



**THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI COURT-III**

Item No.06

IB-1078(ND)/2020

IN THE MATTER OF:

DALMIA FAMILY OFFICE TRUST

..... Applicant/Financial Creditor

Versus

M/s. ATS INFRASTRUCTURE LIMITED

..... Respondent/Corporate Debtor

Order Pronounced On: 09.06.2023

CORAM:

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

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Mr. Ajay Bhargava, Ms. Raddhika Khanna, Advs.

For the Respondent : Mr. Krish Kalra, Adv.

ORDER

Order pronounced in open court vide separate sheets. **(IB)-1078(ND)/2020**
is **dismissed**

-SD-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

-SD-

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



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT-III
(IB) – 1078(ND)/2020**

Order under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

DALMIA FAMILY OFFICE TRUST

(Earlier known as Mridu Hari Dalmia Parivar Trust)

Having Its Registered Office at:

04, Scindia House Connaught Place,
New Delhi, Delhi – 110001

..... Applicant/Financial Creditor

VERSUS

M/s. ATS HOUSING PRIVATE LIMITED

Having Its Registered Office at:

711/92, Deepali, Nehru Place,
New Delhi, Delhi – 110019

..... Respondent/Corporate Debtor

Order Pronounced On: 09.06.2023

CORAM:

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

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Mr. Ajay Bhargava, Ms Raddhika Khanna,
Advocates

For the Respondent : Mr. Krish Kalra, Advocate



ORDER

PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)

1. This Application has been filed by the DALMIA FAMILY OFFICE TRUST, the Financial Creditor (FC)/Applicant on 21.11.2020, before this Adjudicating Authority, under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "the Code") r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("Adjudicating Authority Rules"), for initiating the Corporate Insolvency Resolution Process ("CIRP"), declaring moratorium and for appointment of Interim Resolution Professional ("IRP"), against the Corporate Debtor (CD)/Respondent viz., M/s. ATS HOUSING PRIVATE LIMITED, on the ground that the Corporate Debtor has defaulted to make a Payment of a sum of Rs. 21,16,13,710/- (Rupees Twenty One Crore Sixteen Lakh Thirteen Thousand Seven Hundred and Ten Only) along with Interest amount as on 31.10.2020.

2. **Submissions of the Financial Creditor:**

- a. The Corporate Debtor approached the Applicant/Financial Creditor in and around the first half of the year 2015 through its Promoter/Director i.e., Mr. Getamber Anand and informed Applicant/ Financial Creditor that Corporate Debtor is developing a residential group housing project under the name "PRISTINE" over a plot of land and measuring 93,072 Sq. mtrs. numbered SC-1/A-1 Sector-150, Noida, Uttar Pradesh (said Project).
- b. For the purpose of construction and development of the said Project and to meet the Corporate Debtor's working capital requirements, the Corporate Debtor, through its Promoter/ Director, Mr. Getamber Anand requested Applicant/Financial Creditor for a secured loan to the tune of Rs. 15,00,00,000/- (Rupees Fifteen Crore Only). Corporate Debtor assured Applicant/ Financial Creditor that the Loan Amount will be refunded within a period of forty-two (42) months from the date of disbursement



along with interest @ 20% per annum on the Loan Amount payable on a quarterly basis.

- c. Based on the representations, guarantees and assurances, Applicant/Financial Creditor agreed to disburse a sum amounting to Rs. 15,00,00,000/- (Rupees Fifteen Crores Only) as secured loan to Corporate Debtor. Accordingly, the Loan Agreement dated 20th May 2015 ("Loan Agreement") was executed between Corporate Debtor and Applicant/Financial Creditor. Copy of the Loan Agreement dated 20th May 2015 is filed along with the application.
- d. The said Loan Agreement inter-alia stipulated the following mutually agreed terms between the parties:
 - i. In terms of Clause 2.1, as a security towards the Loan Amount, Corporate Debtor agreed to allot thirty-six (36) flats ("Said Flats") with an aggregate area of 76,050 Sq. Ft., in the said Project on fully paid basis to Applicant/Financial Creditor (which were to be allotted simultaneously with the execution of the Loan Agreement). It was also agreed that individual allotment letters (for all thirty-six flats) will be issued to Applicant/Financial Creditor. Pertinently, under clause 2.4 of the Loan Agreement, it was clearly stipulated that Corporate Debtor shall not be entitled to create any third-party rights in the Said Flats prior to repayment of the Loan Amount along with repayment of other amounts due to Applicant/Financial Creditor in terms of the Loan Agreement. Copies of the thirty-six Allotment Letter(s) issued in favour of the Financial Creditor are filed along with the application.
 - ii. Under clauses 2.2 and 2.3 of the Loan Agreement, Corporate Debtor also agreed to deposit an undated cheque, equivalent to the Loan Amount with Applicant/Financial Creditor. Further, Corporate Debtor undertook to parallelly issue post-dated cheques in favour of the Applicant/



