NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1617 of 2023 & I.A. No. 5841, 5842, 5843 of 2023

(Arising out of the Order dated 28.03.2023 passed by the National Company Law Tribunal, Mumbai Bench, Court-III in IA No. 2376 of 2020 in CP No. 27 of 2019.)

IN THE MATTER OF:

Global Indian School Education Services Pvt. Ltd. …Appellant
Through its Legal Manager,
B-4/232, Safdarjung Enclave
New Delhi – 110029.
Email – legal.india@globalindianschool.org

Versus

Mr. Abhay Narayan Manudhane,
Resolution Professional
Housing Development and Infrastrucure Ltd.
201, Shubh Ashish, 129
Model Town, Andheri (West)
Mumbai – 400053. **…Respondent**

Present

For Appellants: **Mr. Krishnendu. Datta, Sr. Adv. with Mr. Varun K., Mr. Parag K., Ms. Falguni Thakkar, Mr. Rahul Gupta, Adv.**

For Respondents: **Ms. Meghna Rao & Mr. Harshit Goel, Adv.**

J U D G E M E N T

(13.02.2025)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal has been filed by the Appellant i.e., Global Indian School Education Services Pvt. Ltd. under Section 61 (1) of the Insolvency and

Bankruptcy Code, 2016 ("**Code**") against the Impugned Order passed in Interlocutory Application No.2376 of 2020 by the National Company Law Tribunal, Mumbai Bench ('**Adjudicating Authority**') on 28.03.2023.

2. Mr. Abhay Narayan Manudhane who is the Resolution Professional of Housing Development and Infrastructure Ltd. (**Corporate Debtor**) is the Respondent No.1 herein.

3. The Appellant submitted that on 19.12.2015, a Memorandum of Understanding ('**MoU**') was duly executed between the Appellant and the Corporate Debtor concerning the land identified as CTS No. 551/27, 552 (PT), 552/1, 552/5 to 552/12, situated in Village Nahur, Taluka Kurla, M.S.D. LBS Marg Mulund (West), Mumbai. This land measures approximately 7632.10 square meters and is referred to as the "said Land". The MoU stipulated that the Corporate Debtor is responsible for constructing a "built to suit" building on the said Land, which is intended for the establishment and operation of a school by the Appellant. The Appellant emphasizes that this MoU outlines the mutual obligations and expectations of both parties.

4. The Appellant submitted that, as per clause 8.1(i) of MoU, the Appellant was obligated to pay a sum of Rs. 2,37,61,440 to the Corporate Debtor which is undisputed fact.

5. The Appellant submitted that, in accordance with the terms of the MoU, the Corporate Debtor was required to fulfil certain Conditions Precedent to the satisfaction of the Appellant prior to the demising of the said Land, along with

the Building constructed thereon, in favor of the Appellant which was Conditions Precedent, essential prerequisites needed to be met before any transfer of rights could take place regarding the said Land and Building.

6. The Appellant submitted that, as stipulated in clause 3.3 of MoU, in the event where the Corporate Debtor fail to fulfil the Conditions Precedent to the satisfaction of the Appellant by June 1, 2016, or within any mutually agreed timeframe, the Appellant retains the right to terminate the MoU at its discretion by providing written notice to the Corporate Debtor. Furthermore, upon receipt of such notice, the Corporate Debtor is obligated to refund all amounts paid by the Applicant up to the date of termination within 30 days, including interest at a rate of 9% per annum.

7. The Appellant submitted that, despite the passage of nearly 3 years since the execution of the MoU, the Corporate Debtor failed to fulfil any of the Conditions Precedent which is violation of the obligations set forth in the MoU.

8. The Appellant stated that he sent several emails to the property consultants, Jones Lang LaSalle Property Consultants India Pvt. Ltd. ("**JLL**"), who had introduced the Corporate Debtor to the Appellant. In this correspondence, the Appellant expressing his concerns about various uncertainties in the project and not getting conditions precedent fulfilled by the Corporate Debtor. This delay further exacerbates the concerns regarding the Corporate Debtor's compliance with its obligations under the MoU. The Appellant submitted that on 4th March 2019, the Appellant sent an email to the Corporate Debtor referencing a recent

conversation and multiple telephonic discussions regarding the MoU and conveyed that due to an unconscionable delay by the Corporate Debtor in fulfilling the Conditions Precedents, the Appellant had decided to move on from the agreement and requested that the Corporate Debtor provide information regarding the modalities for the refund of the Principal Amount. This was followed up by various other emails requesting the Corporate Debtor to refund his money back.

9. The Appellant submitted that in the first week of June 2019, the Corporate Debtor had a meeting in Bandra, Mumbai, during which they discussed the modalities for the refund of the Principal Amount when the Corporate Debtor agreed to the Appellant's request for a refund. The Appellant submitted that soon after his meeting with the Corporate Debtor, the CIRP for the Corporate Debtor commenced following an order dated August 20, 2019, issued by the Adjudicating Authority in C.P. (IB) -27/I&BP/MB/2019 on an application filed by the Bank of India, against the Corporate Debtor under Section 7 of the Code.

