



**THE NATIONAL COMPANY LAW TRIBUNAL**

**COURT VI, NEW DELHI**

**I.A. 2435/2021**

**IN**

**Company Petition No. (IB) – 2115/(ND)/2019**

*Under Section 60(5) of the Insolvency and Bankruptcy  
Code, 2016.*

**IN THE MATTER OF:**

DMI FINANCE PVT. LTD.

.... FINANCIAL CREDITOR

**VERSUS**

M/S ABLOOM INFOTECH PVT. LTD.

..... CORPORATE DEBTOR

**AND IN THE MATTER OF-**

M/S CHANDGI RAM REAL ESTATE

CONSULTANTS PVT. LTD.

.... APPLICANT

**VERSUS**

IRP MR. PARVEEN BANSAL

...RESPONDENT 1

DMI FINANCE PRIVATE LIMITED

...RESPONDENT 2



**CORAM:**

**SHRI. BACHU VENKAT BALARAM DAS, HON'BLE MEMBER  
(JUDICIAL)**

**SHRI RAHUL BHATNAGAR, HON'BLE MEMBER  
(TECHNICAL)**

For the Applicant: Dr. Farrukh Khan, Adv for the applicant

**ORDER**

**PER- RAHUL BHATNAGAR, MEMBER (TECHNICAL)**

**Order Pronounced on:14.02.2023**

1. This application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 against rejection of claims filed by the applicant/ Financial Creditor by the Resolution Professional.

The applicant in the present application has prayed for the following reliefs: -

- a) *Allow the present application and direct the IRP/RP to accept the claim of Rs. 16,13,96,119/- filed by the applicant as financial Debt and further to classify and categorize the applicant as Financial Creditor of Corporate Debtor.*



- b) Direct the Respondent to reconstitute the CoC after inculcating the abovementioned claim of the applicant*
- c) Stay the proceedings of CoC of the CD till the final disposal of the present application*
- d) Pass any such order or orders as may deem fit and proper in the facts and circumstances of the present case.*

2. Briefly stated the facts of the case as mentioned in the instant application, which are just and necessary for adjudication, are as follows: -

- i. That, the CIRP of the CD was admitted vide order dated 11.03.2021 and Mr. Praveen Bansal was appointed as IRP in the matter.
- ii. That the Applicant thereafter filed its Claim on prescribed format along with documents supporting the said claim before the Respondent on 25.03.2021. That the Respondent through mail dated 31.03.2021 sought some information / clarification from the Applicant and the Applicant through its mail dated 08.04.2021 duly provided the information and reply to the clarifications as sought by the Respondent. On finding no response, the Counsel for the Applicant sent a reminder email dated 05.05.2021



enquiring about the status of its Claim as filed by the Applicant before the Respondent. That the Respondent, in reply to email dated 05.05.2021 sent by the Counsel for the Applicant, sent an email on 07.05.2021 and stated that prima facie the Claim as filed by the Applicant as a Financial Creditor is not tenable and stated various untenable grounds for the same. That the Counsel for the Applicant through an email dated 07.05.2021 explained to the Respondent the maintainability of the Claim filed by the Applicant as a Financial Creditor.

- iii. That the Respondent pending the consideration of an Applicant claim, constituted the CoC of the Corporate Debtor and also proceeded to convene 1<sup>st</sup> meeting of CoC.
- iv. That the Respondent, in reply to email dated 07.05.2021 sent by the Counsel for the Applicant, sent an email dated 09.05.2021 and proposed to obtain independent purported legal advice on Applicant claim and on the Applicant's submissions to the queries raised by the Respondent.
- v. That the Counsel for Applicant vide email dated 10.05.2021 explained the Respondent that his conduct is



in transgression and violation of express provision of IBC, 2016 laws, rules and regulations, as his powers and duties are limited to verifying the claims and has no adjudicating authority.