Financial Creditor for payment of interest on the Loan Amount payable in terms of the Loan Agreement as per the details set forth in Annexure-D thereof. Copy of some of the post-dated cheques issued by the Corporate Debtor towards payment of interest are filed along with the application.

- iii. Under Clause 5.1 and 5.2 of the Loan Agreement, the Corporate Debtor agreed to refund the Loan Amount within a period of forty-two (42) months from the date of disbursement of the Loan Amount along with interest calculated @ 20% per annum on the Loan Amount payable on a quarterly basis. It is further highlighted that as per Clause 5.3, the interest was to be paid by Corporate Debtor to Applicant/Financial Creditor on a quarterly basis, within two (2) days of the close of every financial quarter and in case of delay in payment of interest on its due date, Corporate Debtor was made liable to pay default interest @ 2% per month for the period of default on the amount so defaulted.
- e. As agreed, under Clause 2.1.2 of the Loan Agreement, on 20th May 2015, Mr. Getamber Anand also executed a Guarantee Agreement in favour of Applicant/Financial Creditor, in his capacity as a personal guarantor, to secure the repayment of the Loan Amount along with interest and other amounts payable in terms of the Loan Agreement and fulfillment of other obligations as mentioned in the Loan Agreement. Copy of the Guarantee Agreement dated 20th May 2015 executed by Mr Getamber Anand in favour of the Applicant/Financial Creditor is filed along with the application.
- f. Accordingly, Applicant/Financial Creditor disbursed an amount of Rs. 15,00,00,000/- (Rupees Fifteen Crores Only) as secured loan to Corporate debtor through RTGS on 22nd May 2015.
- g. Instead of meeting the timelines for repayment under the Loan Agreement, Corporate Debtor defaulted in the payments of interest as well as the principal amount and approached



Applicant/Financial Creditor with a request for an extension of time for repayment of the outstanding dues payable to Applicant/Financial Creditor under the Loan Agreement.

- h. Resultantly, the parties executed a Supplemental Agreement to the Loan Agreement, dated 18th December 2018 ("Supplemental Agreement"), whereby the Applicant/Financial Creditor agreed to an extension of time for repayment of the dues by Corporate Debtor under the Loan Agreement subject to the understanding that all other terms and conditions of the Loan Agreement shall remain the same except that interest shall now be levied @18.5% per annum on the Loan Amount payable on quarterly basis w.e.f. 21st November 2018. Further, as per clause I of the said Supplemental Agreement, the date of repayment of the Loan Amount was extended till 30th June 2019 ("Modified Repayment Date"). Copy of the Supplemental Loan Agreement dated 18th December 2018 is filed along with the application.
- i. Under Clause II of the Said Supplemental Agreement, Corporate Debtor issued fresh post-dated cheques (dated 31st March 2019 and 30th June 2019) in favour of Applicant/Financial Creditor for payment of the interest and refund of the Loan Amount to the Applicant/Financial Creditor. Copy of the post-dated cheques dated 31st March 2019 and 30th June 2019 issued by the Corporate Debtor is filed along with the application.
- j. Accordingly, Mr. Getamber Anand executed a new Guarantee Agreement dated 20th December 2018 in favour of Applicant/Financial Creditor, in his capacity as a personal guarantor, replacing and modifying the earlier Guarantee Agreement dated 20th May 2015. Copy of the Guarantee Agreement dated 20th December 2018 executed by Mr Getamber Anand is filed along with the application.
- k. Be that as it may, even the extended time period till 30th June 2019 to refund the Loan Amount also long expired and Corporate Debtor continued to be in default. Succinctly, even after repeated



demands, Corporate Debtor failed to repay the Loan Amount with interest.