10. The Appellant submitted that on August 29, 2019, the Respondent issued a Public Announcement, as required under Regulation 6 of the CIRP Regulations, inviting all creditors to submit their claims along with supporting proof and then only the Appellant became aware of the CIRP of the Corporate Debtor and submitted Form C on August 20, 2020 claiming of Rs. 3,16,18,339 comprising Rs. 2,37,61,440 as the Principal Amount and Rs. 78,56,899 as simple interest calculated at a rate of 9% per annum from December 19, 2015 (the date on which

the Principal Amount was lent) until the commencement of CIRP on August 20, 2019.

11. The Appellant submitted that, in response to the Form C, the Respondent, through an email dated September 1, 2020, unlawfully rejected the Appellant's claims and classified him as an 'Operational Creditor' and directed the Applicant to resubmit its claim using Form B, which is designated for Operational Creditors.

12. The Appellant submitted that, in its email dated September 3, 2020, he clarified to the Respondent that despite being identified as Lessor and Lessee in the MoU, the proposed Lease never materialized and therefore there was no relationship of 'Lessor,' and 'Lessee' with the Corporate Debtor. The Appellant explained that the Corporate Debtor's commitment to lease the land and building was contingent upon fulfilling the Conditions Precedent outlined in Clause 3.1 of the MoU and due to failure by the Corporate Debtor to meet these conditions entitles him to terminate the MoU with written notice, requiring the Respondent to refund all amounts paid up to termination, including interest at 9% per annum, which encompasses the Principal Amount. The Appellant submitted that as per the MoU, the Corporate Debtor was obligated to return the Principal Amount with interest by April 3, 2019, in accordance with Clause 3.3 and since the proposed Lease never came into existence, the Principal Amount constitutes a Financial Debt owed by the Corporate Debtor to the Appellant, as it involved borrowed funds with a commercial effect of borrowing, thus it should have been classified as Financial Debt rather than Operational Debt.

13. The Appellant submitted that the Respondent sent an Email on 24th September 2020, in which the Resolution Professional reversed his previous position and claimed that the Appellant's assertion of Financial Debt does not qualify as either 'Financial Debt' or 'Operational Debt'; instead the claim falls under the category of "other creditors" as per Regulation 9A of the CIRP Regulations, primarily on the ground that the transaction pertained to a 'lease.' The Appellant emphasizes that there was no lease agreement executed between him and the Corporate Debtor; thus, the Corporate Debtor could not be classified as a Lessor, nor can the Appellant be considered as lessee. The Appellant challenged the Impugned Email of the Resolution Professional dated 24.09.2020 by filing Interlocutory Application No. 2376 of 2020 in C.P. No. (IB) 27/ MB/2019 which was dismissed by the Adjudicating Authority in the Impugned Order dated 28.03.2023

14. The Appellant submitted that the Adjudicating Authority failed to appreciate that the Applicant's claim is clearly a 'Financial Debt' as defined under Section 5(8) of the Code. The claim pertains to a debt, along with interest, disbursed by the Appellant to the Corporate Debtor against the time value of money. The disbursement of the Principal Amount was specifically for financing the construction of a building on the said land, and this amount was utilized by the Corporate Debtor as a means of finance for the said construction. The transaction, therefore, has a clear commercial effect of borrowing, satisfying the requirements under Section 5(8) of the code.

15. The Appellant submitted that the MoU constituted a commercial transaction between the parties, with profit as its primary objective and both the Appellant and the Corporate Debtor had a vested commercial interest in the MoU, making it evident that the Principal Amount provided by the Corporate Debtor falls within the definition of 'Financial Debt' under Section 5(8) of the Code. The Corporate Debtor effectively availed financing from the Appellant to fund the construction of a building on the designated land.

16. The Appellant assailed that the Impugned Order where it concluded that the clause providing for interest was not integral to the Corporate Debtor's obligations but merely a collateral term to the main agreement. The Appellant pleaded that the Corporate Debtor neither fulfilled the conditions precedent nor constructed the building, and as per its terms, upon termination, the Corporate Debtor was liable to refund the amounts paid by the Applicant with interest at 9% per annum.

17. The Appellant stated that the Adjudicating Authority failed to appreciate that the contention of the Respondent claiming the Applicant as a "Lessee" under the MoU is unfounded, as the MoU does not constitute a 'Lease Deed'; at best the MoU represents an Agreement to Lease, which did not materialize due to the Corporate Debtor's failure to meet the Conditions Precedent. The Appellant stated that mere designation of the Appellant as a 'Lessee' within the MoU does not automatically confer such a legal status. The Appellant further argued that a holistic reading of the MoU clearly demonstrates that the proposed Lease Deed

was contingent upon the Corporate Debtor's compliance with specific conditions, none of which were satisfied, thereby negating any claim that the Appellant is a 'Lessee' under law.

