



IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI, COURT-III

IB-348(ND)/2024

(Order under Section 7 of the IBC, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016)

IN THE MATTER OF:

1. M.K. Jain

S/o Lt. Sh. R.S. Jain
R/o B-2, Pushpanjali Farm,
Brijwasan, South West Delhi – 110061.
Email: mkjain@chelseamills.com

... FINANCIAL CREDITOR NO. 1

2. Neeru Jain

W/o Sh. M.K. Jain
R/o B-2, Pushpanjali Farm,
Brijwasan, South West Delhi – 110061.
Email: mkjain@chelseamills.com

... FINANCIAL CREDITOR NO. 2

3. Rishabh Jain

S/o Sh. M.K. Jain
R/o B-2, Pushpanjali Farm,
Brijwasan, South West Delhi – 110061.
Email: mkjain@chelseamills.com

... FINANCIAL CREDITOR NO. 3

4. M.K. Jain (HUF)

Through Sh. M.K. Jain, Karta
R/o B-2, Pushpanjali Farm,
Brijwasan, South West Delhi – 110061.
Email: mkjain@chelseamills.com

... FINANCIAL CREDITOR NO. 4

VERSUS

M/s. Krrish Realtech Pvt. Ltd.

Through its Director Mr. Amulya Kumar
Mishra Basement 1, Elegance Tower, Plot
No. 8, District Center, Jasola,
South Delhi-110025.
Email: krrishinfra@yahoo.com

... CORPORATE DEBTOR



Order Pronounced On: 03.04.2025

CORAM:

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

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

PRESENT:

For Applicant : Mr. Gaurav Mitra, Mr. Vipul Wadhwa, Advs.

For Respondent : Mr. Dhruv Pande, Adv.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. The present application has been filed by one Mr. M.K. Jain, claiming to be a Financial Creditor along with and on behalf of Applicant Nos. 2 to 4 before this Adjudicating Authority under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**" or "**Code**") r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, seeking an Order to initiate Corporate Insolvency Resolution Process ("CIRP"), declaring moratorium and for appointment of Interim Resolution Professional ("IRP"), against M/s. Krrish Realtech Pvt. Ltd., the Respondent/Corporate Debtor for the alleged default of Rs. 12,30,25,023/-. The Corporate Debtor is registered with Registrar of Companies, Delhi & Haryana and is therefore within the jurisdiction of this Adjudicating Authority.
2. The Financial Creditor No. 1 i.e., Mr. M.K. Jain, Financial Creditor No. 2 i.e., Ms. Neeru Jain and Financial Creditor No. 3 i.e., Mr. Rishabh Jain are law abiding citizens of India. Financial Creditor No. 2 is the wife of Financial Creditor No. 1 and Financial Creditor No. 3 is the son of Financial Creditor No. 1. The Financial Creditor No. 4 i.e., M.K. Jain (HUF) is a HUF headed by Financial Creditor No. 1 as its Karta. The present Application is being filed by Financial Creditor No. 1, Mr. MK Jain, also on behalf of Financial Creditor No. 2 to 4 (herein collectively referred to as "**Financial Creditors**").
3. The Corporate Debtor is a company registered under the Companies Act, 2013 and is involved in real estate activities. Mr. Amit Katyal, Mr. Satish Kumar Seth and Mr. Vipin Jain were the Directors of the Corporate Debtor.



