NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 1563 of 2023

(Arising against the impugned order dated 06.10.2023 passed by the Hon'ble National Company Law Tribunal, Allahabad Bench at Prayagraj, in CP (IB) No. 33/ALD/2023)

IN THE MATTER OF:

Rajesh Alfred
Sole Proprietor of M/s Anand Enterprices
Available At: 57, The Domes, Jaipur Road,
Ajmer, Rajasthan-305001 **...Appellant**
Email: ralfred5520@gmail.com

Versus

Ketsaal Retail LLP
Through it Designated Partner/ Authorized Representative
Mr. Washim Raza Khan
Registered Office At: B-71, Sector-80,
Naida, Gautam Buddha Nagnr,
UttarPradesh-2013016. **...Respondent**
Email: finance.acc01@gmail.com

Present:

For Appellant:	**Mr. Sushant Singhal, Mr. Ajit Singh Johar & Mr. Manibhadra Jain, Advocates.**
For Respondents:	**Mr. Raj Srivastava, Ms. Suchita Gautam, Mr. Akash Chowdhary, Mr. Divyanshu Saraswat, Advocates.**

J U D G M E N T
(3rd July, 2025)

INDEVAR PANDEY, MEMBER (T)

The present appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code'), arising from the Order dated 06.10.2023 passed by the National Company Law Tribunal, Allahabad Bench (**Adjudicating Authority**), at Prayagraj, in CP (IB) No. 33/ALD/2023. The

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said petition under Section 7 of the Code was filed by the **Appellant - Rajesh Alfred** sole Proprietor of M/S Anand Enterprises, seeking initiation of Corporate Insolvency Resolution Process (CIRP) against the **Respondent—M/s Ketsaal Retails LLP (Corporate Debtor)** due to default in repayment of a financial debt of Rs. 2,77,00,000/-, comprising capital investment and assured returns. However, the Adjudicating Authority dismissed the petition on the ground that the Appellant did not qualify as a 'Financial Creditor' and the transaction in question did not amount to a 'Financial Debt' as defined under Section 5(8) of the Code. Aggrieved by these findings, the Appellant has approached this Appellate Tribunal.

Brief facts:

2. The brief facts of the case are as follows:

(i) M/s Ketsaal Retails LLP/ Respondent, was incorporated on 16.08.2017 under the Limited Liability Partnership Act, 2008, and is engaged in the business of retail trade and related services.

(ii) On 07.12.2020, the Appellant, acting through his proprietorship concern M/s Anand Enterprises, entered into a Reseller Agreement with the Respondent, whereby the Appellant made a capital investment of Rs. 20,00,000/- with a clear stipulation under Clause 4(m) of the Agreement that the Respondent would pay an assured return of 7% per month on the said investment after an initial lock-in period of three months, during which no return was to be paid.

(iii) A First Addendum Agreement was executed between the parties on 17.05.2021. Under the revised terms, the Appellant increased his

investment from Rs. 20,00,000/- to Rs. 50,00,000/, and the Respondent, in return, agreed to enhance the monthly assured return from 7% to 9%, effective from August 2021 onwards.

(iv) In accordance with the original agreement, on 17.05.2021, the Respondent paid the Appellant a sum of Rs. 1,40,000/-, calculated as 7% return on Rs. 20,00,000/- (i.e., Rs. 20,00,000 x 7/100). Payment for the same amount were made on 18.06.2021; 20.07.2021 and 20.08.2021.

(v) Thereafter, on 25.09.2021, the Respondent paid a higher return of Rs. 4,50,000/-, corresponding to 9% of the revised investment amount of Rs. 50,00,000/- (i.e., Rs. 50,00,000 x 9/100), as per the First Addendum Agreement.

(vi) The parties executed a Second Addendum Agreement on 07.10.2021, through which the Appellant's capital investment was further increased from Rs. 50,00,000/- to Rs. 1,00,00,000/-, and the monthly assured return was enhanced from 9% to 12%, with effect from January 2022. The return structure was to include 9% paid monthly and the remaining 3% as annual cumulative disbursement by March 31st of each year.