18. The appellant submitted that, despite the MoU designating the parties as "Lessor" and "Lessee," the actual relationship between them was that of a "borrower" and "lender." This assertion is grounded in the fact that the Conditions Precedent outlined in the MoU were never fulfilled by the Corporate Debtor, thereby preventing the establishment of a lease agreement as specified in Clause 5 of the MoU. The Appellant pleaded that when interpreting contractual documents, the true nature of the transaction should be discerned and the genuine intentions of the parties involved, rather than relying solely on terminologies used. The Appellant pleaded that the Hon'ble Supreme Court in the case of ***Yellapu Uma Maheswari v. Buddha Jagadheeswararao*** *[(2015) 16 SCC 787]*, which emphasizes that substance should prevail over form in legal interpretations.

19. The appellant submitted that there is no correlation between the amount paid as a security deposit and the services rendered by the Corporate Debtor. A review of Clause 3 of the MoU, which outlines the Conditions Precedent, reveals that the Corporate Debtor was required to obtain various approvals, certificates, sanctions, and permissions from the Municipal Corporation of Greater Mumbai ('**MCGM**'), banks, financial institutions, and other government authorities. However, as indicated in Clause 8.1(i) of the MoU regarding the Security Deposit,

an amount of Rs. 2,37,61,440/- was to be deposited with the Corporate Debtor as six months' rent for Phase I Premises. Since the building was never constructed and the lease agreement was never executed, the rent was never due. Consequently, the amount paid by the appellant to the Corporate Debtor of Rs. 2,37,61,440 should be considered merely an "advance." Therefore, it is asserted that there is no meaningful connection between the funds disbursed and any operational services provided by the Corporate Debtor. The Appellant stated that the lack of correlation implies that the debt owed does not qualify as an operational debt.

20. The appellant submitted that the fully refundable security deposit of Rs. 2,37,61,440 as outlined in Clause 3.3 of the MoU, constitutes a financial debt under Section 5(8)(f) of the code as this clause states that if the Corporate Debtor fails to fulfil the Conditions Precedent by July 1, 2016, it is obligated to return the security deposit to the appellant and any failure to return this amount within 30 days, interest at the rate of 9% per annum would apply. Given that the Conditions Precedent were not met by the Corporate Debtor, the Appellant requested refund. The refundable nature of this amount, coupled with the stipulated interest rate, indicates that this transaction has the commercial effect of borrowing. The appellant asserts that since the security deposit is entirely refundable with interest, as clearly stated in Clause 8 of the MoU, it aligns with the definition of financial debt under Section 5(8)(f) of the code. The precedent set in ***Pioneer Urban Land and Infrastructure Ltd. v. Union of India*** *[(2019) 8 SCC 416]* further supports

this interpretation, affirming that such amounts raised under agreements can indeed be classified as financial debt due to their nature and terms.

21. The appellant submitted that the amount paid to the Corporate Debtor has been classified as "Loans and Advances" in the audited financial statements for the fiscal year 2015-16. In contrast, the Respondent's counsel was unable to locate any receipt of this amount in their audited statements but provided a single ledger page indicating the receipt of Rs. 2,37,61,440/- labelled as a "Security Deposit."

22. The appellant submitted that the Respondent's attempt to distinguish the case of ***Global Credit Capital Limited & Anr. vs. Sach Marketing Pvt. Ltd. & Anr.*** *[(2024) SCC OnLine SC 649]*, on the basis that the agreement in that case provided for the refund of the security deposit along with interest, whereas the present agreement does not, is unfounded. In fact, Clause 3.3 of the current agreement explicitly stipulates the refund of the advance along with interest. Moreover, both in ***Global Credit Capital Limited (Supra)***, the Hon'ble Supreme Court has made it clear that interest is not the sole determining factor in classifying a debt as a financial debt. Therefore, the distinction drawn by the Respondent lacks a valid basis. The appellant asserts that the true nature of the transaction should be assessed based on its commercial effect rather than solely on specific terms regarding interest payments. Thus, the appellant contends that the present transaction should be recognized as a financial debt under Section 5(8)(f) of the Code, consistent with precedents established by the Supreme Court.

23. Concluding his arguments, the Appellant urged this Appellate Tribunal to dismiss the Impugned Order and allow his appeal.

24. Per contra, the Respondent denied all the averments made by the Appellant in the present appeal.

25. The respondent submitted that, promptly following his appointment as the interim resolution professional pursuant to the Admission Order, he published the Public Announcement on 29.08.2019, in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process) Regulations, 2016 ("**CIRP Regulations**"). This announcement called upon all creditors to submit their respective claims along with supporting documentation using the prescribed forms outlined in the CIRP Regulations.