- vi. That pursuant to the email dated 10.05.2021 addressed by the Counsel for Applicant to the Respondent, the Counsel for Applicant again sent a reminder/follow up email dated 14.05.2021 enquiring the status of its claim. That on 18.05.2021, Respondent addressed an email to Applicant appended with an attachment of purported legal opinion. That the legal opinion has not only quantified the claim of CRC to be treated as 'Other Debt' but also capped the claim to the tune of Rs.5,66,00,000/-. That the Counsel for Applicant vide an email dated 18.05.2021, addressed to the Respondent, made his final submissions before the Respondent in regard to its claim. That Respondent vide its email dated 20.05.2021, based on his whims and fancies rejected the Claim filed by the Applicant as a "Financial Creditor" of the Corporate Debtor and classified Applicant in category of "Other Creditors" and admitted the claim



only of an amount of Rs. 5,66,00,000/-. The aforesaid turn of events clearly establishes and demonstrate that the Respondent has grossly erred while exceeding his powers and duties and has proceeded to exercise adjudicatory functions, which is impermissible. The decision of Respondent is manifestly arbitrary and is gross abuse of process of law. The Claim of the Applicant, for the reasons as averred in the instant Application, qualifies to be a financial debt and its status to of Financial Creditor. Hence the applicant has made this present application.

vii. The brief facts in relation to the Applicant's claim is as follows:

- Corporate Debtor (Abloom) induced the Applicant / Financial Creditor (CRC) to invest into its Project (admeasuring 20242.60 sq. mtrs., bearing Plot No. A-3A, Sector 132, Noida) to which Corporate Debtor (Abloom) hold Lease Hold Rights by virtue of Lease Deed dated 24.08.2006 duly executed by New Okhla Industrial Development Authority (NOIDA)



- The terms and understandings as agreed between the Financial Creditor (CRC) and the Corporate Debtor were duly recorded in the Term Sheet dated 11.02.2019
- In addition to the foregoing, in order to protect the rights and interests of the Applicant / Financial Creditor (CRC), shareholders of the Corporate Debtor (Abloom), namely, M/s Ninex Developers Limited, M/s Duaphin Cables Pvt. Ltd. & Mr. Sandeep Garg also entered into a separate Memorandum of Understanding dated 11.02.2019 with the Financial Creditor (CRC) guaranteeing the covenants on behalf of the Corporate Debtor in favor of Financial Creditor (CRC).
- Further, owing to certain requirements, an Addendum to the Term Sheet and MoU dated 15.04.2019 was executed by and between the Applicant / Financial Creditor (CRC) and the Corporate Debtor (Abloom) (along with its shareholders).



- That the Corporate Debtor, notwithstanding specific obligations on its part as contained in the aforesaid documents, miserably failed in adhering to the said obligations. In lieu of such default on part of the Corporate Debtor, the Applicant / Financial Creditor (CRC) in continuance of its persistent follow-ups demanding the Corporate Debtor to adhere to the contractual obligations in event of default by the Corporate Debtor, the Applicant / Financial Creditor (CRC) issued a Legal Notice dated 20.06.2020 demanding the Corporate Debtor to refund and pay the debt payable on its part, however, in vain. On finding no option, the Applicant / Financial Creditor (CRC) filed an Application under Sec 7 of IBC before Hon'ble National Company Law Tribunal against the Corporate Debtor.

3. The resolution professional of M/s. Abloom Infotech Pvt Ltd. had filed his reply to the averments of the applicants.



The defence taken by the resolution professional, respondent herein, are stated in brief as below: -

- i. That, the Applicant submitted its claim in FORM C as a Financial Creditor (CRC) amounting to Rs. 16,13,96,119/- along with supporting documents to the RP vide email dated 25-03-2021.

HEAD OF ACCOUNT	CLAIMED AMOUNT (IN RS.)	REMARKS
Principal Amt	5,67,18,000/-	Money paid by CRC pursuant to the Term Sheet entered into by Shareholders of Corporate Debtor & CRC dated 11-02-2019.
Penal Amt	5,67,18,000/-	Double of the Principal Amt claimed due to occurrence of default by the Corporate Debtor.
Interest Amt	4,79,60,119/-	Interest claimed for the period 08-06-2019 to 11-03-2021 at the rate of 24% p.a. Date of default is claimed as 01-06-2019 and interests starts 7 days after occurrence of default.
<b>Total Claim</b>		<b>Rs. 16,13,96,119/-</b>

- ii. That before forming any opinion on the categorization of CRC and determining the amount of claim to be admitted, the RP, by way of available documents and evidences, considered it imperative to first understand



the relationship between CRC and Corporate Debtor and its associated terms and conditions.