(vii) The Respondent again paid the Appellant a return of Rs. 4,50,000/- on 02.11.2021, corresponding to 9% return on Rs. 50,00,000/-, confirming compliance with the revised agreement terms.

(viii) However, starting 01.12.2021, the Respondent defaulted in making further payments. The assured return payable for November 2021 (due on 01.12.2021) was never paid. The Respondent failed to make any subsequent monthly or annual payments thereafter.

(ix) On 14.07.2022, the Appellant addressed a formal email to the Respondent, exercising his right to a formal and final exit under Clause 5 of the Second Addendum, and demanded refund of the entire capital investment of Rs. 1,00,00,000/-, along with the outstanding assured returns from November 2021 onwards.

(x) Clause 5 of the Second Addendum provided that upon such formal exit being communicated by the Appellant, the Respondent was obligated to refund the total capital invested within 90 days via direct deposit, which the Respondent failed to comply with.

(xi) On 20.08.2022, the Corporate Debtor admitted its liabilities towards the Financial Creditor under Notice Dated 20.08.2022 addressed to the Financial Creditor.

(xii) On 05.11.2022, the Respondent issued another notice, admitting its responsibility and liability towards the Appellant, stating that operational failures had caused delays but confirming its intention to fulfil its commitments and avoid evasion of liabilities.

(xiii) On 25.11.2022, the Corporate Debtor, vide letter dated 25.11.2022 addressed to the Financial Creditor, acknowledged the capital investment and the liability to return amounts with returns.

(xiv) Despite the Appellant's clear request for dissolution of agreement and multiple acknowledgments from the Respondent, no repayment of capital or accrued returns was made.

(xv) The Appellant thereafter, filed a petition under Section 7 of the Code before the Adjudicating Authority on 24.03.2023, seeking initiation of CIRP on account of default in repayment of a total financial debt amounting to Rs. 2,77,00,000/-, which included a principal capital investment of Rs. 1,00,00,000/- (Rs. One Crore) and accrued assured returns from November 2021 till March 2023 amounting to Rs. 1,77,00,000/- (Rs. One Crore Seventy-Seven Lakhs).

(xvi) On 08.06.2023, the Hon'ble NCLT issued notice to the Respondent to appear and respond to the petition. As the Respondent failed to appear despite valid service, it was set Ex-Parte by the NCLT vide its Order dated 22.08.2023.

(xvii) However, during final arguments on 26.09.2023, Adjudicating Authority allowed oral submissions to be made on behalf of the Respondent, solely on the basis of Vakalatnama filed on the e-portal, despite the Respondent being ex-parte and without any formal application for setting aside the ex-parte order. No written reply or affidavit was filed by the Respondent.

(xviii) The Adjudicating Authority on 06.10.2023 passed the impugned order, whereby it dismissed the Section 7 Petition, holding that the Appellant did not fall within the scope of 'Financial Creditor' and that

the amounts invested and returns promised did not qualify as a 'Financial Debt' under Section 5(8) of the Code.

(xix) Aggrieved by the impugned order the Appellant has preferred the present appeal before this Tribunal.

Submissions of the Appellant

3. Ld Counsel for the Appellant submitted that the impugned order dated 06.10.2023, wherein the Hon'ble NCLT, New Delhi Bench dismissed the Section 7 Application filed by the Appellant on the ground that he is a "speculative investor," is factually misconceived and legally untenable. The Appellant did not invest with an intent to acquire any property or unit, nor is he a homebuyer seeking resale profits. The Appellant had entered into a purely financial arrangement with the Corporate Debtor, Ketsaal Retails Ltd., whereby he made capital investments amounting to a total of Rs.1,00,00,000/-, in return for assured returns denominated as "Profit Margins," as contractually provided under the Agreement dated 07.12.2020, and reaffirmed in Addenda dated 17.05.2021 and 07.10.2021.