26. The respondent submitted that on 20.08.2020, the appellant submitted a belated claim in Form C, nearly a year after the cut-off date for filing claims, which was 08.09.2019. This claim amounted to Rs. 3,16,18,339/-, consisting of the principal amount of Rs. 2,37,61,440/- and Rs. 78,56,899/- as simple interest calculated at a rate of 9% per annum from the date the principal was lent to the Corporate Debtor on 19.12.2015, until the commencement of the CIRP on 20.08. 2019.

27. The respondent submitted that, in fulfilling his duties and obligations as the Resolution Professional of the Corporate Debtor, he examined the appellant's claim and, in an email dated 01.09.2020, informed the appellant that their claim could be considered despite its delayed submission. However, this consideration

was contingent upon the appellant submitting the claim in the correct form as required by the applicable regulations.

28. The respondent submitted that in response to the email from the appellant, the Resolution Professional sent an email dated September 24, 2020, providing detailed reasoning as to why the claim filed by the appellant did not qualify as either a financial or operational debt. The Resolution Professional requested that the appellant re-file their claim under Regulation 9A of the CIRP Regulations, categorizing it as an "other creditor." The Respondent submitted that in both emails dated 01.09.2020, and 24.09.2020, the Resolution Professional did not reject the appellant's claim outright. Instead, he proceeded with the verification process and sought to guide the appellant in properly submitting their claim in accordance with the relevant regulations.

29. The Respondent submitted that it is important to note that the MoU does not specify that the monies paid were in consideration of the time value of money. According to Clause 8 of the MoU, the sum of Rs. 2,37,61,440/- provided by the Appellant to the Corporate Debtor was classified as a security deposit. This deposit is refundable without any interest upon the completion of the contractual terms between the parties, which is set to occur after 30 years from the execution of the MoU. Therefore, the assertion that this amount constitutes a financial transaction based on the time value of money is unfounded, as the terms clearly outline that it is a security deposit subject to specific conditions.

30. The Respondent submitted that the conditions outlined in Section 5(8) of the Code for classifying a debt as a financial debt have not been met in this case. Specifically, Section 5(8) defines financial debt as a debt that is disbursed against consideration for the time value of money, which includes money borrowed against interest or any amount raised with a commercial effect of borrowing. The Hon'ble Supreme Court in ***Pioneer Urban Land and Infrastructure Limited (Supra)*** has established that for a debt to qualify as financial debt, three criteria must be satisfied: (i) there must be a disbursal of money, (ii) the transaction must have a commercial effect of borrowing, and (iii) there must be consideration for the time value of money. This position was reaffirmed in ***New Okhla Industrial Development Authority v. Anand Sonbhadra*** *[(2023) 1 SCC 724]*, which upheld the principles laid down in ***Pioneer Urban Land and Infrastructure Limited (Supra)***.

31. The Respondent submitted that, while it is true that the Appellant disbursed an amount, the other two conditions stipulated in Section 5(8) of the Code have not been satisfied in this case and the transaction lacks a commercial effect of borrowing as there is no consideration for the time value of money. Therefore, the claim cannot be classified as a financial debt under the provisions of the Code.

32. The Respondent submitted that Clause 8 of the MoU states that the security deposit is fully refundable without any interest upon the termination of the lease, which is set to occur after 30 years. Consequently, since no interest is payable on

the security deposit, it does not possess any time value for money nor does it exhibit a commercial effect of borrowing.

33. The Respondent submitted that Clause 3.3 of the MoU stipulates that interest is payable to the Appellant by the Corporate Debtor only upon termination of the MoU by the Appellant through a written notice. The Respondent stated that this interest, payable upon termination, is characterized as liquidated damages and does not carry any profit motive. Therefore, the inclusion of this interest clause does not transform the security deposit into a financial debt under the provisions of the Code.

34. The Respondent submitted that Clause 8.5 of the MoU outlines the circumstances under which the security deposit may be forfeited by the Corporate Debtor. Notably, this includes situations where, despite the fulfilment of the Conditions Precedent by the Corporate Debtor as specified in Clause 3, the parties fail to enter into the lease deeds and subsequently terminate the MoU. This provision allows the Corporate Debtor to forfeit the security deposit, indicating that the transaction does not possess a commercial effect of borrowing. Therefore, it is clear that the nature of this transaction does not align with the characteristics required for it to be classified as a financial debt.

35. The Respondent submitted that this Appellate Tribunal, in ***Budhpur Buildcon Pvt. Ltd. Vs. Abhay Narayan Manudhane, Resolution Professional*** *[(2022) SCC OnLine NCLAT 3854*], has held that interest in the form of liquidated damages or penal interest payable upon the termination of a contract does not

qualify a debt as a financial debt. Specifically, the Appellate Tribunal noted that liquidated damages, as defined under Section 74 of the Indian Contract Act, 1872, do not constitute part of financial debt. This precedent underscores that such penalties are not aligned with the characteristics required for classification as financial debt under the Code.

