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

**Company Appeal (AT) (Insolvency) No. 684 of 2024**

**[Arising out of the Impugned Order dated 28.03.2024 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench-IV in CP (IB) No. 1142 (MB) of 2023]**

**In the matter of:**

**Amit Narang**
**Suspended Director of Narang Developers Private Limited**
Narang Manor, Ground Floor, Plot No. 96B,
15th Road, Bandra (West), Mumbai – 400 050

...Appellant

**Versus**

1. **Aditya Birla Finance Limited,**
   G-Corp, 13th Floor, Ghodbunder Road, next to Hypercity Mall, Thane – 400 615

2. **Narang Developers Private Limited**
   Through its Interim Resolution Professional
   A company incorporated under the provisions of the Companies Act, 2013 having its registered address at Narang Manor, Ground Floor, Plot No. 96B, 15th Road, Bandra (West), Mumbai – 400 050

...Respondents

**Present:**

For Appellant : Mr. Chitranshul A. Sinha, Ms. Meghna Rao, Mr. Harshit Goel, Advocates.

For Respondent : Mr. Krishnendu Datta, Sr. Advocate with Mr. Lalit Katariya, Mr. Akhil Sachar, Ms. Niharika Sharma, Ms. Ashrita Chindwarhe, Advocates.

**J U D G M E N T**

**(Hybrid Mode)**

**Per: Barun Mitra, Member (Technical)**

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated 28.03.2024 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-IV) in C.P. (IB) No. 1142/MB-IV/2023. By the impugned order, the Adjudicating Authority has admitted Section 7 application filed by the Respondent No.1 and admitted the Corporate Debtor into Corporate Insolvency Resolution Process (**"CIRP"** in short). Aggrieved by the impugned order, the present appeal has been preferred by the Ex-Director of the Corporate Debtor.

**2.** Coming to the factual matrix of the present case, a Section 7 application under IBC was filed against the Corporate Debtor-Narang Developers Pvt. Ltd (NDPL) by Aditya Birla Finance Ltd-Financial Creditor. The Financial Creditor, a Non-Banking Finance Company had sanctioned a loan facility aggregating Rs 11.50 Cr wherein NDPL-Corporate Debtor, an MSME entity, is a Co-Borrower, subject to terms and conditions contained in Sanction letters dated 19.09.2016 and 04.12.2018 and the Facility Agreement dated 29.09.2016 and Supplementary Facility Agreement dated 07.12.2018. An Indenture of Mortgage was also executed on 17.10.2016 by the Corporate Debtor in favour of the Financial Creditor creating security interest over the secured asset. On account of default in repayment of the loan, the loan accounts were classified as Non-

Performing Assets (NPA) on 16.06.2019. The Financial Creditor-Respondent No. 1 issued a Demand Notice on 05.07.2019 to the Corporate Debtor under Section 13(2) of the SARFAESI Act. Thereafter, the Corporate Debtor made payments of Rs 30 lakhs and Rs 70 lakhs besides offering to clear the entire outstanding dues of Rs 2.38 Cr. on or before 15.03.2020. Due to non-payment of the dues, the Financial Creditor filed a Section 7 petition against the Corporate Debtor by holding the date of default as 15.03.2020. The Corporate Debtor was admitted into CIRP by the Adjudicating Authority on 28.03.2024. Aggrieved by this order, the present appeal has been preferred by the Suspended Director of the Corporate Debtor.

**3.** We have heard Shri Chitranshul A. Sinha, Ld. Advocate appearing for the Appellant and Shri Krishnendu Datta, Ld. Sr. Advocate representing the Respondent No.1.