- iii. It is relevant to note that Corporate Debtor executed a Binding Term Sheet (hereinafter referred to as "Term Sheet") dated 11.02.2019 with the Applicant for development of IT Park on the Leased Land and divided the developed area between the Corporate Debtor and CRC in the pre-defined ratio. Clause 3 of the Term Sheet obligated the Corporate Debtor and its shareholders for fulfilment of condition precedents. These condition precedents included the obligation for settlement of dues of Financial Creditor (DMI) and Noida Authority
- iv. Further, the shareholders of the Corporate Debtor and CRC signed Memorandum of Understanding dated 11.02.2019 (hereinafter referred to as the "MOU") for assistance of CRC for payment of OTS amount and enter into a definitive agreement for development of IT Park. Subsequently, the Corporate Debtor and its Shareholders signed Addendum to Term Sheet and MOU ("Addendum") dated 15.04.2019 with CRC redefining the



obligations for settlement of dues of DMI and Noida Authority.

- v. Both the Term Sheet and the Addendum recognize that the validity and bindingness of the Term Sheet between the Corporate Debtor and CRC is premised on the leave of the DMI to the Board of Directors of the Corporate Debtor to enter into the arrangement. In the absence of non-settlement of the Dues of Financial Creditor (DMI) and the lifting of embargo, the agreement between CRC and the Corporate debtor is a non-starter. Reference in this regard may be made to Clause 2 of the Term Sheet, wherein it has been categorically agreed that:

*"...That it is made clear that the obligations made herein are sine qua non for executing the definite Agreement..."*

- vi. It is the admitted position on record that neither the claims of the Financial Creditor were settled as per the Term Sheet nor was a Definitive agreement executed between the CD and CRC



- vii. Therefore, in view of non-settlement of dues of DMI and non-lifting of embargo on the Board of Director of the Corporate Debtor, the Term Sheet is a non-starter and does not constitute a valid and binding document
- viii. Further, the Applicant has claimed that it is a financial creditor because Shareholders of the Corporate Debtor had approached for extending financial assistance to the Corporate Debtor. For this the Applicant relies on "Para E" of MOU. It is submitted that as per the understanding of the RP, the nature of the transaction has to be examined from the perspective of the Corporate Debtor. The phrase extending the financial assistance to the corporate debtor has been used in the MOU, to which the Corporate Debtor is not a party to the understanding. Signing of the Addendum, which amends the Term Sheet and the MOU, by the Corporate Debtor, does not implicitly make the Corporate Debtor a party to the MOU. Based on the presented facts, it cannot be concluded that Corporate Debtor is a "Borrower" and its Shareholders are the "Guarantors".



- ix. Clause 3 of the Term Sheet states that payment has been made to the Corporate Debtor as Refundable Non-interest-bearing security deposit to secure the performance of Term Sheet dated 11.02.2019. The security deposit is adjustable from amounts receivable from the customers of the Corporate Debtor sold at the time of submission of application for completion certificate in relation to the Project with the appropriate Government authorities.
- x. The Applicant has a right to recover the principal amount from amount to be realised from customers of the Corporate Debtor. There is no clause in the Term Sheet, which provides for repayment of the security deposit. Term Sheet also does not have any clause regarding payment of interest calculated with reference to the time period other the clause regarding interest payable on amount refundable to the Applicant after occurrence of the event of default. Hence, debt cannot be classified as financial debt and the Applicant, hence, cannot be



classified as financial creditor within the meaning of section 5(8) of Insolvency and Bankruptcy Code, 2016.

- xi. It is further submitted that the Applicant has not paid the security deposit for providing goods or services including employment. Hence, it cannot be classified as operational creditor within the meaning of section 5(21) of Insolvency and Bankruptcy Code, 2016. The debt neither has any element of lending or borrowing, nor is the same toward any supply of goods or services.
- xii. That it is to be noted that such transactions which are a part of the Term Sheet cannot be termed "*Financial Debt*" since these transactions do not satisfy any of the conditions laid down under Section 2(8) of the Insolvency Code. Hence, the Applicant cannot be treated as a Financial Creditor under Section 2(7) of the Insolvency Code.
- xiii. The answering Respondent therefore, after duly verifying and collating the claim of CRC and based on the legal opinion received, classified the Applicant under the category of "Other Creditors" and admitted the claim of



CRC to the tune of Rs. 5,66,00,000/- out of the total claim of Rs. 16,13,96,119/- under the category of "*Other Debt*".