36. The Respondent submitted that, in the present case, the interest on the security deposit is payable only upon the termination of the MoU, which characterizes this interest as penal interest or liquidated damages. Since this interest is contingent upon termination, it does not carry any profit motive. Moreover, it is clear that the security deposit was intended solely to secure rent payments and does not exhibit a commercial effect of borrowing. Additionally, the interest clause in the MoU aligns with Section 74 of the Indian Contract Act, 1872, which pertains to liquidated damages and further reinforces that it cannot be classified as a financial debt. Therefore, the presence of this interest clause does not transform the security deposit into a financial debt under the provisions of the Code.

37. The Respondent submitted that the law laid down by the Hon'ble Supreme Court in ***Global Credit Capital Limited (Supra)***, is not applicable to the facts of the present case. In *Global Credit*, the agreement contained a specific clause for payment of interest on the security deposit from the very first day of deposit, which was not contingent on any event. Additionally, there was no forfeiture clause in the agreement. The agreement, structured as a letter, provided for a fixed

monthly remuneration of Rs. 4,000/- against a security deposit of Rs. 53,15,000. The Hon'ble Supreme Court held that the security deposit in *Global Credit* constituted financial debt due to several factors: (i) the fixed interest clause in the agreement, (ii) absence of a forfeiture clause, (iii) the relationship between the deposit and the object of the agreement, and (iv) how both the Corporate Debtor and Creditor treated the deposit and interest in their respective books of accounts. These distinguishing features are absent in the present case, making the principles laid down in *Global Credit* inapplicable to this matter.

38. The Respondent submitted that, as per Clause 3 of the MoU the conditions precedent and the procedure for the Appellant to terminate the MoU require a written notice. Specifically, Clause 3.3 mandates the issuance of such a notice, while Clause 22 outlines the requirements for delivering that notice, which must be signed and delivered in writing. To date, the Appellant has not issued any notice as stipulated in Clauses 3.3 and 22 for terminating the MoU. Therefore, since no termination has occurred, the clauses regarding the refund of the security deposit and any associated interest have not come into effect.

39. The Respondent submitted that the email dated March 4, 2019, sent by the Appellant to the Corporate Debtor does not indicate any intention to terminate the MoU. Similarly, the email dated 22.03.2019, fails to clarify the Appellant's intent regarding termination. Neither of these emails requests a refund of the security deposit along with interest from the Corporate Debtor. Furthermore, the email dated 11.06.2019, from JLL to the Appellant does not provide any indication of

whether they wish to proceed with or terminate the MoU. This email suggests further discussion but does not mention a refund of the security deposit along with interest. Additionally, the email dated 21.06.2019, from the Appellant to the Corporate Debtor does not state that the refund of the security deposit was discussed during their meeting.

40. The Respondent submitted that since the MoU has not been terminated by the Appellant to date, the principal amount, i.e., the security deposit, has not become payable. Moreover, interest on the security deposit is only payable upon termination of the MoU by the Appellant, which has not occurred. The payment of interest is contingent upon either termination of the MoU or lease deeds by the Corporate Debtor. The Respondent further asserts that the interest provided under the contract is not associated with any debt but is merely in the form of liquidated damages or penalties for a timely refund of the security deposit upon termination. The Respondent stated that Appellate Tribunal in ***Budhpur Buildcon Pvt. Ltd. (Supra)*** has held that penal interest does not meet the criteria for financial debt and cannot be claimed as such.

41. The Respondent submitted that, since the Appellant has not terminated the MoU to date, the clause regarding the refund of the security deposit along with interest has not come into effect. Consequently, the claim made by the Appellant does not qualify as a financial debt under the provisions of the Code.

42. The Respondent further submitted that any delays in fulfilling the Conditions Precedent on the part of the Corporate Debtor were attributable to the

delay in the notification of the Development Plan 2034 and the Development Control and Promotion Regulation 2034 by the Government of Maharashtra. The Development Plan 2034 was officially notified on 08.05.2018, and the Development Control and Promotion Regulation 2034 came into effect on 13.11.2018. The parties were aware of these developments from the time they entered into the MoU, as they specifically included provisions regarding changes in the Development Plan within the MoU itself. Therefore, any potential termination of the MoU would be influenced by these force majeure circumstances, which would preclude the activation of any interest clause.

43. The Respondent submitted that the emails dated 28.04.2018, 07.05.2018, and 19.07.2018, support the assertion that the parties to the MoU were aware of the force majeure conditions being in effect. Therefore, even if the email dated March 4, 2019, is considered a notice of termination under the MoU, such termination would be attributable to a force majeure event, which does not result in the payment of interest on the security deposit. Without the interest being payable, the security deposit fails to meet the criteria for classification as a financial debt under Section 5(8) of the Insolvency and Bankruptcy Code.

44. The Respondent submitted that, while there are claims that may be admitted by the Resolution Professional, not all claims fall within the definition of financial debt. The impugned emails from the Respondent do not constitute a rejection of the Appellant's claim; rather, they merely request that the Appellant submit the claim in the proper form and category.