1. Further, in due course, It has come to the knowledge of Applicant/Financial Creditor that Corporate Debtor has created charge/mortgage/encumbrances of third party(ies) on Said Flats. The said third-party charge created by Corporate Debtor has jeopardized Applicant/Financial Creditor's interest in the said thirty-six (36) flats.
- m. Even the statutory liability of depositing the entire TDS, on the interest component, with the concerned government authority has not been fulfilled by Corporate Debtor for the FY 18-19 and FY 19-20.
- n. Clause 5.3 and 7.16 of the Loan Agreement specifically mentions that, in the event of delay in payment of interest on the due date and/or as a consequence of any event of default, Corporate Debtor shall be liable to pay default interest @2% per month for the period of default on the amount so defaulted.
- o. In view of the aforesaid circumstances and reasons, Applicant/Financial Creditor was constrained to issue a Demand Notice dated 04th November 2020 to the Corporate Debtor demanding the entire Loan Amount of Rs. 15,00,00,000/- (Rupees Fifteen Crores Only) along with interest due and payable as of 31st October 2020, including the default interest calculated at the rate of 2.0% per month on the due amount since the date of default (being 30th June 2019), of Rs. 6,16,13,710/- (Rupees Six Crores Sixteen Lakhs Thirteen Thousand Seven Hundred and Ten Only). The Applicant/Financial Creditor within a period of 3 days from the receipt of the said Demand Notice. Therefore, the total amount of debt as on 31st October 2020 amounted to Rs. 21,16,13,710/- (Rupees Twenty One Crores Sixteen Lakhs Thirteen Thousand Seven Hundred and Ten Only). Copy of the Demand Notice dated 04th November 2020 is filed along with the application.



p. To the shock and surprise of the Applicant/Financial Creditor, the Corporate Debtor yet again defaulted by failing to repay the Loan Amount due and payable to the Applicant/Financial Creditor along with interest within a period of 3 days from the receipt of the said Demand Notice dated 04th November 2020.

3. **Submissions of the Corporate Debtor:**

- a) It is not disputed that the Applicant and Respondent entered into a Loan Agreement dated 20.05.2015 pursuant to which the Financial Creditor invested certain sums in the Applicant Company. This Agreement was renewed vide the Supplemental Agreement dated 18.12.2018. Several other agreements were also entered into between the ATS Group and Dalmia Group entities. These agreements were entered into as part of one umbrella transaction between the Dalmia Group and ATS Group, which is evident from the commonality of the parties, the subject matter, and the similar terms and conditions in various agreements between the Parties and with regard to which the Hon'ble High Court passed a common order in 9 matters and 2 others vide another common order and the said Court recognized the commonality of all the matters and the Parties and sought for a common Sole Arbitrator to be appointed for all 11 transactions for this purpose.
- b) The Applicant submits that certain differences arose between the ATS Group and the Dalmia Group with respect to the payments to be made in relation to the aforesaid transaction. Subsequently, the two Groups entered into a global and holistic settlement of inter-se commercial issues on 17.08.2020 ('Settlement') and the said settlement amended and novated the other agreements and pursuant to this settlement it was clear that there were and are no sums payable to the alleged Financial Creditor at the present, the said issue in respect of all 11 transactions (on which the settlement took place) is the dispute before the Ld. Arbitrator.



- c) The two Groups also agreed that the ATS Group would allot units/apartments worth Rs. 75 crores and sell these units/apartments and pay the entire sale proceeds to the Dalmia Group. Hence, both groups agreed that the ATS Group would allot apartments worth Rs. 75 crores in favour of the Dalmia Group as part of the holistic settlement as security. In furtherance of this holistic settlement that had been arrived at, ATS Group and its various entities issued post-dated cheques to the Dalmia Group for an aggregate amount of Rs. 150 crores on 17.08.2020 and 18.09.2020.
- d) Therefore, the Applicant submits that the Dalmia Group and the ATS Group settled all their disputes in August 2020 and that the understanding arrived at between the two groups is the final and holistic settlement between the Parties and the Parties confirmed the same and acted in furtherance thereof.
- e) It is submitted that the present Reply is being filed without prejudice to the Respondent's application under Section 8 of the Arbitration and Conciliation Act 1996 for seeking direction to refer the subject matter of this case to arbitration as per the agreement between the Parties and as per the Order of the Hon'ble Delhi High Court dated 08.01.2021 and on this basis the consent of the parties as also recorded in the said order of the Hon'ble High Court. The Respondent maintains that this Application is not maintainable owing to the reasons set out under the said Application filed u/s 8 of the Act by the Corporate Debtor and the same is reiterated herein and not be reproduced for the sake of brevity.
- f) It is submitted that the present Application is devoid of any merit and is not maintainable. The Applicant does not have any right to approach this Tribunal as it is not a 'financial creditor' within the meaning of the Insolvency and Bankruptcy Code 2016 ('IBC'). In any event, neither the sums being claimed to be due constitute a 'financial debt' nor has any 'default' occurred within the meaning



of the Code. As such, the present Application is wholly misconceived and a mere attempt to browbeat the Respondent into paying sums that are otherwise not due and payable.