4. Ld. Counsel pointed out that the capital was deployed into the business of the Respondent, and in lieu thereof, a fixed return of 7% per month was contractually promised. The Appellant's status is fundamentally different from that of a speculative homebuyer. By treating the Appellant as a "speculative investor," the Hon'ble NCLT mixed distinct legal categories and ignored the commercial nature of the transaction. The Appellant is, therefore, not a speculative investor, but a financial creditor under Section 5(7) of the

Code, having disbursed funds for a time-bound return as defined under Section 5(8) of the Code.

5. Ld. Counsel for the Appellant submitted that the disbursement of Rs.1,00,00,000/- by the Appellant was a capital investment, not an advance or deposit for goods or services. The contractual documents—the main Agreement dated 07.12.2020 and the Addenda dated 17.05.2021 and 07.10.2021—provide for monthly Profit Margins/Assured Returns, which qualify as time value of money. Specifically, Clause 7 of the Agreement dated 07.12.2020 lays down the guaranteed monthly "Profit Margin" on the invested capital, while Clause 4 of the Addendum dated 17.05.2021 and Clause 5 of the Addendum dated 07.10.2021 reconfigure the return timelines, but reaffirm the assured nature of the payments. The said clauses fix financial liability on the Respondent and are neither contingent nor discretionary.

6. Ld. Counsel further submitted that the default on the part of the Corporate Debtor is clearly established by documentary evidence. Bank Account Statements show disbursement of investment funds and initial returns, until the Respondent stopped honouring its obligations. The Appellant issued Demand Notices dated 20.08.2022 and 05.11.2022. The Respondent acknowledged receipt of funds and obligations in Letter dated 21.01.2023, and never denied liability in any reply. The email dated 14.07.2022 refers to the capital investment and overdue returns. The claim amount thus exceeds the threshold of Rs.1 crore under Section 4 Code due to accumulated unpaid returns. As per Section 3(12) of the Code, the non-payment of assured financial obligations constitutes "default." The Appellant,

therefore, fulfils every statutory requirement of a financial creditor entitled to initiate CIRP under Section 7 of the Code.

7. Ld. Counsel for the appellant further submitted that the Hon'ble NCLT's reasoning that the Appellant's investments were consideration for the sale of goods is factually and legally erroneous. The Appellant never entered into any sale transaction with the Respondent. The Agreement dated 07.12.2020, in Clause 3, clearly stipulates that the investment shall remain with the Respondent and in return, a monthly fixed return (Profit Margin) shall be paid. The agreement does not define or refer to any goods, nor is any delivery schedule, product specification, invoice, or price per unit annexed to or referenced in the agreements. Even the Addenda dated 17.05.2021 and 07.10.2021 solely modify timelines and reaffirm fixed financial return, without altering the essential nature of the transaction.

8. The Counsel further drew attention to the Respondent's conduct, which repeatedly affirmed the existence of a financing arrangement. The Respondent issued cheques, sent acknowledgment letters, and even responded to Demand Notices without claiming any underlying goods transaction. The Bank Statements contain entries for regular returns titled as margins, not for sale proceeds. The email dated 14.07.2022, sent by the Appellant, specifically demands returns under the investment contract, and the Respondent did not contradict the nature of the demand. These returns were fixed percentages and were paid consistently for a while, before being discontinued—an event that directly triggered the default under the Code. There is no factual or

documentary basis for the NCLT's finding that the transaction was in the nature of goods sale.

9. Ld. Counsel for the Appellant argued that the impugned order fails to apply the binding ratio of the Hon'ble NCLAT in '*Nikhil Mehta & Sons (HUF) v. AMR Infrastructure Ltd.' [Company Appeal (AT)(Insolvency) No. 07 of 2017]*, where it was held that a transaction involving disbursement of funds for assured returns constitutes a financial debt under Section 5(8) of the Code. In that case, like in the present one, the investor had no intention to occupy or trade property, but had merely invested funds in the corporate entity for fixed returns, and default thereof was held sufficient to invoke Section 7 of the Code.

10. The counsel further relied on M/s Nikhil Mehta and Sons Vs. AMR Infrastructure Ltd. (supra), where the Hon'ble Appellate Tribunal held that structured returns on capital disbursed constitute a financial arrangement and, in the event of default, confer a right to file a petition under Section 7. The Appellant's case here stands on even stronger ground, given the explicit documentation of the returns, bank statements, and undisputed notices. By failing to consider these precedents or distinguish them, the Hon'ble NCLT committed a grave legal error, resulting in a dismissal contrary to settled law.