45. Concluding, his arguments the Respondent submitted that the Adjudicating Authority correctly rejected the Appellant's request to classify the security deposit as a financial debt and to recognize the Appellant as a financial creditor. Therefore, the present appeal lacks merit and should be dismissed.

Findings

46. We have already noted the facts of the case earlier. The only point to be decided in the present appeal is whether the claims of the Appellant should have been treated as financial debt or as other debt as classified by the Respondent. It is the case of the Appellant that he signed a MoU with the Corporate Debtor under which the Corporate Debtor was to perform its duties and meet the conditions precedent by stipulated dates. The Appellant submitted that purpose of the MoU was to create a school by the Corporate Debtor which could be operated by the Appellant for thirty years.

47. The Appellant conceded that although the term 'lessor' and 'lessee' and lease, etc., have been used in the MoU, no such lease agreement was created ever since the Corporate Debtor could not fulfil any of the formalities and develop the building and infrastructure as stipulated in the MoU.

48. It is the case of the Appellant that since the Corporate Debtor failed to perform his part of obligation, the advance given by the Appellant assumed the character of financial debt in terms of Section 5(8) of the Code. He highlighted the relevant clauses of the MoU to buttress his point.

49. The Appellant submitted that his relationship with the Corporate Debtor was of financial creditor and financial debtor therefore, the amount given by him should have been treated as a financial debt.

50. The Appellant argued that since lease agreement was never executed as such there has been no co-relation between the amount paid under MoU as security deposit as claimed by the Respondent. It is the case of the Appellant that in terms of Clause 8.1(i) of the MoU, Rs. 2,37,61,440/- was deposited by the Appellant with the Corporate Debtor as six months rents of property of phase-I but since no building was constructed by the Corporate Debtor, the deposit could not have been treated as operational debt. The Appellant further argued with this was more in nature of mobilisation advance for helping the Corporate Debtor to construct school building which is akin to financial debt.

51. The Appellant cited the case passed by the Hon'ble Supreme Court of India in the matter of ***Global Credit Capital Limited (Supra)*** according to which such mobilisation advance should have been treated purely as a financial debt. He also negated the arguments of the Respondent differentiating the ***Global Credit Capital Limited (Supra)*** with the present appeal and argued that since, the security deposit was fully refundable in terms of Clause 3.3 of the MoU , thus it can be treated as financial debt.

52. The Appellant has elaborated that the amount paid has been shown by him as "loans and advance" in the financial statement for the year 2015-16 which have

been duly audited thus, the transaction is having commercial effect of borrowing in terms of Section 5(8)(f) of the Code.

53. On the other hand, the Respondent had categorically stated that initially based on the Appellant's claim, the claim was classified as financial debt. However, during scrutiny, the Respondent found that the claims do not meet the basic requirements of Section 5(8) of the Code as well as the ratio of landmark judgment as delivered by the Hon'ble Supreme Court of India in the matter of ***Pioneer Urban Land and Infrastructure Limited & Anr. vs. Union of India & Ors.*** *[(2019) 8 SCC 416]* i.e., although there was disbursal of money as security deposit, the transaction did not have a commercial effect of borrowing as there was no time value of money.

54. The Respondent submitted that the ratio of the judgment the Hon'ble Supreme Court of India passed in ***Global Credit Capital Limited (Supra)*** is not applicable in the present case as the agreement in question in the said judgment of the Hon'ble Supreme Court of India provided for refund for the security deposit along with interest which is not the case in the present appeal.

55. The Respondent also submitted that in the books of the Corporate Debtor, the said security deposit has not been reflected as loans or advance taken from the Appellant and hence the claims of the Appellant could not have been accepted as financial debts. The Respondent submitted that in fact the Corporate Debtor has treated the security deposit as other "current liability" and shown clearly as security deposit. Further, the Respondent argued that even the Appellant has not

made any provision of payment of interest in their own books of accounts, thus the Appellant has no merit in the appeal.

56. The Respondent refuted the claim of the Appellant that interest @9% p.a. has been provided in the MoU and submitted that this stipulated interest is in nature of penalty in case of default of by the Corporate Debtor for payment of lease rentable and thus, the same cannot be treated as having commercial effect of the borrowing in terms of the Code.

57. The Respondent pleaded that even assuming but not accepting that in terms of Clause 3 of the MoU, the Appellant had right to terminate and seek the money back, however, the fact remains that the Appellant till date has not terminated the MoU invoking Clause 22 of the MoU. The Respondent highlighted that the email dated 04.03.2019 sent by the Appellant to the Corporate Debtor does not mention anything about the termination of MoU.

58. The Respondent argued that the interest provided under the MoU is not against any debt but is only in form of the liquidated damages or penalty for timely refund of the security deposit upon termination of MoU.

59. The Respondent highlighted that in terms of judgment of this Appellate Tribunal delivered in the case of ***Budhpur Buildcon Pvt. Ltd. (Supra)*** it has been held that penal interest cannot be classified as financial debt and therefore, even in the present appeal the clause of penal interest for non-refund of security deposit cannot be treated as financial debt.