xiv. That the Applicant stating that the legal opinion is grossly based on erroneous view of complete factual matrix is absolutely denied and is held fallacious. The rationale behind the analysis and the opinion formed by the answering Respondent in the form of Legal Opinion is based on the documentary proofs provided by the Applicant itself.

xv. Hence the present application is liable to be dismissed in view of facts and circumstances as stated above

4. M/s DMI Finance Private Limited moved an Interlocutory Application bearing IA No 5958/2021 for impleadment in the present application and the same was allowed vide order dated 09.12.2022 and M/s DMI Finance Pvt Ltd. (Hereinafter referred to as Respondent no 2/ R-2) was allowed to be impleaded as Respondent. Respondent No 2 has made the following submissions in the application: -



i. That R-2 (DMI) is presently the member of the committee of creditors of the Corporate Debtor (hereinafter referred to as "CoC") and holds 68.1% voting share.

ii. That the Corporate Debtor (Abloom) along with the following entities: -

- **Ninex Developers Limited ("Borrower No. 1")**
- **Red Topaz Real Estate Private Limited ("Borrower No. 2")**
- **RMG Developers Private Limited ("Borrower No. 3") (The Borrower No. 3 was removed as a party from the Loan Agreement vide the amendment dated July 24, 2017)**

had executed a loan agreement dated 27.04.2016 ("Loan Agreement") with the R-2 for a loan facility of Rs. 16,00,00,000 (Rupees Sixteen Crore) ("Loan Facility")

iii. That, pursuant to the Loan Agreement, the Loan Facility of Rs. 13,35,00,000 (Rupees Thirteen Crore



and Thirty-Five Lakhs) was disbursed in the following tranches:

- a. Tranche 1 of Rs. 7,00,00,000 (Rupees Seven Crore) against the notice of drawal dated May 2, 2016.
  - b. Tranche 2 of Rs. 2,00,00,000 (Rupees Two Crore) against notice of drawal dated February 12, 2018.
  - c. Tranche 3 of Rs. 2,75,00,000 (Rupees Two Crore and SeventyFive Lakh) against notice of drawal dated March 13, 2018.
  - d. Tranche 4 of Rs. 1,60,00,000 (Rupees One Crore and Sixty Lakh) against notice of drawal dated May 15, 2018
- iv. That, the Loan Facility was obtained for the limited purpose of facilitating repayment and for full and final settlement of the unsecured loans obtained by the Corporate Debtor from various entities, with the proceeds of the first two tranches to be utilized for the purpose set out as follows:



- Repayment and full and final settlement of unsecured loans obtained by the Corporate Debtor.
  - Repayment and full and final settlement of unsecured loans obtained by the Corporate Debtor from Dhoot Ninex Project Private Limited.
  - Balance amount to be first utilized for the payment of dues of NOIDA Authority for land admeasuring 20,242.60 square meters constituted in Plot No. A-3A, Sector 132, NOIDA, Gautam Budh Nagar, Uttar Pradesh, leased to the Corporate Debtor by NOIDA Authority under lease deed dated August 28, 2006 ("IT Land").
  - Any remaining amount to be utilized for general corporate purpose subject to 'End Use Restrictions' under the Loan Agreement.
- v. That until August 2017, the Corporate Debtor made payments to regularize the outstanding amount, including all interest components accrued until that date. However, from the next instalment date i.e.,



September 15, 2017, the Corporate Debtor failed to make 'Payment Instalment' (as defined under Article 1.1 of the Loan Agreement) on the Payments Date (as defined under Article 1.1 of the Loan Agreement) i.e., the 15th of each month. The Corporate Debtor made irregular and / or delayed payments which were not in compliance of the repayment schedule of the Loan Agreement thereby triggering defaults under the Loan Agreement.

- vi. That as the Corporate Debtor was going through financial difficulties and was unable to repay the loan disbursed by R-2, the Corporate Debtor approached the R-2 requesting to work out any arrangement. Therefore, the R-2 in order support the Corporate Debtor and in the capacity of 'lender' entered into a tripartite agreement to sell dated 28.09.2018 (hereinafter referred to as the "Agreement to Sell" or the "Tripartite Agreement" as context may require) with Pardos Realtor Private Limited (hereinafter referred to as "Pardos") as the 'buyer' and the



Corporate Debtor in the capacity of 'seller', whereby the Corporate Debtor agreed to sell the IT Land to Pardos.