**4.** Making his submissions, the Ld. Counsel for the Appellant submitted that the loan facility was disbursed by Respondent No.1 to M/s Csango Industries Pvt. Ltd. (**"Csango"** in short) and to Pacific Link Exports Pvt. Ltd. (**"Pacific Link"** in short) and not to the Corporate Debtor. Hence, in the absence of any disbursement of loan amount to the Corporate Debtor, the Respondent No. 1 cannot rightfully claim to be a Financial Creditor of the Corporate Debtor. Further, since the loan had not been disbursed to the Corporate Debtor, the latter did not have any liability or obligation to repay the loan facility. It was also contended that the Corporate Debtor was merely a Co-Borrower to the Facility Agreement without any liability to repay the loan facility and hence cannot be subjected to the rigours of insolvency resolution process. It was also pressed

that in the absence of any contractual agreement, the Adjudicating Authority committed an error in holding that the liability of the Borrower and Co-Borrower as co-extensive. While not denying that the Corporate Debtor had volunteered to clear the outstanding dues of the Respondent No. 1, it was contended that simply because the Corporate Debtor had given an assurance to make payment on behalf of Csango, this did not imply the contractual obligations arising out of the loan facility to Csango to become binding on the Corporate Debtor. Submission was pressed that the Corporate Debtor did not execute the mortgage deed and that the mortgage deed was given by other entities. Hence, putting Corporate Debtor to the rigours of CIRP by the Adjudicating Authority is completely dehors the law and against the very object of IBC. It was also submitted that the element of disbursement against consideration for the time value of money by the Financial Creditor qua the Corporate Debtor was also absent. In support of their contention reliance was placed on the judgment of the Hon'ble Supreme Court in the matter of ***Anuj Jain-Interim Resolution Professional for Jaypee Infratech Ltd. Vs Axis Bank Ltd. (2020) 8 SCC 401*** which has laid down the fundamental requirements of "disbursement against the consideration for time value of money" for any transaction to become a financial debt. Since the alleged debt did not fall within the definition of the word "Financial Debt" as defined in Section 5(8) of the IBC, it was also submitted that the Respondent No. 1 cannot be looked upon as the Financial Creditor. It was therefore vociferously argued that the Adjudicating Authority ought to have first adjudicated upon the maintainability of the Section 7 petition against the Corporate Debtor before admitting the same.

**5.** Another contention that was pressed was that the Facility Agreement between Respondent No. 1 and Csango was not stamped as per the provisions of the Maharashtra Stamp Act and therefore being insufficiently stamped, the Facility Agreement could not have been relied upon by the Adjudicating Authority to support the claim of the Respondent No. 1 as Financial Creditor of the Corporate Debtor. It was also added that the date of default having been shown as 15.03.2020 in the Section 7 application, it was hit by Section 10-A of IBC. It was also asserted that the Section 7 application was barred by limitation. It is also the contention of the Appellant has held that the Framework for Revival and Rehabilitation, as notified by the Ministry of MSME and adopted by RBI on 17.03.2016, was required to be followed prior to classification of the Borrower's account as NPA before taking further action for recovery of the dues. In support of their contention, reliance has been placed on the judgment of the Hon'ble Supreme Court in ***M/s Pro Knits Vs The Board of Directors of Canara Bank & Ors, 2024 INSC 565.*** However, as the Respondent No.1 had failed to comply with the said framework before filing the Section 7 application, thereby contravening the directions of the Hon'ble Supreme Court, which having not been taken cognisance of by the Adjudicating Authority, the impugned order is liable to be set aside.

**6.** Refuting the contentions of the Appellant, the Ld. Sr. Counsel for the Respondent No.1 submitted that the Respondent No.1 had provided an aggregate loan facility Rs 11.50 Cr. to the Borrower and the Co-Borrowers. It is submitted that the Adjudicating Authority had correctly concluded that the Corporate Debtor is a Co-Borrower based on the various Agreements placed