60. After, noting the pleading of the parties we need to look into the relevant clause of the MoU which are reads as under :-

> *"**Clause 3.3**- In the event the Lessor is unable to fulfill the Conditions Precedent to the satisfaction of the Lessee within the aforementioned period, then Lessee may at its own discretion terminate this MOU by issuing a written notice to the Lessor. Within 30 days of receipt of the notice the Lessor shall refund the amounts paid to it till the date of such termination along with interest thereon @ 9% per annum.*
>
> ***Clause 4.5** – The Lessee shall at its own cost and expense appoint a Project Manager who shall co-ordinate with the Lessor during the construction of the Building and will receive from the Lessor a monthly report (Work in Progress Report) with weekly email updates. The Parties agree that they shall jointly inspect ongoing construction on the said Land once a month till completion of the same.*
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> ***Clause 8.1(i)** –Six months of the Phase I Premises Rentals equivalent to a sum of Rs. 2,37,61,440/- (Rupees Two Crore Thirty Seven Lacs Sixty One Thousand Four Hundred Forty only) paid simultaneously against execution of the MOU;"*
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> ***Clause8.5** –Notwithstanding anything to the contrary contained herein, it is expressly agreed that Lessee's obligation to hand over vacant possession of the Property to the Lessor shall arise only if the Lessor is ready and willing to simultaneously refund and repay to Lessee the Security Deposit and has complied with all their obligations under the lease deeds. Till the refund of the Security Deposit to the Lessee by the Lessor, the Lessee shall be entitled to remain in*

occupation of the said Property without payment of any Rentals or any other amounts or charges whatsoever till the Security Deposit is repaid by the Lessor and such continuing in possession of the said Property by Lessee shall not constitute a default or a trespass of the Property by it under this MOU and/or the lease deeds proposed to be executed by Lessor in favour of Lessee. Further, the Lessor shall be liable to pay interest at the rate of 9% per annum on the Security Deposit from the date the Security Deposit was to be refunded to the Lessee till the Lessor refunds the same. However, if upon the expiry, or termination, or earlier determination, of Lease Term the Lessee fails, refuses, or neglects to vacate and hand over the said Property to the Lessor and/or fails, refuses or neglects to observe, perform, comply with, and/or satisfy any of its obligations under the Lease Deed, (i) the Lessor shall be entitled to withhold the entire Security Deposit (without any interest liability thereon) and (ii) the Lessee shall be liable to pay to the Lessor, in addition to the prevailing Rentals and all other amounts payable by the Lessee under the lease deed, the entire property rates and taxes, cesses, outgoings, statutory impositions etc. levied/charged in respect of the Property together with pre-estimated liquidated damages of such amount being twice the per day rent and/or Revenue (which the lessor and the Lessee consider to be reasonable, and not as a penalty) for wrongful use of the Building and the said Land calculated from the date of the expiry, or termination, or earlier determination of the Lease, till the Lessee vacates and hands over charge of the Building and the said Land to the Lessor and complies with

all its obligations as aforesaid. The aforesaid rights of the Lessor shall be without prejudice to all its rights and remedies under the lease deed and under law against the Lessee."

Clause 22 *–All notices, consents and approvals to be given under this MOU shall be in writing and shall unless otherwise provided herein or mutually agreed between the Parties be signed by oniy the authorized signatory of the Parties and any notice to be given to the Parties as intimated to each other by the Parties from time to time shall be considered as duly served if the same shall have been delivered to, left or posted addressed to the concerned Party at its address first hereinabove mentioned in this MOU. Any change in the address of the Parties should be immediately notified in writing to the other Parties, failing which all correspondences made in the last known addresses shall be deemed to be considered as due service of Notices."*

(Emphasis Supplied)

61. We note that MoU dated 19.12.2015 was signed between the Appellant and the Corporate Debtor for handing over premise by the Corporate Debtor to the Appellant which has not happened. It is also fact that no separate lease agreement was signed or entered into between the Appellant and the Corporate Debtor, although, word like "lessor" and "lessee" have been used in the MoU.

62. We will therefore need to look into the intent of the transaction between both parties for determining whether the money transferred by the Appellant to the Corporate Debtor was financial debt or otherwise. It is not disputed that Rs.

2,37,61,440/- was indeed received by the Corporate Debtor from the Appellant but nature of the said money is in dispute.

63. We observe that to become financial debt, the transaction has to meet the criteria as stipulated in the definition of Section 5(8) of the Code which reads as under :-

> *"**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- ……..*
>
> (Emphasis supplied)

Thus, the basic ingredient of Section 5(8) of the Code is that the money should have been disbursed against the consideration of time value of money.

64. In the judgment of ***Pioneer Urban Land and Infrastructure Limited (Supra),*** the Hon'ble Supreme Court of Indian has stipulated the three guiding factors i.e., there should be disbursal, the transaction should have commercial effect of borrowing and there must be time value of money.