11. Ld. Counsel submitted that the impugned order is vitiated by a material breach of natural justice and procedural rules. The Respondent was repeatedly shown to have evaded service, as recorded in the impugned order itself, yet was permitted to enter appearance at the final stage of arguments without following the mandatory process under Rule 49(2) of the NCLT Rules,

2016. This rule clearly provides that a defaulting party must file a formal application to recall an ex parte order and offer justification. The Respondent neither filed such an application nor obtained a formal recall, and yet was heard on merits, while the Appellant had no opportunity to counter the submissions made ex post facto.

12. Counsel emphasized that this procedural irregularity caused substantive prejudice. The Appellant, having proceeded ex parte initially, was blindsided at the final hearing when the Respondent was allowed to make submissions despite non-compliance with procedural norms. The Hon'ble Tribunal thereby violated the settled principle of audi alteram partem, and the impugned order dated 06.10.2023 is thus liable to be set aside on the ground of procedural impropriety alone.

13. Counsel for the Appellant submitted that the entire transaction between the parties was a structured financial investment backed by legally enforceable agreements. The Agreement dated 07.12.2020, followed by Addenda dated 17.05.2021 and 07.10.2021, establish a continuing relationship of capital infusion and structured return. Clauses 1 and 3 of the main agreement, and Clauses 4 and 5 of the Addenda, explicitly mention that the Appellant shall invest funds with the Corporate Debtor and shall receive fixed monthly margins or returns, unrelated to any actual profit or performance. These are clear hallmarks of a financial arrangement under Code.

14. Counsel highlighted that the Respondent's own conduct confirms the financial character of the arrangement- issuance of cheques, payment of

returns, acknowledgments in letter dated 21.01.2023, and bank entries showing fixed margin payments. The Notices dated 20.08.2022 and 05.11.2022, and the email dated 14.07.2022, all reinforce the continuous and acknowledged financial obligation. There was no sale of goods, no invoice, no GST component, and no linkage to any commodity or service. The investment was made purely for financial return, and the Respondent defaulted, thereby giving rise to a valid claim under Section 7 Code. The Appellant is a financial creditor and entitled to full protection under the Code. He prayed for setting aside the impugned order dated 06.10.2023 and allow the Section 7 application.

Submissions of the Respondent

15. Per contra, Ld. Counsel for the Respondent stated that the impugned order dated 06.10.2023, passed by the Hon'ble National Company Law Tribunal, Allahabad Bench, is fully justified in law and does not suffer from any infirmity. The Ld. Adjudicating Authority rightly held that the Appellant is not a "Financial Creditor" under Section 5(7) of the Code, and the sum of Rs. 2,77,00,000/- claimed by the Appellant does not constitute a "Financial Debt" under Section 5(8) of the Code.

16. Counsel for the Respondent submits that for a debt to qualify as a "financial debt", it must involve a disbursement against the "consideration for time value of money", as held in the landmark judgment of the Hon'ble Supreme Court in *Anuj Jain, IRP of Jaypee Infratech Ltd. v. Axis Bank Ltd.*, (2020) 8 SCR 291. In the present case, no such element is present. The

transaction was not a loan or financial assistance, but rather a business transaction governed by commercial terms.

17. Counsel for the Respondent further submits that the agreement dated 07.12.2020, and the subsequent addendums dated 17.05.2021 and 07.10.2021, were entered into under the framework of a Reseller Agreement, whereby the Appellant, through his proprietorship concern M/s Anand Enterprises, agreed to act as a reseller of products supplied by the Respondent. The parties agreed to sell the products on various e-commerce platforms such as Amazon, and the so-called "assured returns" were nothing but profit margins or commissions related to the commercial sale of goods.