before it and supporting documents. Since the Corporate Debtor was a Co-Borrower to the said loan facility, the Respondent No.1 was a Financial Creditor qua the Corporate Debtor. It has also been contended that it is a well settled principle of law that a Co-Borrower is also a Borrower and its liability is joint and several alongwith the Principal Borrower. In support of their contention, reliance has been placed on the judgment of ***Maitreya Doshi Vs Anand Rathi Global Finance Ltd.*** The Borrower and Co-Borrowers including Corporate Debtor had created security interest over the secured assets against the financial assistance provided by Respondent No. 1 and the mortgage deed clearly bears the signature of the Corporate Debtor through its Director Mr. Amit Narang. Having failed to adhere to the financial commitments made under the Loan Agreement, the Loan account was declared NPA and a Demand Notice had been issued on 05.07.2019 under Section 13(2) of SARFAESI Act. The Borrower and Co-Borrowers including Corporate Debtor failed to discharge their liability in terms of the demand notice. However, the Corporate Debtor as Co-Borrower sent a letter to the Respondent No.1 acknowledging the outstanding debt and assuring the repayment of the debt by 15.03.2020 besides requesting the Respondent No.1 to restructure their debt. This letter clearly shows that the Corporate Debtor was liable for the contractual obligations arising out of the loan agreement and having defaulted in making payments, Section 7 proceedings could well be instituted against the Corporate Debtor. On the issue of the Facility Agreement being an insufficiently stamped instrument, it was contended that non-payment of stamp duty being a curable defect, it does not render the instrument void. Rebutting the argument that the Financial Creditor

had not followed the RBI guidelines, applicable to an MSME, before declaring the account of the Corporate Debtor to be NPA under the SARFAESI Act, it was contended that this constituted an independent proceeding. Hence, it did not disentitle the Respondent No.1 to initiate proceedings under Section 7 of IBC against a Co-Borrower.

**7.** We have duly considered the arguments advanced by the Learned Counsels for both parties and perused the records carefully. Having noted their rival contentions as summarised above, the short question which arises for our consideration is whether the Appellant had a financial debt qua Respondent No.1 which had become due and payable and whether there was an incidence of default thereof.

**8.** Before we enter into the facts of the case, it may be useful to refer to the definition clauses of IBC which deal with 'financial creditor' and 'financial debt' as set out in Sections 5(7) and 5(8) of the IBC which is to the effect:

> *"**5(7) "financial creditor"** means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;*
>
> ***5(8) "financial debt"** means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes –*
>
> *(a) money borrowed against the payment of interest;*
>
> *(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
>
> *(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
>
> *(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian*

*Accounting Standards or such other accounting standard as may be prescribed;*

*(e) receivables sold or discounted other than any receivables sold on non-recourse basis;*

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

*(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate of 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;"*

**9.** Basis the above-cited definition clauses of 'financial debt' and 'financial creditor', we can safely conclude that for any creditor to become financial creditor under Section 5(7) of IBC, there must be a financial debt which is owed by the borrower to the financial creditor. Furthermore, for a debt to become "financial debt" under the various transactions stated in subclauses (a) to (i) of Section 5(8) of IBC, the basic non-negotiable ingredients to be met is disbursal of funds against the consideration for time value of money as spelt out in the principal clause which we have already noted above.

**10.** It is the case of the Appellant that no direct consideration has flown from the Respondent No.1 to the Corporate Debtor and that the loan facility was actually disbursed to Csango and Pacific Link. Hence, there was no obligation on the part of the Corporate Debtor to repay the loan facility and the Respondent

No.1 not having advanced credit to the Corporate Debtor, it was not entitled to initiate a Section 7 application against the Corporate Debtor.

**11.** It is the counter contention of the Respondent No.1 that the Respondent No.1 in Part-V of the Section 7 application had submitted the entire list of documents which evidences that the Corporate Debtor was a Co-Borrower. It was submitted that the Corporate Debtor was a Co-Borrower and therefore there exists a clear and unambiguous nexus of the Co-Borrower with the facility disbursed by the Respondent No.1 to the primary Borrower. Reliance was placed on the judgment of the Hon'ble Supreme Court of India in ***Maitreya Doshi Vs Anand Rathi Global Finance Ltd.*** in ***Civil Appeal No. 6613 of 2021*** to contend that a Financial Creditor is entitled to initiate proceedings under Section 7 of the IBC against the Co-Borrowers also. The Corporate Debtor had also signed a Demand Promissory Note unconditionally promising repayment of loan to the Financial Creditor as a Co-Borrower besides indemnifying Respondent No.1 in the event of default. It was also contended that the Corporate Debtor by letters dated 10.02.2020 and 20.02.2020 offered to repay the outstanding debt on or before 15.03.2020 and also forwarded a cheque of Rs 30 lakhs and Rs 70 lakhs towards repayment. Thus, the Corporate Debtor had by their conduct displayed their attribute as a Co-Borrower and the attendant liability to clear the outstanding dues of the Respondent No.1.