- g)** It is submitted that there exist disputes between the Parties inter alia under the Loan Agreement and which disputes have been referred to arbitration to a Sole Arbitrator Hon'ble Mr. Justice (Retd.) Swatanter Kumar by the Hon'ble High Court's order dated 08.01.2021 passed in OMP(I)(Comm) 387/2020 (Dalmia Family Holdings LLP v. ATS Infrastructure Limited), OMP(I)(Comm) 388/2020 (Dalmia Family Office Trust v. Domus Greens Private Limited and Anr.), OMP(I)(Comm) 399/2020 (Dalmia Family Holdings LLP v. Getamber Anand), and OMP(I)(Comm) 401-40712020 (Dalmia Family Office Trust v. Getamber Anand). Copies of Orders of the Hon'ble High Court Order is filed along with the application.
- h)** It is noteworthy to mention that the aforesaid Order was passed after both Parties jointly consented to refer all their disputes to arbitration by Sole Arbitrator Hon'ble Mr. Justice (Retd.) Swatanter Kumar. As such both Parties were ad-idem on the existence of the disputes between the Parties and the need to resolve them by reference to arbitration. The relevant consent terms as proposed by both Parties to the Hon'ble High Court are filed along with the application.
- i)** In light of the above, it is submitted that no 'financial debt' exists as of date and it cannot be said that the Applicant herein is a Financial Creditor and as such the present Application is misconceived. Moreover, the amount being claimed to be due by the Applicant is admittedly disputed and the said dispute has specifically been jointly referred to arbitration by both Parties including the said issues inter alia as to whether the Applicant is a financial creditor, whether there is a financial debt, what is the time period of the said alleged debt and whether there is any alleged default, etc. As such, pending any such adjudication by



the Tribunal the present Application in any event cannot be entertained and ought to be dismissed on this ground alone.

- j)** In any event and without prejudice to anything stated in this Reply, it is submitted that the Applicant is not a 'financial creditor' but a mere 'investor' who had invested certain sums into the Respondent company (and which sums are not in any event due as explained below). Furthermore, no amount has been disbursed by the Applicant as any financial debt. Therefore, the Respondent does not, in any event, satisfy the requirements of the Code and is not eligible to file the present Application.
- k)** It is submitted that time was not of the essence in any of the agreements between the Parties. Moreover, it is clear that the Parties had always considered that the alleged time/alleged stipulated dates under the Agreement could not be set in stone and were extendable.
- l)** It is submitted that the governmental authorities have imposed drastic restrictions on the businesses' functioning across the country. These restrictions imposed by the government authorities led to our economic activities virtually being brought to a halt, liquidity shortages and other disruptions in our business. The impact of the pandemic is uniquely challenging and still unclear owing to which several regions in the country are in full or partial lock-down and the consequent mobility constraints are having a serious and profound impact on all businesses in the country, including the real estate sector.
- m)** It is reiterated that the aforesaid post-dated cheques were issued to Dalmia Group as part of the global settlement between the two groups as per which the Dalmia group agreed to accept post-dated cheques dated 31.08.2021 and security by way of allocation of several units/apartments in different ATS projects for the amounts that were alleged to be due from ATS Group. It is towards this holistic settlement Agreement. It is submitted that this rate of interest as has sought to be captured in the Loan



Agreement and the amendment/ supplemental agreement thereafter, is clearly oppressive and exorbitant and cannot be countenanced. In this regard any such agreements seeking to impose these unfair, unjust, onerous terms and interest on the Respondent cannot be relied upon and the amounts as contained therein cannot be stated to be the due amount from the Respondent.