18. The counsel further submitted that the entire control of the online seller accounts, inventory management, coordination with platforms, and operational execution was in the exclusive domain of the Respondent. The Appellant was not a lender, but a commercial associate who shared in business returns, which were never in the nature of debt obligations.

19. The counsel further contends that although the Appellant claims there was a fixed monthly return on investment, the terms of the agreement show that these returns were structured more like profit margins or business incentives, and not interest payments on a disbursed loan. The absence of any loan agreement, promissory note, fixed repayment schedule, or acknowledgment of borrowing proves that no financial debt was ever created.

20. It is submitted by the Respondent's counsel that no valid demand notice was ever served by the Appellant to the Respondent prior to the filing of the Section 7 Petition. The Respondent has never acknowledged any debt owed to

the Appellant in the nature of a financial debt. The so-called notices referred to by the Appellant were part of ongoing business communications and not legal acknowledgments under the law.

21. Counsel for the Respondent submits that the Appellant has deliberately bypassed the dispute resolution mechanism provided in the agreements, which clearly stipulate that any dispute arising between the parties must be referred to arbitration. Instead, the Appellant wrongly invoked the Code without exhausting the contractual remedies. Such conduct clearly amounts to misuse of the Code as a tool for debt recovery, which has been strongly deprecated by the Hon'ble Supreme Court in *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*, (2019) 8 SCC 416.

22. The Respondent's counsel further stated that the cancellation of the Respondent's GST registration, which the Appellant is relying upon, was duly informed to the Appellant in writing. Despite this, the Appellant chose to initiate insolvency proceedings, indicating a malicious intent and commercial pressure tactic rather than a genuine case of financial default.

23. He further submitted that the Appellant has failed to prove any contractual relationship establishing him as a financial creditor. There is no evidence on record to show that the funds were disbursed as a loan with a repayment obligation. There is also no mention of such a liability in the books of accounts or balance sheet of the Respondent.

24. Ld. Counsel for the Respondent relies on the decision of this Tribunal in '*Neeraj Jain v. Cloudwalker Streaming Technologies' [Comp. App. (AT) (Ins.)*

No. 1354 of 2019 decided on 24.02.2020], wherein it was held that if the claimant fails to establish a financial debt with clear documents, and if no valid demand notice is issued, the petition under Section 7 is liable to be rejected. The facts of the present case fall squarely within this principle.

25. Ld. Counsel further submitted that this Tribunal in '*Ambica Enclave Pvt. Ltd. v. Ashrae Baba Infra Projects Pvt. Ltd.' [Comp. App. (AT) (Ins.) No. 1034 of 2022 decided on* 16.05.2024), reaffirmed that even where money is paid under commercial terms, unless it is disbursed for time value of money, it cannot be termed as a financial debt. The Appellant's claim suffers from the same defect.

26. Counsel for the Respondent states that the Appellant has not pointed out any specific error of law or fact in the findings of the Ld. Adjudicating Authority. The appeal is based merely on a restatement of facts that were already considered and rejected by the Tribunal. The Appellant's repeated reliance on "assured returns" is misplaced and fails to override the legal test laid down under Section 5(8) of the Code.

27. Summing up his arguments Ld. Counsel stated that the present appeal is not maintainable either on facts or in law. The Appellant has approached this Hon'ble Appellate Tribunal not for resolving insolvency, but for enforcing a commercial investment through coercive legal means under the Code. Such an approach is impermissible and has been consistently rejected by the Hon'ble Supreme Court and this Tribunal. He, therefore, submitted that the present company appeal be dismissed with costs.

Analysis and findings

28. We have gone through the records and heard the submission of Learned Counsels in detail. The counsels have also submitted their written submissions.

29. Ld. NCLT in the impugned Judgment has held that the amount invested by the appellant with Corporate Debtor did not fall in the category of financial debt as the transaction does not have a consideration for the time value of money, which is a substantive ingredient to be satisfied for fulfilling the requirement of the expression "Financial debt".