4. **Submissions of the Applicant/Financial Creditor:**

- (i) It is stated that the Directors of the Corporate Debtor namely Mr. Amit Katyal, Mr. Satish Kumar Seth and Mr. Vipin Jain ("**Directors**") approached the Financial Creditors for financial help and accordingly, a Memorandum of Understanding dated 28.07.2018 was entered into between the Financial Creditors and the Corporate Debtor and an Addendum to the said MOU was also executed on the same date i.e. 28.07.2018.
- (ii) Under the MOU, the Corporate Debtor represented that it had adequate ownership rights in certain plots in the proposed residential colony being developed by Braham City Pvt. Ltd. ("BCPL") in Sectors 60, 61, 62, 63 and 65, Gurugram, Haryana. It is pertinent to note that the BCPL was formerly known as "Brahama Krrish Buildtech Pvt. Ltd." and is one of the group companies to which the Corporate Debtor also belongs i.e., "The Krrish Group". The Corporate Debtor also represented that it is the owner of certain plots measuring 8186.022 sq. yds. in BCPL's project, which have been allotted to one of its customers namely Kelvin Buildcon Pvt. Ltd. ("Kelvin Plots"). The MOU was executed in a manner so as to ensure that in lieu of the investment, the Corporate Debtor would facilitate and structure a deal whereby the Financial Creditors would be able to buy the Kelvin Plots at a certain pre-determined price.
- (iii) Based upon the representations and assurances of the Corporate Debtor, the Financial Creditors agreed to invest a sum of INR 15,00,00,000/- (Rupees Fifteen Crore Only) ("**Invested Amount**") in the Corporate Debtor. As per the Addendum, the Financial Creditors were required to further invest a sum of INR 5,27,13,307/- (Rupees Five Crore Twenty-Seven Lakh Thirteen Thousand Three Hundred and Seven Only) and the Corporate Debtor was required to allot three additional Kelvin Plots to the Financial Creditors.
- (iv) It is submitted that the MoU records the amount given by the Financial Creditors as an 'Investment', which would enable the Corporate Debtor to procure certain plots from an existing owner i.e., Kelvin and to reallocate the same to the Financial Creditors at a price fixed under the MoU. Further, if any amount becomes due and payable by the Investors/Financial Creditors over



and above the Invested Amount, then the Investors/Financial Creditors would make payment of the said amount to the Corporate Debtor.

(v) The MOU also records that the Corporate Debtor agreed to complete the process of re-allotment of the Kelvin Plots, as detailed hereinabove on or before 15.09.2018 ("**Cut Off Date**"). till the Cut Off Date, the Financial Creditors were to make a payment of INR 11,19,82,492/- (Rupees Eleven Crore Nineteen Lakh Eighty-Two Thousand Four Hundred and Ninety-Two Only). However, the Financial Creditors ended up making a payment of INR 12,08,20,844/- (Rupees Twelve Crore Eight Lakh Twenty Thousand Eight Hundred and Forty-Four Only) till the Cut Off Date.

(vi) It is submitted that the Corporate Debtor was required to provide certain fully paid-up apartments/plots as security to secure the Investment made by the Financial Creditors. Under the MOU, the Corporate Debtor represented that in the event the Corporate Debtor is unable to arrange for the Kelvin Plots, on or before the Cut-Off Date i.e., 15.09.2018, the Financial Creditors may utilize and/or dispose off the securities as they deem fit. The following securities were created in favour of the Financial Creditors:

a. *17 plots in Brahma City, to be developed by Brahma City Pvt. Ltd. ("**Brahma Plots**")*

b. *6 Apartments in a project namely "Florence Estate" developed by Angle Infrastructure Pvt. Ltd. in which Mr. Amit Katyal was a 99.9% shareholder at the relevant time. ("**Florence Apartments**").*

c. *1 Apartment in a project namely "Ibiza Town" developed by Krrish Shalimar Projects Pvt. Ltd ("**Ibiza Apartment**") in which Mr. Amit Katyal is the Promoter, erstwhile Director and majority shareholder.*

(vii) It is submitted that the Financial Creditor further invested a sum of INR 2,29,40,000/- (Rupees Two Crore Twenty-Nine Lakh and Forty Thousand Only) into the Corporate Debtor on 07.01.2019. Therefore, the Financial Creditors invested a total sum of INR 14,37,60,844/- (Rupees Fourteen Crore Thirty-Seven Lakh Sixty Thousand Eight Hundred and Forty-Four Only) ("Total Invested Amount") into the Corporate Debtor.