**12.** At this stage, it may be useful to refer to the material on record to ascertain whether the Corporate Debtor can be held to be a Co-Borrower qua the Facility Agreements with the Financial Creditor-Respondent No.1. We find that the Corporate Debtor alongwith other Co-Borrowers had applied for mortgage loan

of Csango from Respondent No.1 on 29.07.2016. The mortgage loan application was signed by Corporate Debtor and other Co-Borrowers as placed at page No. 319 of Appeal Paper Book (**"APB"** in short). The Sanction Letter of 15.09.2016 of Rs 10 Cr. issued by the Financial Creditor clearly depicts Csango and Pacific Link as Borrowers and the Corporate Debtor as one of the Co-Borrowers as placed at page No. 334 of APB. Undisputedly, this Sanction Letter bears the signature of the Corporate Debtor. We also find a Board Resolution of the Board of Directors of the Corporate Debtor dated 16.09.2016 and 17.09.2016 resolving that the Corporate Debtor would be a Co-Borrower for the facility of Rs 10 Cr. including taking necessary action to create security documents in favour of the lender as placed at page No. 341 and 343 respectively. It is also noticed that the Corporate Debtor alongwith Csango and Pacific Link executed an Undertaking-cum-Declaration dated 26.09.2016 in favour of Respondent No.1 indemnifying the Respondent No.1 in the event of default under Facility Agreement. This Undertaking-cum-Declaration is also signed by the Corporate Debtor and placed at page No. 349 of APB. This document clearly depicts the Corporate Debtor as a Co-Borrower. More importantly, it also stipulated that "The Borrower and Co-Borrower are hereinafter collectively referred to as "Co-Borrowers" which shows that they had stepped into each other's shoes. The Facility Agreement dated 29.06.2016 was also executed between Csango and Pacific Link with the Corporate Debtor as Co-Borrower. This agreement appears at page no. 358 of APB wherein the Corporate Debtor has also appended its signature. The Facility Agreement at Clause 25 clearly states that the liability of the Borrowers in respect of this facility "shall be joint and several." Further, in order to secure the

Facility Agreement of 29.09.2016, an Indenture of Mortgage dated 17.10.2016 was executed in favour of Respondent No.1 in which the Co-Borrowers including the Corporate Debtor was a "Confirming Party". This document created a security interest for the said Secured Asset and is placed at page no. 163 of the APB. An Irrevocable Power of Attorney in favour of Respondent No.1 to enforce the security interest created in the said Secured Asset in terms of the Indenture of Mortgage is placed at page no. 345 of APB. Even this document is found to be signed by the Corporate Debtor. At page no. 382 of the APB, we find a Demand Promissory Note dated 29.09.2016 promising jointly and severally to pay to the Respondent No.1 an amount of Rs 10 Cr. for value received with interest. This Demand Promissory Note has also been signed by the Corporate Debtor. The Letter of Continuity for Demand Promissory Note is also placed at page No. 383 of APB which was also signed by the Corporate Debtor. Similarly, for the sanction of Rs 1.50 Cr. dated 04.12.2018, the Corporate Debtor has signed similar documents viz Sanction Letter (page no. 409 of APB), Board Resolution of the Corporate Debtor (page no. 416 of APB), Supplementary Facility Agreement dated 07.12.2018 (page no. 423 of APB).