30. The key issue for determination before us is whether the amount claimed by appellant qualifies as a 'Financial Debt' under the Code. This issue is critical as only a person to whom a Financial Debt is owed can be treated as a Financial Creditor under Section 5 (7) of the Code. Only a Financial Creditor is entitled to initiate Corporate Insolvency Resolution Process under Section 7 of the Code. If the transaction does not meet the legal threshold of a financial debt then the appellant would not have locus to maintain proceedings under Section 7 of the Code and the petition is liable to be dismissed at the threshold.

31. The appellant relies on Section 5 (8) of the Code which defines the 'Financial debt' and types of transactions which are classified as Financial debt. The appellant in particular relies on Section 5 (8) (f) of the Code and states that his transaction is covered by the aforesaid Section. The relevant Section and sub-Sections are reproduced below:

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-

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

32. The Hon'ble Supreme Court in *Anuj Jain, IRP of Jaypee Infratech Ltd. v. Axis Bank Ltd.* (supra) has explained the ingredients of Financial debt in detail. The relevant paras of the Judgment are extracted below:

"The essentials for financial debt and financial creditor

43. 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.

44. As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a D financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.

45. It is also evident that what is being dealt with and described in E Section 5(7) and in Section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown

that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code.

47. A conjoint reading of the statutory provisions with the enunciation of this Court in Swiss Ribbons (supra), leaves nothing to doubt that in the scheme of the Code, what is intended by the expression financial creditor' is a person who has direct engagement in the functioning of the corporate debtor, who is involved right from the beginning while assessing the viability of the corporate debtor, who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor.

[Emphasis supplied]

33. It is clear from the above that time value of money is one of the key ingredients for a debt to be treated as 'Financial debt'. It also comes out clearly that the Financial Creditor is one who is involved with the Corporate Debtor since the beginning and who also acts as a mentor of the Corporate Debtor during the setting up of the business and also during re-organization of Corporate Debtor during Financial stress.

34. In this background to understand the commercial transactions between the appellant and the respondent we take a look at the 'Reseller Agreement' which is the key document on the basis of which the transactions between the two parties took place. The relevant clauses of the Reseller Agreement are extracted below:

"KETSAAL(R) RESELLER AGREEMENT

This Reseller Agreement (the "Agreement") is signed on 07th December 2020

BY AND BETWEEN

KETSAAL RETAILS LLP, *having its office at BH-133, SECTOR 70, NOIDA-201307 INDIA (Hereinafter called "Ketsaal" Which expression unless repugnant to the context shall mean and include its subsidiaries, and its successors and assigns), through its Authorized Person Mr. Akshay Vohra.*

AND

M/S ANAND ENTERPRISES, *having its office at 57, The Domes Jaipur Road, Ajmer, Rajasthan 305001.*

(Hereinafter called "Reseller" Which expression unless repugnant to the context shall mean and include its subsidiaries, and its successors and assigns) through its Authorized Person ***Mr. Rajesh Alfred***

RECITALS

A. Our parent company has developed a brand name "Ketsaal" as a seller on Amazon.

B. Many of the products are best seller on Amazon and holds Top ranking in their Category.

C. Our parent company KETSAAL RETAILS LLP owns the Trademark "Ketsaal" and other trademarks used in connection with the operation of KETSAAL Retails LLP as a seller on Amazon & Mall.

D. Our parent company has granted you the right to sublicense the right to sell just some of the products under the brand name KETSAAL on Amazon. Apart from the products mentioned in this agreement, you are not authorized to sell any other products by name of Ketsaal

E. You desire to sell products and operate under the brand name KETSAAL and we, in reliance on your representations, have approved your application

In consideration of the foregoing and the mutual covenants and consideration below, you and we agree as follows:

1. DEFINITIONS

For purposes of this Agreement, the terms below have the following definitions:

E "Reseller" is the second party who is purchasing products from Ketsaal with only purpose to resell them on Amazon

2. BASIS OF THE AGREEMENT

The relationship between the parties shall be that of seller and buyer and not that of principle and agent and the transaction is on principle to principle basis not withstanding anything to the contrary that may be contained in this agreement or any correspondence or letters between the parties hereto. Accordingly, the RESELLER shall at no point hold himself out as an agent of Ketsaal and Ketsaal shall not be responsible for any act omission or commission on the part of the RESELLER

5. PAYMENT

I. The reseller agrees to pay the consideration amount of Rs 20,00,000/-, at the time of signing this agreement the reseller paid Rs. 20,00,000/- via NEFT Rs. 9,00,000/- Ref. ID DCBLR52020120700007401, Rs. 9,00,000/- Ref. ID DCBLH20342007347, Rs. 2,00,000/- Ref ID. DCBLH20342475023 in favor of company.