- vii. That, as per Clause 1.3 of the Agreement to Sell, it was mutually agreed amongst all the aforesaid parties that the payment made towards the sale of IT Land was to be used for repayment of the Loan Facility as mentioned in Schedule 3 of the Agreement to Sell. However, the Agreement to Sell was terminated by Pardos on account of breach by the Corporate Debtor itself.
- viii. That, thereafter, on account of default of outstanding amount, the R-2 was constrained to file the IBC Petition, in relation to the financial debt amounting to Rs. 7,94,47,080 (Rupees Seven Crore Ninety-Four Lakh Forty-Seven Thousand and Eighty) ("Financial Debt"), which was admitted by this Tribunal vide order dated 11.03.2021.
- ix. That, thereafter, the R-2 came to know that the applicant (CRC) had filed its claim to the tune of Rs.



16,13,96,119 (Rupees Sixteen Crore Thirteen Lakh Ninety-Six Thousand One Hundred and Nineteen) against the Corporate Debtor ("Purported Claim") with the RP, on the basis of the following illegal and void agreements, which were entered into, in relation to the development of IT Land

- x. That, it is pertinent to note that the Purported Agreements are in complete violation of the Loan Agreement and the Corporate Debtor was not even a party to the Purported MoU. Further, the Borrower No. 1, Dauphin Cables Private Limited and Mr. Sandeep Garg, i.e., the shareholders of the Corporate Debtor, had entered into the Purported MoU only in their individual capacity, by virtue of being the shareholders of the Corporate Debtor; and therefore, they cannot be considered as the authorised representative of the Corporate Debtor
- xi. That, the RP after obtaining a legal opinion had wrongly classified the Respondent No. 1 as 'Other Creditor' and capped the Purported Claim to the tune



of Rs. 5,66,00,000 (Rupees Five Crore and Sixty Six Lakhs) vide e-mail dated May 18, 2021. The Respondent No. 1, thereafter, filed the CRC Application against the said decision of the RP before this Adjudicating Authority, without disclosing the complete facts as to how its Purported Claim arose and without including the Applicant as an appropriate party.

- xii. That, this Ld. Adjudicating Authority vide its order dated 01.09.2021 allowed an amount of Rs. 5,67,18,000 (Rupees Five Crore Sixty-Seven Lakh and Eighteen Thousand) out of the Purported Claim, to be classified as 'financial debt'. Thereafter, the RP, once again incorrectly and wrongly classified the Respondent No. 1 as a 'financial creditor' capping its claim to Rs. 5,66,00,000 (Rupees Five Crore and Sixty-Six Lakh) vide e-mail dated September 26, 2021.
- xiii. That, thereafter, R-2 had no other option but to prefer an appeal under Section 61 of the Code before the Hon'ble National Company Law Appellate Tribunal,



Principal Bench at New Delhi ("Hon'ble Appellate Authority") against the order dated 01.09.2021 passed by this Adjudicating Authority bearing C.A. (AT) (I) No. 1079 of 2021 ("DM1 Appeal"), inter alia, praying to set aside the said order and to direct the RP to exclude the applicant i.e. Chandgi Ram Real Estate Consultants Pvt. Ltd. from the CoC.

xiv. That, similarly, the applicant (CRC) had also preferred an appeal under Section 61 of the Code before the Hon'ble Appellate Authority against the same order i.e., the order dated 01.09.2021 passed by this Adjudicating Authority titled "Chandgi Ram Real Estate Consultants Private Limited v. Parveen Bansal, RP of Abloom Infotech Private Limited" bearing C.A. (AT) No. 73 of 2022 ("CRC Appeal"), inter alia, praying to set aside the said order and admit the Purported Claim of the M/S Chandgi Ram Real Estate Consultants Pvt. Ltd. amounting to Rs. 16,13,96,119 (Rupees Sixteen Crore Thirteen Lakh Ninety-Six Thousand One Hundred and Nineteen).



xv. That, thereafter, the Hon'ble Appellate Authority vide order dated 21.07.2022 ("NCLAT Order") disposed off the DMI Appeal and CRC Appeal, whereby the Hon'ble Appellate Authority, without going into the merits, inter alia, set aside the order dated 01.09.2021 passed by this Ld. Adjudicating Authority in the CRC Application and revived the CRC Application before this Ld. Adjudicating Authority to be considered afresh after hearing the parties. The relevant extract of the NCLAT Order is reproduced hereinunder:

*"6. We are of the view that the Order dated 01.09.2021 passed in I.A. No. 2435/2021 deserve to be set aside. Hence the Order dated 01.09.2021 is set aside and the I.A. No. 2435 of 2021 is revived before the Adjudicating Authority to be considered afresh after hearing the parties. We only observe that I.A. No. 2435 of 2021 may be considered and decided before the Adjudicating Authority grants approval or disapproval of the Resolution Plan. We make it clear that we are not expressing any opinion on the merits of the claim of the parties."*



5. No rejoinder has been filed to the reply filed by respondents.

6. We have gone through documents on record filed by all the parties and arguments advanced by counsels of all the parties.

7. It is observed that the applicant has moved an application bearing IA No- 5557/20219 against the Resolution Professional & M/s Pardos Relators Private Limited for wrongfully admitting exaggerated and inflated claim of M/s Pardos Realtors Private Limited of Rs. 20.57 Cr. in the category of “Other Creditors” stating that the RP is favoring DMI Finance and M/s Pardos Relators Private Limited and prayed to this Tribunal to reject the claim of the 20.57 Crore of M/s Pardos Relators Private Limited. However later, this application was withdrawn by the applicant.

8. The Claim of the Applicant is based on the following documents: -

1. MoU dated 11.02.2019 between CRC and Shareholders of CD(Abloom)



2. Term Sheet dated 11.02.2019 between CRC, CD (Abloom) and Shareholders of CD

3. Addendum to Term Sheet & MoU dated 15.04.2019 between CRC, CD (Abloom) and Shareholders of CD

Para 2 of the Term sheet dated 11.02.2019 acknowledged that there were loan agreements between Abloom (CD) and DMI Finance (R-2) dated 30.12.2014 & 27.04.2016 and that there is an embargo upon the Board of Directors of Abloom to enter into any agreement except with the leave of DMI Finance. Thus, to overcome this difficulty, the shareholders of Abloom, in their personal capacity have entered into the MoU dated 11.02.2019 and assured the applicant that they shall honour the terms of the agreement. Further, it is stated that the said agreement would become regular when the embargo is lifted by DMI Finance after repayment of entire loan amount and then the parties may enter into definite agreement. The shareholders of the Corporate Debtor were well aware that CD was not Authorised to enter into any agreement.



So, the applicant (CRC) as well as the CD were aware that this agreement is non-binding and non-enforceable on the CD due to the embargo by DMI Finance since the parties could not enter into such type of agreement without the consent of DMI Finance. Further as per Article 53A of the AoA of the CD, the CD was mandated to obtain a written approval from DMI Finance before entering into any agreement. The said article has been reproduced hereinunder as below: -

*"53A. Notwithstanding anything contained in these Articles or any document executed by the Company, **no resolution shall be passed at any general meeting or any meeting of any class of any shareholders of the Company in respect of the following matters, without the prior written approval of the DMI Nominee:***

- (a) Make any alterations or modifications to the Memorandum and Articles of the Company;*
- (b) Make any alterations in the authorized or issued and paid share capital of the Company,*
- (c) Transfer or record any encumbrance or third party rights in respect of shares of the Company and/or record any transfer or encumber in any manner the shares of the Company (except in favour of DMI), (d) Change the auditor of the Company,*
- (e) Obtain any loan, financing, credit, borrowing, debt or other similar facility or provide any guarantee for any of the aforesaid,***



***(f) Mortgage, encumber or create any third-party rights on the assets of the Company in any manner (except in favour of DMI);***

***(g) Declare or distribute any dividend to shareholders, directly or indirectly make payment of any commission, remuneration or other payment or any affiliate, associate, related party directors or any company, directly or indirectly controlled or owned by any director of the Company or their relatives.,"***

