then too not from the date of bond but from the date of default.

Therefore, it is argued, if the defendants failed to take advantage of this liberal terms and did not pay up within the time stipulated they have only themselves to blame and the rate of interest claimed ought not to be considered to be penal. Even, however, if allowances are made for these circumstances interest at 75% must I think be deemed to be in the nature of a penalty, and that being so it was open to the court to give relief by reducing the rate of interest from 75 per cent to 25 percent. I agree, therefore, that the appeal fails and must be dismissed."

j. The Appellant also cited the Judgment in Arjan Bibi Vs. Asgar Ali Chowdhuri, MANU/WB/0155/1886 para 3-6:

3. It seems to us that this stipulation does not fall under Section 74 of the Contract Act. No sum is named here as the amount to be paid by the defendant in case of a breach. It simply stipulates that if the money is not paid within two months and fifteen days the borrower agrees to pay the amount borrowed with interest at the

rate of 2 annas per rupee per month. It therefore falls within Section 2 of Act XXVIII of 1855.

4. The distinction between an agreement to pay interest at a certain rate and an agreement to pay a certain sum of money as the amount to be paid in case of breach is stated in a decision of this Court in the case of Mackintosh v. Crow I.L.R. 9 Cal. 689. Mr. Justice WILSON in delivering the judgment of the Court, after examining the various cases bearing upon this point and explaining the nature of the provisions of Section 2 of Act XXVIII of 1855, and Section 74 of the Contract Act, says: "In all such cases this element is present, that by the terms of the contract a sum is made payable by reason of the breach, capable of calculation at the time of the breach, and payable in all events, though in the second class of cases the payment is spread over a term. But where the contract is merely that if the money is not paid at the due date, it shall thenceforth carry interest at an enhanced rate, I do not see how it can be said that there is any sum named as to be paid in case of breach. No one can say at the time of the breach what the sum will be. It

depends entirely on the time for which the borrower finds it convenient to retain the use of the money. It is a fresh sum becoming due month by month, i.e., as the case may be, for a new consideration. And in my opinion the case falls under the first rule of law abovementioned, not under the second. This view of the, law was acted upon by this Court In Mackintosh v. Hunt I.L.R. 2 Cal. 202."

5. It is true that in this case the rate of interest stipulated for is to be payable from the date of the loan; but this circumstance does not, in our opinion, take the case out of the purview of Section 2 of Act XXVIII of 1855; because there is only one rate of interest stipulated to be paid here. The bond does not provide for the payment of two rates of interest, one lower and the other higher, the latter being payable under certain circumstances. In this case it cannot be therefore held that a lower rate is the stipulated rate of interest agreed to be paid by the debtor under Section 2, Act XXVIII of 1855, and that a higher rate is named in order to determine the amount of compensation to be paid under Section 74 of the Contract Act in case of a breach. The agreement in this case, is

that no interest would be payable if the money covered by the bond be paid within the time mentioned in it, but if it be not paid within that time, interest at the rate of 2 annas per rupee per mensem would be payable. This agreement falls, in our opinion, under Section 2 of Act XXVIII of 1855.

6. We may point out here that the authority of the cases in which a higher rate of interest has been considered to be in the nature of a penalty has been much shaken by the decision of the Judicial Committee of the Privy Council in Balkishen v. Run Bahadur Singh I.L.R. 10 Cal. 305. In that case a solenamah provided for the payment of six per cent, interest upon the money payable under it, but under certain circumstances the rate was to be doubled. Their Lordships observed: "They do not concur with the High Court that the payment of a double rate of interest was in the nature of a penalty. The solenamah was an agreement fixing the rate of interest, which was to be at the rate of 6 per cent, under certain circumstances, and 12 per cent, under others."

k. The Respondent has cited the judgment of Hon'ble Supreme Court in Anuj Jain, IRP for Jaypee Infratech Limited Vs Axis Bank Limited & Ors; para 46:

> *"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 disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against*

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

be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money."

l. The Appellant has cited the Judgment of Hon'ble Supreme Court in Feteh Chand Vs. Balkishan Dass, (1964) 1 SCR 515: AIR1963SC 1405 para 8:

8. The claim made by the plaintiff to forfeit the amount of Rs. 24,000/- may be adjudged in the light of s. 74 of the Indian Contract Act, which in its material part provides :-

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable

compensation not exceeding the amount so named or, as the case maybe, the penalty stipulated for."

The section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine preestimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrors is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty. The second clause of the contract provides that if for any reason the vender fails to get the sale-deed registered by the date stipulated, the amount of Rs.

25,000/- (Rs. 1,000/- paid as earnest money and Rs. 24,000/- paid out of the price on delivery of possession) shall stand forfeited and the agreement shall be deemed cancelled. The covenant for for- feiture of Rs. 24,000/- is manifestly a stipulation by way of penalty."

m. All the above citations reflect one thing categorically and clearly that there must be a disbursal of fund by the Creditor to the Debtor purely in the form of release of fund as a "borrowing" and must have a "time value of money". The method may be different but the nature must be borrowing and in extended terminology even the liability in respect of guarantee is also covered. There must be a "Financial Debt" which is owed by the other side i.e. the Debtor. It should be amply clear that the CD owe the "Financial Debt" to the Creditor. There is a difference between the levy of liquidated damages or penal interest for default and the financial debt per se. Hence, we cannot borrow unrelated concept from unrelated judgments to prove that wherever a word "interest" is there it means corresponding to a "Financial Debt" and we accordingly confirm that "Financial Debt" will always carry an interest towards time value of money. However, interest per se in any business contract cannot be termed to make the "debt" as a "Financial Debt", if it is

in the nature of liquidated damages or in the nature of penal interest, which is a result of compensation for breach of contract which is stipulated for penalty. Hence, while examining the case, whether the Appellant is a Financial Creditor or not we are now arriving at a conclusion based on above said discussions both on law & on facts and the citations produced by the parties, some of which have been explicitly cited as above reveals that the Appellant is not a "Financial Creditor" and hence, we are upholding the order of the Adjudicating Authority.

n. Accordingly, the Appeal deserves to be dismissed and is dismissed. The order of the Adjudicating Authority is sustained.

Interim order, if any, passed by this Appellate Tribunal, is vacated.

Pending application, if any, stands disposed of.

No order as to cost.

[Justice Rakesh Kumar]
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

***9th September,* 2022**

New Delhi

Raushan.K