II. The sale of the goods by Ketsaal shall be on advance payment by RTGS/Demand Draft/cheque/NEFT/IMPS against supplies made as may be required by Ketsaal from

time to time. The discretion of Ketsaal on choice of mode of payment shall be final and binding upon the RESELLER

III The reseller has to agree to re-invest the amount for first six months which he gets from the Amazon subject to amazon payment cycle, with Ketsaal under this agreement. Thereafter, the reseller can take out 7% profit amount. The capital investment can also be increased or decreased by the reseller.

IX ***The RESELLER shall give advance payment to Ketsaal and Ketsaal will dispatch goods within 15 days will be the dispatch time either complete shipment or in parts after receiving the payment from the RESELLER****. For regular update of stock, reseller will be informed.*

18 ARBITRATION

If any of the dispute arose between both the parties so that both parties agrees upon that dispute resolve by the sole arbitrator. The seat or legal place of arbitration shall be in New Delhi, India. The language of the arbitral proceedings shall be in the English language. The award of the arbitrators shall be final and binding upon the Parties. The costs of the arbitration shall be borne by the Party whose contention was not upheld, unless otherwise provided in the arbitration award.

(Emphasis supplied)

35. The key elements of the Reseller Agreement dated 07.12.2020 are as given below:

(i) It's an agreement between Ketsaal Retails LLP (Corporate Debtor) and M/s Anand Enterprises through its authorised person Mr. Rajesh Alfred (Appellant);

(ii) The appellant is a Reseller of products of Corporate Debtor;

(iii) Corporate Debtor has a brand name 'Ketsaal' as a seller on Amazon;

(iv) Corporate Debtor has granted the right to sell to the appellant, some of the products of under brand name Ketsaal on Amazon;

(v) The Appellant who is reseller is defined as the second party who is purchasing products from Ketsaal with only purpose to resell them on Amazon.

(vi) The relationship between the parties shall be that of seller and buyer and not that of principle and agent;

(vii) The reseller agrees to pay the consideration amount of Rs. 20 lakhs at the time of signing the agreement;

(viii) The sale of the goods by Ketsaal shall be on advance payment by RTGS/Demand Draft/cheque/NEFT/IMPS against supplies made as may be required by Ketsaal from time to time;

(ix) The reseller has to agree to re-invest the amount for first six months which he gets from the Amazon subject to amazon payment cycle, with Ketsaal under this agreement;

(x) The reseller can take out 7% profit on Rs. 20 lakhs after 6 months;

(xi) The reseller has to make advance payment to Ketsaal and Ketsaal will dispatched goods within 15 days; and

(xii) There is a arbitration agreement for any dispute between the Ketsaal and Reseller

36. The basic agreement clearly shows that this is a commercial agreement under which the appellant was to procure the Ketsaal branded products from the Respondent and sell it on the Amazon. For this the payment was to be made on advance for procuring the goods that would be subsequently resold by the appellant. There is no mention in the agreement of any lending relationship, interest payments, re-payment schedules or Acknowledgment of any debt obligations, instead the agreement clearly indicated that the transaction was structured as a commercial partnership, wherein the appellant was to get a share in the revenue or profit generated through resell of goods.

37. There is a stipulation in the agreement that any proceeds received from Amazon in the first six months were to be re-invested with Ketsaal. It's only after the six-months period that the reseller could take out the 7% profit margin. Such a clause in the agreement is inconsistent with a debt or lending arrangement and rather it is a characteristic of commercial collaboration wherein both the parties share business risk and benefits. The so called assured return are nothing more than profit margins arising from business activities and not interest payable on loan. This commercial structure lacks the essential ingredients of a financial debt as defined under Code.