65. We note that a similar view was taken by the Hon'ble Supreme Court of India in the matter of ***New Okhla Industrial Development Authority vs. Anand Sonbhadra*** *[(2023) 1 SCC 724]* which had concurred with the view taken in the ***Pioneer Urban Land and Infrastructure Limited (Supra)*** thus we are duty bound to the ratio stipulated in the said judgment.

66. In the present case, we have already noted that there has been disbursal of money by the Appellant to the Corporate Debtor. However, what is to be seen is

as to whether the other two conditions of Section 5(8) are satisfied by the Appellant or not i.e., whether the transaction got commercial effect of the borrowing and whether there is time value of money. For commercial effect, the intent between the lenders and the Corporate Debtor/ Borrower should be clear which indicate the purpose of such financial facilities. Such financial facilities/ loans are typical when the financial creditors lent money, stipulating the period for which money is lent, purpose for such money and also stipulate the returns on the financial debt in terms of interest, etc. Although the interest may not be sine qua non for such disbursal to fall in category of financial debt, however, the time value of money is definitely required in same form or other.

67. In the present case we note that the money was disbursed but as a security deposit. When we analyse further, we note that the intent of both the parties were very clear that the Corporate Debtor was to acquire land, seek approvals from various authorities, develop building for school and handover the same to the Appellant so that the Appellant could have run the school for 30 years. In return, the Appellant was supposed to make monthly rental payments to the Corporate Debtor and for the same purpose, the Appellant disbursed Rs. 2,37,61,440/- to the Corporate Debtor which was a security deposit against rentals.

68. It is noted that in terms of Clause 3.3 of the MoU, the interest @ 9% p.a. has been stipulated in case of default by the Corporate Debtor to fulfil conditions precedent within the stipulated period and eventually it was discretion of the Appellant to terminate the MoU entitling him to get refund of the amount paid

along with the interest @9% per annum. We find the nature of the transaction very clear i.e. it is operational lease and thus, the money deposited by the Appellant with the Corporate Debtor can be described only as security deposit and not as financial debt. We also find that the interest @ 9% p.a. stipulated in Clause 3.3 of the MoU is in nature of penal interest or in nature of liquidated damages. Further, to have the commercial effect of borrowing having time value of money the interest payable by the Corporate Debtor to the Appellant should be regular and continues from the date of disbursal of money or as agreed upon but certainly cannot depend upon termination of MoU for want of meeting conditions precedent by the Corporate Debtor.

69. We observe that in the present case, the security deposit was provided by the Appellant to the Corporate Debtor under the MoU for the purpose of securing monthly rental payments. Furthermore, none of the clauses in the MoU indicate that the amount paid by the Appellant to the Corporate Debtor was intended to be used for the construction of the proposed building or for any other normal business operations of the Corporate Debtor, thus we are unable to accept pleadings of the Appellant that security deposit of rent was meant as mobilisation advance.

70. As far as the case cited by the Appellant i.e., ***Global Credit Capital Limited (Supra),*** we note that the Hon'ble Supreme Court of India has held that the test to determine whether the financial debt is within the meaning of Section 8(5) of the Code, the real nature of the transaction should be looked into. The Hon'ble

Supreme Court of India further stipulated that it could be an operational debt if the subject matter of the debt has some connection of co- relation with the service subject matter of transaction. Taking clue from this, we find that to subject matter of MoU was renting the school premises by the Corporate Debtor to the Appellant on monthly rental basis and therefore it does not fall within the definition of financial debt in terms of Section 5(8) of the Code. Thus, we do not find ***Global Credit Capital Limited (Supra)*** is applicable in the present case.

71. Thus, we hold that in the present case the money disbursed by the Appellant is clearly security deposit given under MoU for securing the monthly rental from the Appellant.

72. We further note that Clause 8 of MoU provide for security deposit is fully refundable without any interest after expiry of lease period of thirty years, which amplifies that the deposit did not have any time value of money and commercial effect of the borrowing.

73. We find from the terms of the MoU that the security deposit was not disbursed in consideration of the time value of money as no interest would accrue from the date of disbursement. A meaningful reading of Clauses 3.3 and 8.4 of the MoU reveals that the stipulation for interest was included solely to impose a penalty, should the Corporate Debtor fail to fulfil its obligations under the MoU to the satisfaction of the Appellant. The interest clause could only be involved upon a breach or termination of the agreement, indicating that the security deposit does not possess the characteristics of a financial transaction, therefore, the

security deposit does not qualify as a financial debt under the Code. We also find that Clause 8.5 of the MoU explicitly states that the purpose of the security deposit was to impose penal interest in the event of the Corporate Debtor's failure to refund the security deposit to the Appellant which makes it clear that the security deposit was not intended for funding any construction activity by alleged mobilisation advance, as claimed by the Appellant.

74. In view of above discussion, we do not find any merit in the Appeal. Appeal devoid of any merit stand rejected. No costs. I.A, if any, are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

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