The Corporate Debtor failed to obtain any such written approval from DMI Finance. Therefore, we are of the view that the MoU dated 11.02.2019 between the applicant and the Shareholders of the CD cannot be enforced on the CD since CD was not a party to the MoU and besides there was an embargo on the CD to enter into any agreement including loan agreement without consent of DMI Finance. However, it is an undisputed fact that payment by the Applicant (CRC) was made to the Corporate Debtor's account to repay the loan taken by the Corporate Debtor from DMI Finance. Hence, it cannot be said that no amount is payable to the applicant. Further DMI Finance through additional affidavit dated 07.12.2022 in para 13



has stated that in the interest of expediting the approval of resolution plan in respect of the Corporate Debtor, DMI does not have any objection if CRC (Applicant) is treated as a financial creditor of the Corporate Debtor and claim of Applicant is restricted and limited to Rs. 5,66,00,000 (Rupees Five Crore and Sixty-Six Lakh). This would also entail, applicant not receiving anything more than the amount of Rs. 5,66,00,000 (Rupees Five Crore and Sixty-Six Lakh) from the successful resolution applicant, namely, Exotica Housing Private Limited, pursuant to the resolution plan. We are, therefore of the considered view that as per Article 53A of the Articles of Association of the Corporate Debtor, it was mandatory to obtain a written approval from DMI Finance before entering into any agreement, however, since DMI Finance has given its consent through additional affidavit dated 07.12.2022 to admit the debt to the extent of 5,66,00,000 it can be considered as deemed approval of DMI Finance to the Corporate Debtor for accepting a loan of Rs. 5,66,00,000 from CRC. Hence, we consider it fair



and reasonable to accept the claim of the applicant to the tune of Rs. 5,66,00,000.

However, the question remains whether this debt is to be treated as Financial Debt or otherwise. To answer this question, it is pertinent to refer to the definition of Financial Debt as defined under section 5(8) of the Code which is reproduced as under: -

***Sec. 5 (8) "financial debt": means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-***

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

*[Explanation. -For the purposes of this sub-clause, -*

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*



- (ii) (ii) *the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]*

It is clear from the definition of “Financial debt” that there should be disbursal of money and there should be time value of money in order to constitute Financial Debt. In the present case, as per the Term Sheet and MoU, the payment was made as a Refundable Non-Interest-Bearing Security Deposit to secure the performance of terms of agreement which was proposed to be adjusted by CRC from the sale of units forming part of Abloom Area. Further there was no consent from DMI Finance to enter into any agreement. However, subsequently DMI Finance gave its approval to admit the claim of the applicant as Financial Creditor. We find no locus or indeed justification for one creditor to advise regarding classification of the debt of other creditor. It is for the Adjudicating Authority to determine whether the debt of the applicant (CRC) is a Financial Debt or otherwise. As per the MoU and Term sheet, the applicant



had disbursed an amount of Rs. 5,66,00,000 in the account of the Corporate Debtor to fulfill its obligations as per the terms of the said MOU. Even though a definitive agreement was not executed between CRC and the CD on account of the embargo placed by DMI, the intention of the parties here is an important consideration to determine the nature of financial assistance provided by CRC to the CD. The financial assistance provided was with the intention of the parties for co-development of the land and not as an interest-bearing loan with clear terms of repayment since the funds were provided in the form of Refundable Non-Interest-Bearing Security Deposit and the same was proposed to be adjusted from the sale of units forming part of Abloom Area. Therefore, it is clear that time value was missing in the arrangement.

Hence the debt will not come under the definition of 'Financial Debt'. Accordingly, we direct the Resolution Professional to admit the claim of the applicant only to the extent of Rs. 5,66,00,000 (Rupees Five Crore and Sixty-Six Lakh) as "Other Debt".



Further we are of the view that it was the obligation of the shareholders and not of the Corporate Debtor to honour the terms of the agreement. The liability of any interest or penalty would therefore be recoverable from the shareholders of the CD since they have assured the applicant that they shall honour the terms of the agreement in their individual capacities. However, this issue can only be decided after going into the merits of the case by the appropriate forum.

This order is in compliance of the order of Hon'ble NCLAT dated 21.07.2022 wherein the Appellate Tribunal directed this Tribunal to consider the matter afresh after hearing the parties and decide this IA before granting approval or disapproval of the Resolution Plan.

9. The I.A No 2435 of 2021 stands decided/disposed off in terms of the above.

Let copy of the order be served to the parties.

**SD/-**

**(RAHUL BHATNAGAR)  
MEMBER (TECHNICAL)**

**SD/-**

**(BACHU VENKAT BALARAM DAS)  
MEMBER (JUDICIAL)**