**13.** The Corporate Debtor having signed multifarious documents in their capacity as "Co-Borrower" including signing of a Demand Promissory Note promising "jointly and severally" to repay the consideration received from the Respondent No.1 with interest cannot now deny the obligations of discharging their liability of repayment of the debt to the Respondent No.1. The Corporate Debtor had also undertaken to indemnify the Respondent No.1 in the event of default under the Facility Agreement and agreed to be a Confirming Party to the

Indenture of Mortgage. Given this backdrop, the ground now taken by the Corporate Debtor that no liability can be fastened on it in respect of a loan facility given to Csango as primary borrower lacks merit since it is a well settled legal precept that the liability of a Co-Borrower and a Primary Borrower has equal and similar liabilities under a Common Loan Agreement. It is pertinent to point out that this Tribunal in the matter of ***State Bank of India Vs Athena Energy Venture Pvt Ltd.*** *in* ***CA(AT)(Ins) No. 633 of 2020*** has held that with the coming into force of Act 26 of 2018, under the amended Section 60(2) and 60(3), CIRP can proceed against the Principal Borrower as well as Guarantor. The said judgment held that IBC has no aversion to simultaneously proceeding against the Corporate Debtor as Principal Debtor and Corporate Guarantor. Therefore, when the Principal Borrower and Guarantor have co-extensive liabilities, we see no reason as to why CIRP proceedings cannot be initiated against a Co-Borrower who has equal and similar liabilities with that of the Primary Borrower under a Facility Agreement which has been jointly signed and executed as in the present factual matrix.

**14.** We also find that the reliance place by the Respondent No. 1 on the judgement of the Hon'ble Supreme Court of India in ***Maitreya Doshi Vs Anand Rathi Global Finance Ltd.*** in ***Civil Appeal No. 6613 of 2021*** is contextually relevant wherein it has held that: *"If there are two borrowers or if two corporate bodies fall within the ambit of corporate debtors, there is no reason why proceedings under Section 7 of the IBC cannot be initiated against both the Corporate Debtors. Needless to mention, the same amount cannot be realised from both the Corporate Debtors. If the dues are realised in part from one Corporate*

*Debtor, the balance may be realised from the other Corporate Debtor being the co-borrower. However, once the claim of the Financial Creditor is discharged, there can be no question of recovery of the claim twice over."*

**15.** The Appellant has however contested the tenability of the Facility Agreement on the ground that it was insufficiently stamped. This contention has been considered by the Adjudicating Authority and held to be an irrelevant ground in adjudicating on the admissibility of a Section 7 petition. The Adjudicating Authority has adverted reference to a judgement of the Hon'ble Madras High Court in ***Spicejet limited v/s Credit Suisse AG [2022 SCC online Mad 112]*** in the matter. We are also of the considered opinion that the liability of a Corporate Debtor cannot be done away merely on the ground of stamping inadequacy in the Facility Agreement. Insufficient stamping is only a technical deficiency which is curable. It has been held by a 7 Judges Bench of the Hon'ble Supreme Court in Curative Petition (C) No. 44 of 2023 while dealing with a constitution bench decision of 5 Judges of the Hon'ble Supreme Court in ***NN Global Mercantile (P) Ltd. Vs Indo Unique Flame Ltd. (2024) 6 SCC 1*** that non-stamping or improper stamping does not result in the instrument becoming invalid. The effect of not paying duty or paying an inadequate amount renders an instrument inadmissible and not void. Hence, we are of the firm view that admission of Section 7 application cannot be obfuscated by raising specious technical pleas.

**16.** We also notice that the Adjudicating Authority has also carefully considered the argument raised by the Appellant that the date of default fell

under Section 10-A period. We are entirely in agreement with the findings of the Adjudicating Authority which is as reproduced below:

> *"4.4. Further the Corporate Debtor has raised a defence that the date of default falls under the Section 10A period. The Section 10A of the Code provides that "no application u/s 7, 9 and 10 shall filed for any default arising on or after 25.03.2020 till 24.03.2021". In the present case the date of default has not occurred between the stipulated period therefore the contention raised by the Corporate Debtor has no substance."*

The date of default as specified in Part-IV of the Section 7 application is 15.03.2020. That being so, the application is clearly not hit by Section 10-A of IBC and the contention of the Appellant is clearly misplaced and hopelessly devoid of merit.

