

Insolvency and Bankruptcy Board of India
7th Floor, Mayur Bhawan, Connaught Place, New Delhi - 110001

17th May, 2022

Subject: Judgment¹ dated 17th May, 2022 of the Hon'ble Supreme Court of India in the matter of New Okhla Industrial Development Authority Vs. Anand Sonbhadra [Civil Appeal No. 2222, 2367-2369 of 2021]

The Hon'ble Supreme Court considered whether NOIDA, the Appellant (i.e. Lessor) who has acquired land for the purposes of setting a residential township is a Financial Creditor (FC) of the Corporate Debtor (CD) under the Insolvency and Bankruptcy Code, 2016 (Code). While holding it to be an Operational Creditor (OC), it made some important findings and observations as under:

Sl. No.	Subject / Issue	Ruling	Para / Page No.
1	'Financial Debt' under section 5(8)	<p>(a) A debt is a liability or an obligation in respect of a right to payment. Irrespective of whether there is adjudication of the breach, if there is a breach of contract, it may give rise to a debt. In the context of section 5(8), disbursement has been understood as money, which has been paid. In the context of the transaction involved in such real estate projects, the homebuyers advance sums to the builder, who would then utilise the amount towards the construction in the real estate project.</p> <p>(b) What is relevant is to attract section 5(8), on its plain terms, is disbursement. While, it may be true that the word 'transaction' includes transfer of assets, funds or goods and services from or to the corporate debtor, in the context of the principal provisions of section 5(8) of the Code, to import the definition of 'transaction' in section 2(33), involving the need to expand the word 'disbursement', to include a promise to pay money by a debtor to the creditor, will be uncalled for straining of the provisions.</p> <p>(c) 'Debt' means a liability or obligation, which relates to a claim. The claim or right to payment or remedy for breach of contract occasioning a right to payment must be due from any person.</p>	<p>56/67</p> <p>56/68-69</p> <p>56/70</p>

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		In the lease in question, there has been no disbursement of any debt (loan) or any sums by the NOIDA to the lessee.	56/71
2	Section 5(8)(d) and Section 5(8)(f)	<p>The subject matter of section 5(8)(d) is a lease or a hire-purchase contract. It is not any lease or a hire-purchase contract, which would entitle the lessor to be treated as the financial creditor. There must be a lease or hire-purchase contract, which is deemed as a finance or capital lease. The law giver has not left the courts free to place, its interpretation on the words ‘finance or capital lease’. The legislature has contemplated the finance or a capital lease, which is deemed as such a lease under the Indian Accounting Standards.</p> <p>The Appellant is not the financial lessor under section 5(8)(d) of the Code. Needless to say, there is always power to amend the provisions which essentially consist of the Indian Accounting Standards in the absence of any rules prescribed under section 5(8)(d) of the Code by the Central Government.</p> <p>Section 5(8)(f) is a residuary and catch all provision. A lease, which is not a finance or a capital lease under section 5(8)(d), may create a financial debt within the meaning of section 5(8)(f), if, on its terms, the Court concludes that it is a transaction, under which, any amount is raised, having the commercial effect of the borrowing.</p> <p>The lease in question does not fall within the ambit of section 5(8)(f). This is for the reason that the lessee has not raised any amount from the Appellant under the lease, which is a transaction. The raising of the amount, which, according to the Appellant, constitutes the financial debt, has not taken place in the form of any flow of funds from the Appellant/Lessor, in any manner, to the lessee. The mere permission or facility of moratorium, followed by staggered payment in easy instalments, cannot lead to the conclusion that any amount has been raised, under the lease, from the Appellant, which is the most important consideration.</p>	59/76-77 121/147 141/181 141/182
3	Conclusion	The appeal failed, holding that the Appellant is not a Financial Creditor.	