38. This would further be clear from the fact that the Appellant has claimed that he was promised fixed monthly return of 7% when the investment was Rs. 20 lakhs, revised to 9% by the first addendum agreement, when the investment rose to Rs. 50 lakhs, and further revised upwards to 12% by the

second addendum agreement, when the investment was raised to Rs. 1 crore. As we know that a 12% monthly return amounts to interest rate of 144% per annum, even without compounding. It is beyond comprehension that any commercial entity would ever borrow a sum at 144% annual interest rate. Such returns can only be possible in commercial ventures and not from financial deposits/ investments. We are therefore clear that the aforesaid profit margin under the reseller agreement lacks the essential ingredients of financial debt as claimed by the appellant under Section 5 (8) (f) of the Code.

39. In many commercial transactions, particularly in distributorship, reseller agreement or joint ventures the parties agree to fixed return or margin based compensation. However, such arrangements do not fall under the scope of financial debt under the Code unless they are predicated on disbursement of money that carries the 'time value of money' as an essential ingredient. This Appellate Tribunal in *Ambica Enclave Pvt. Ltd. v. Ashrae Baba Infra Projects Pvt. Ltd.* (supra) has held that and advanced payment made for commercial purposes, even if it includes clauses relating to fixed returns, will not constitute a financial debt unless it was clearly structured as a loan or borrowing.

40. Similarly, this Appellate Tribunal in *Neeraj Jain v. Cloudwalker Streaming Technologies* (supra) held that contributions made by individuals or entities as part of business partnership or collaborations without the clear intention of re-payment with interest, do not qualify as Financial debt. In the present case also the appellant was not lending money to the Corporate Debtor with an obligation of repayment over a specified period with interest, rather he was engaged in a revenue sharing model based on re-selling goods

on online platform Amazon. The promise returns were conditional and contingent upon business outcomes. Hence, the essential requirement of time value of money is found absent, therefore, the said transaction cannot be classified as Financial debt.

41. The Appellant has relied on certain emails and correspondences in which the Respondent acknowledges receipt of funds and mentions some unpaid amounts. However, such communications cannot have the effect of converting a commercial transaction into a financial debt. Mere acknowledgement of financial liability is not sufficient and the nature and purpose of original transaction has to be examined to determine whether it meets the criteria of Financial debt.

42. We have also seen that the books of accounts of the respondent do not acknowledge the appellant as a Creditor there is no entry treating the amount as a loan or borrowing in the balance sheet. This further collaborates the findings that the transaction was never intended to be a loan. The emails may create a basis for commercial or civil dispute resolution, but they do not satisfy the requirements of the Code for establishing the transactions between the parties as a Financial debt.

43. It is also seen from the Clause 18 of the Reseller Agreement that for all disputes arising out of the agreement shall be resolved through arbitration. This clearly indicates that parties had mutually agreed to a dispute resolution mechanism in case of any disputes arising out of the agreement. In view of existence of such arbitration clause in the agreement the appellant should have gone for the arbitration instead of filing CIRP petition. In our view it is an abuse of CIRP process by the appellant.

44. Finally, we have seen from the records that the Appellant did not disburse funds to Respondent as a loan or borrowing. The Reseller Agreement, the only document showing the nature of transaction between the parties also does not reflect any element of time value of money in any of the clauses. The transaction was in essence a commercial arrangement governed by the Reseller Agreement provided for profit margins, not interest. The exchange of correspondence between the parties also does not in any way convert the commercial nature of transaction into a financial debt. The existence of an arbitration clause further reinforces the view that the dispute should have been adjudicated through the mutually agreed dispute resolution mechanism of arbitration rather than trying to invoke CIRP process under the Code.

45. In view of the above, we hold that the debt in question is not a financial debt as defined under the Code. Therefore, the appellant does not qualify as 'Financial Creditor' under the Code and hence cannot invoke insolvency proceedings.

46. We concur with the findings of Adjudicating Authority. The appeal is dismissed. There would be no order as to costs. Pending I.As if any are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

SA/Pragya (LRA)