**17.** This brings us to another limb of the argument raised by the Appellant that the Section 7 petition was barred by limitation having been filed on 16.11.2023 while the date of default as specified in Part-IV of the Section 7 application was 15.03.2020. The judgment of the Hon'ble Supreme Court in ***Laxmipat Surana Vs Union Bank of India (2021) SCC Online SC 267*** is a complete answer to the above submission made by the Appellant. This judgment has held that if an acknowledgment is made by the Corporate Debtor of the debt within three years period, which happens to be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, fresh period of limitation shall be available to the Financial Creditor. We notice that the Adjudicating Authority has also dwelled upon this aspect and the relevant findings of the Adjudicating Authority is in line with the above-cited judgement of the Hon'ble Supreme Court. The relevant extract of the judgement is as reproduced below:

*"4.5. This bench notes that, the date of default as specified in part IV of the petition is 15.03.2020. Accordingly, the limitation would ordinarily expire on 14.03.2023. The date of filing of the present petition is 16.11.2023. However, the bench notices that the Corporate Debtor has made a part payment against the loan on 01.05.2021 and accordingly a fresh period of limitation will be computed from 01.05.2021. Considering the aforesaid part payment and corresponding renewal of cause of action, the limitation period stands extended. The captioned petition is therefore fit for admission."*

**18.** We find no sound reasons to disagree with the above findings of the Adjudicating Authority. Apart from the fact that the Corporate Debtor made part payment against the loan on 01.05.2021, we also notice that the Corporate Debtor in their email has acknowledged the outstanding debt under the Facility Agreement and Supplementary Facility Agreement on 11.05.2022 and sought time to liquidate the debt on receipt of sale proceeds of land parcel belonging to them. This acknowledgement has also clearly extended the limitation period. The copy of the e-mail is as reproduced below:

*"From: Narang Civilisation*
*narangcivilisation@yahoo.co.in*
*To: rajendra.pednekar@adityabirlacapital.co*
*Santanu.basu@adityabirlacapital.com*
*Sent: 11 May 2022 09:50 AM*

*Subject: loan Account A/c ABFLMUMLAP0000003433 & ABFLMUMLAP0000038261*

*dear rajendra ji dear shantanu*

*we understand that we have outstanding payments to be made for the above loan accounts. we have transacted our land parcel at boisar, however we need 1 month to conclude the receipt of the 1st tranche of the payment of this sale. Kindly bear with us. we humbly thank you for your patience and obliging us as we look forward to conclude these above mentioned payments."*

**19.** Thus, in the instant matter, whether we factorise the part payment against the loan on 01.05.2021 or take into account the email of the Appellant of 11.05.2022 wherein the outstanding debt under the Facility Agreement and Supplementary Facility Agreement has been acknowledged, the present application having being filed within three years from the date of acknowledgement of the debt, it cannot be held to be barred by time.

**20.** This now brings us to the submission raised by the Appellant that the Corporate Debtor was required to be given time to regularise its loan account in terms of RBI circular before declaring the account of the Corporate Debtor to be NPA under the SARFAESI Act. We do not find much substance in the contention of the Appellant that they were denied adequate opportunity to regularise their loan account. Respondent No.1 on 24.02.2020 vide their letter had accepted to regularise the loan account of the Corporate Debtor subject to payment of an amount of Rs 2.38 Cr. towards the over-due debt on or before 15.03.2020. We also find that in response to this letter, the Corporate Debtor deposited Rs 1 Cr. in two tranches but failed to pay the balance amount as assured by 15.03.2020 to regularise the loan account. Furthermore, declaration of account as NPA under the SARFAESI Act is an independent proceeding and cannot be adopted as a defence to obstruct the Financial Creditor from proceeding under IBC to initiate CIRP against the Corporate Debtor.