- n) It is further stated that in any event and without prejudice to the aforesaid, it is clear that the Applicant, in any event, is not a body that can either be in the business of disbursing loans or be engaged in lending activities and in fact even as per the Objects of the Applicant, no such activity is permitted and therefore it cannot be alleged by the Applicant that it is a lender or a financial creditor particularly when the same is not even allowed by its Memorandum/Objects and as such is contrary to law.
4. In the Rejoinder Affidavit dated 10.05.2021, it is submitted by the Financial Creditor that Section 238 of the Code, provides that the Code shall override anything inconsistent contained in any other law for the time being in force. The non-obstante clause in Section 238 of the Code makes it evident that proceeding such as the present Application under Section 7 of the Code shall not be precluded on account of the pendency of arbitration proceedings under the Act. Undisputedly, there has been no amendment, modification or variation of the Loan Agreement (except by way of the aforesaid Supplemental Agreement dated 18th December 2018). There has been no amendment, modification, or variation of the Supplemental Agreement dated 18th December 2018 in writing and signed by the Authorised Representative of the Financial Creditor, as contemplated by the Loan Agreement, read with the Supplemental Agreement mentioned above. Furthermore, the Corporate Debtor itself has failed to establish the same before this Tribunal. The Corporate Debtor has approached the Financial Creditor with



proposals for settlement of their dues towards the Financial Creditor/Dalmia Group, vide emails dated 27th October 2020 and 07th November 2020, clearly establishes that no such "global settlement", or any settlement whatsoever had ever been arrived at, especially not prior to that. Even vide email dated 07th November 2020 issued by the Corporate Debtor, the Corporate Debtor issued a fresh proposal, nowhere referring to any "global settlement" of August 2020 or otherwise, and clearly exploring mere options for settlement with no concrete offer on the total liability towards Dalmia Group. Thus, alleged global settlement of 17th August 2020 (alleged date of global settlement) is nothing but a figment of the Corporate Debtor's imagination with a view to wriggling out of its outstanding admitted crystallised Financial Debt.

5. **Analysis and Findings**

- i. We have heard the Ld. Counsels appearing for both parties from time to time. We have also perused the documents on record.
- ii. We have to consider the following issues:
 - a. Whether the Applicant falls in the category of Financial Creditor as per Section 5(7) of the Code or not?
 - b. Whether the amount claimed by the applicant as per Part IV of the Application of a sum of Rs. 21,16,13,710/- (Rupees Twenty One Crore Sixteen Lakh Thirteen Thousand Seven Hundred and Ten Only) along with Interest amount is a financial debt under section 5(8)(f) of the Code or not?
- iii. It is submitted that the Financial Creditor and the Corporate Debtor entered into Loan Agreement on 20.05.2015. In the said Loan Agreement, Mridu Hari Dalmia Parivar Trust has been described as a "Lender" and M/s. ATS Housing Private Limited has been described as a "Borrower".

The relevant clauses of the Loan Agreement are extracted below for the better understanding of the case: -



a) ***“The Lender hereby agrees to grant a secured loan amounting to Rs. 15,00,00,000/- (Rupees Fifteen Crores Only) (hereinafter referred to as the "Loan Amount") to the Borrower for the purpose of construction and development of the Project and working capital requirements of the Borrower, subject to the terms and conditions specified in this Agreement.***

b) ***The Borrower shall allot 36 number of flats in the Project ("Said Flats"), details whereof is set forth in Annexure C, on fully paid basis to the Lender simultaneously with execution hereof. The Borrower shall issue allotment letters for the Said Flats to the Lender and shall execute individual flat buyer agreements with the Borrower for the Said Flats simultaneously with execution hereof. The said allotment letters and the flat buyer agreements shall contain a specific clause that the Said Flats are fully paid up including PLC, EDC, IDC and applicable taxes. The Lender shall not be liable to make payment of any other charges including maintenance charges until receipt of repayment of the Loan Amount in terms of this Agreement;***

c) ***Mr. Getamber Anand shall give his personal guarantee in favor of the Lender.***

d) ***Simultaneously with disbursement of the Loan Amount, the Borrower shall deposit an undated cheque for the Loan Amount with the Lender.***

e) ***Simultaneously with disbursement of the Loan Amount, the Borrower shall issue post-dated cheques to the Lender for payment towards the interest on the Loan Amount payable in terms of this Agreement as per details set forth in Annexure D hereof.***

f) ***The Borrower shall not be entitled to create any third party rights in the Said Flats prior to repayment of the***



Loan Amount and other amounts due thereon in terms of this Agreement to the Lender.

g) In consideration of grant and disbursement of the Loan Amount to the Borrower in terms of this Agreement, the Borrower shall pay the following to the Lender:

- (i) Interest at the rate of 20% per annum on the Loan Amount payable on a quarterly basis ("Interest"); and***
- (ii) Refund of the Loan Amount.***

h) On receipt of the refund of the Loan Amount along with interest thereon and other amounts payable in terms of this Agreement, ("Outstanding Obligations") by the Lender, the Lender shall release the charge created pursuant to this Agreement.

i) DISPUTE RESOLUTION

i. In case of any dispute or claim arising out of or in connection with or relating to this Agreement, the Parties shall attempt to first resolve such dispute or claim amicably. In the event no amicable resolution or settlement is reached within a period of 30 days from the date of reference of such dispute or claim, such dispute or claim shall be referred to the arbitration by an arbitration tribunal of three arbitrators, one of which shall be appointed by each of the Parties and the presiding arbitrator shall be appointed by the two arbitrators so appointed. The arbitration proceedings shall be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification/ amendment thereof.

ii. The arbitration proceedings shall be conducted in the English language and the place of arbitration shall be New Delhi. The Arbitration award shall be final and binding on the Parties and the Parties agree to be



bound thereby and to act accordingly. The Parties shall continue to perform such of their respective obligations that do not relate to the subject matter of the dispute. without prejudice to the final determination”

From the perusal of the abovementioned clauses of the Loan Agreement, it appears that the Loan Agreement is not in the nature of Financial Debt.

- iv.** We are of the view that the alleged interest @ 20% per annum on the Loan Amount payable on a quarterly basis is ex-facie illegal as contested and barred by the provisions of the Usurious Loans Act, 1918. As per the provisions of the said Act, a maximum interest of 7.50% per annum is payable on the secured loan and 12.50% per annum is payable on unsecured loans. Even otherwise, the interest @ 20% per annum on the Loan Amount payable on a quarterly basis (revised interest levied @18.5% per annum on the Loan Amount payable on quarterly basis w.e.f. 21st November 2018) is completely ex-facie illegal and exorbitant. Without prejudice, after perusing the relevant clauses of the Loan Agreement, the Financial Creditor is a speculative investor and cannot claim the status and benefits as a Financial Creditor under Explanation (i) of Section 5(8)(f) of the Code, and it is not an interested party in the financial well-being, growth, and vitality of the Corporate Debtor, but is just interested in his investment. Guidance in this regard is also available in the judgment of Hon’ble NCLAT in **Sudha Sharma vs Mansi Brar and Anr.** [Company Appeal (AT) (INS) No. 83 of 2020] emphasized: ***“that money deposited/invested for speculative purpose does not entitle a person to take advantage of clause (f) of section 5(8) and be considered a financial creditor by virtue of being an allottee of a housing unit/flat.”***

While determining Issue (a), We are of the view that the status of “Financial Creditor” cannot be accorded to a person who, in the



garb of a lender comes in the project as a speculative investor and for mere recovery of monies files exorbitant claims. Therefore, the benefit of section 5(8)(f) of the Code will not enure in his favour and the amount claimed in Part IV of the application doesn't amount to become Financial Debt as per code.

- v. At this stage, it is pertinent to refer to the definition of the expression "Financial Creditor" in sub-section 7 of Section 5 of the Code.

Section 5 of sub-section 7 reads as follows: -

"Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;"

- vi. At this stage, it is also pertinent to refer to the definition of the expression "Financial Debt" in sub-section 8 of Section 5 of the Code.

Section 5 of sub-section 8 "Financial Debt" reads as follows: -

"Financial Debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

money borrowed against the payment of interest;

(e) *****

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

(g) *****

(h) *****

(i) **"***

- vii. While determining Issue (b), we are of the considered view that the amount involved in the present case cannot be considered as a Financial Debt within the definition of sub-section 8 of Section



5 of the Code. We are also of the opinion that the Applicant is not a Financial Creditor holding any financial debt which is in default of payment by the Corporate Debtor.

- viii.** It is submitted that as it is a settled law, the pre-requisites for an application under Section 7 of the Code are the existence of 'financial debt' and a 'default', and as evident from the facts in the preceding paragraphs, it cannot be said that there is any financial debt, much less any default and therefore the present application is not maintainable.

Hence, we are inclined to **dismiss** this application.

6. **Order**

In light of the above facts and circumstances, it is hereby ordered as follows: -

- i.** The Application bearing **(IB)-1078(ND)/2020** filed by the Applicant/Financial Creditor, under section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Respondent/Corporate Debtor, is hereby **dismissed**.
- ii.** The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India ("IBBI") for their record.
- iii.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

No order as to costs.

-SD-
(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

-SD-
(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)