**21.** This now brings us to the submission raised by the Appellant that the key ingredient of Section 5(8) of the IBC of disbursement of loan against consideration for time value of money by the Financial Creditor qua the

Corporate Debtor is missing and hence this is not a fit case for initiation of Section 7 proceedings. We now proceed to examine whether in the present case, disbursement of money by the Respondent No.1 took place against the consideration for time value of money. It is well settled principle of law that Section 5(8) of IBC is a residuary provision with a catch-all nature and includes money borrowed against the payment of interest. In the instant case, the Sanction Letter clearly provides that 15% p.a. floating interest linked to Long Term Reference Rate of the Financial Creditor was applicable. The loan facility having been extended by Respondent No.1 being interest-bearing, this disbursement squarely falls within the purview of Section 5(8)(a) of the IBC and has all the trappings of a financial debt. We therefore, do not find any force in the contention of the Appellant that the disbursal of funds by the Respondent No.1 was without consideration for time value of money.

**22.** Before we proceed further, it is relevant to take note of the findings which have been returned by the Adjudicating Authority in the impugned order, the relevant excerpts of which are as reproduced below:

> *"4. This bench has perused the documents and pleadings available on record and considered the arguments of both the sides.*
>
> *4.1 This bench observed that the facility agreement dated 29.09.2016 is duly executed by the Borrower as well as the Co-Borrower, therefore, the Corporate Debtor cannot at this stage contend that the debt is not a financial debt as it a settled law that the liability of borrower and co-borrower is co-extensive.*
>
> *4.2 This bench notes that vide letter dated 10.02.2020 the Corporate Debtor has acknowledged the outstanding debt. Moreover, the Corporate Debtor has also made part payments in furtherance of the debt. Considering the aforesaid facts, we hold that the defence of the Corporate Debtor on this ground holds no merit.*

.....

*5. The factum of existence of financial debt and its default stands proven on record. It has also been established that the petition is within time. Considering the facts placed before us and the fact that, the Corporate Debtor owes the Financial Debt in excess of Rs.1 Crore, which is in default, this bench is of the view that in such circumstances, it is imperative that the Corporate Insolvency Process be initiated in the matter of the Corporate Debtor."*

**23.** The trigger for initiation of the corporate insolvency resolution process by a Financial Creditor under Section 7 of IBC is the occurrence of a default by the Corporate Debtor beyond a prescribed threshold limit. Default in the IBC framework means the incidence of non-payment of debt in whole or in part when the debt has become due and payable, in law and in fact. In the present facts of the case, there is no doubt in our minds that facility amount was disbursed by the Respondent No.1. No claim has been made that the loan facility was repaid by the Primary Borrower or the Co-Borrowers. There is clearly no material on record to show that this debt had been liquidated by the Corporate Debtor. This debt had also been clearly acknowledged by the Corporate Debtor in their reply to the SARFAESI notice. It is also an undisputed fact that a re-structuring proposal had been sent by the Corporate Debtor to the Respondent No.1 on 10.02.2020 and 20.02.2020 acknowledging their liability to pay to the Respondent No. 1. Having sent a re-structuring proposal, the Corporate Debtor has no good grounds to deny that they were not wearing the shoes of the Co-Borrower. The acknowledgment of debt in the present facts of the case is therefore clear and unambiguous and nothing on record controverts the position that there was a default in repayment. That being the case, there arises no doubt in our minds that there was a debt on the part of the Primary Borrower and the

Co-Borrowers qua the Financial Creditor which remained unpaid. The obligation of the Co-Borrower is coextensive and coterminous with that of the Primary Borrower and hence a right or cause of action becomes available to the financial creditor to proceed against the primary borrower, as well as the Co-Borrower in equal measure in case they commit default in repayment of the amount of debt. We are of the considered opinion that since in the facts of the present case, a debt has arisen which is due and payable by the Corporate Debtor and a default has occurred, the Respondent No. 1 was entitled to file the Section 7 application. We are also of the considered view that Section 7 application filed by the Financial Creditor was not barred by time and the debt and default being proven, the Adjudicating Authority did not commit any error in admitting the Section 7 application.

**24.** In view of the foregoing discussions, we do not find any error in the judgement of the Adjudicating Authority admitting the Section 7 application. There is no merit in the Appeal. The Appeal stands dismissed. No costs.

**[Justice Ashok Bhushan]**
**Chairperson**

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

**[Arun Baroka]**
**Member (Technical)**

**Place: New Delhi**

**Date: 25.09.2024**

Harleen/Abdul