- (viii) It is submitted that the Corporate Debtor failed to allot the Kelvin Plots in favour of the Financial Creditors on or before the Cut Off Date. Therefore, the Corporate Debtor committed a breach of the terms of the MOU and the Addendum. The Financial Creditors enquired about the securities created by the Corporate Debtor in favour of the Financial Creditors.
- (ix) Upon enquiry, the Financial Creditors gained knowledge of the fact that the securities which were created in favour of the Financial Creditors were all unenforceable, fraudulent and bogus. The Florence Apartments which were offered as security were reserved for the Central Government employees as per the license bearing no. 170/2008. The license bearing no. 170/2008 was granted by the Department of Town and Country Planning.
- (x) It is submitted that upon further enquiry, the Financial Creditors gained the knowledge of the following facts pertaining to the securities created by the Corporate Debtor in favour of the Financial Creditors:
- a. The Apartment Buyer's Agreements vide which the rights were created in favour of the Financial Creditors have been shown to be purportedly signed and executed in the year 2015 when the MOU was itself executed only in 2018.*
 - b. That Plot Buyer's Agreements with respect to Brahma Plots, executed by the Corporate Debtor in favour of the Financial Creditors were all undated except two agreements.*
 - c. The two executed agreements pertaining to the Brahma Security, which are dated, were affixed with stamp papers dating back to the year 2013. It is pertinent to note that the transaction between the Financial Creditors and the Corporate Debtor was entered only in 2018.*
- (xi) The Financial Creditors also gained the knowledge of the fact that the security interest pertaining to the apartment bearing No. G-0401 i.e., the Ibiza Apartment, was not fully paid up as represented in the MOU.
- (xii) The Financial Creditors also found out that the Corporate Debtor had allotted a plot bearing no: A-10 (Brahma Plots) to M/s. HAL Offshore Ltd. vide a letter dated 09.06.2017 and MVL Ltd. before entering into the MOU with the Financial Creditors and before representing to the Financial Creditors that plot bearing no. A-10 will be provided as a security to the Financial Creditors.



- (xiii) It is submitted that having gained the knowledge of the foregoing misrepresentations, the Financial Creditors terminated the MOU vide its letter dated 05.11.2019 and sought a refund along with interest @24% per annum from the date on which the investment was made till the date of refund.
- (xiv) Thereafter, the Corporate Debtor replied to the termination notice dated 05.11.2019 vide its letter dated 03.12.2019. Vide the said letter, the Corporate Debtor acknowledged the execution of the MoU, admitted to the receipt of INR 13,63,14,463/- (Rupees Thirteen Crore Sixty-Three Lakh Fourteen Thousand Four Hundred and Sixty-Three Only) and further admitted its failure to allot the Kelvin Plots in favour of the Financial Creditors. The Corporate Debtor accepted the termination of the MoU and agreed to refund an amount of INR 13,63,14,463/- (Rupees Thirteen Crore Sixty-Three Lakh Fourteen Thousand Four Hundred and Sixty-Three Only) to the Financial Creditors.
- (xv) The Financial Creditors wrote another letter dated 20.01.2020 to the Corporate Debtor seeking a refund of the invested amount. The Financial Creditors further clarified that it was illegal for the Corporate Debtor to withhold the refund even after admitting to having received at least INR 13,63,14,463/- (Rupees Thirteen Crore Sixty- Three Lakh Fourteen Thousand Four Hundred and Sixty-Three Only).
- (xvi) The Corporate Debtor vide letter dated 09.03.2020 agreed to refund an amount of INR 13,08,61,884.48/- (Rupees Thirteen Crore Eight Lakh Sixty-One Thousand Eight Hundred Eighty-Four and Forty-Eight Paisa Only). However, even after agreeing to refund an amount of INR 13,08,61,884.48/- (Rupees Thirteen Crore Eight Lakh Sixty-One Thousand Eight Hundred Eighty-Four and Forty-Eight Paisa Only), the Corporate Debtor failed to make any payment towards the same to the Financial Creditors.
- (xvii) The Financial Creditors vide its letter dated 27.09.2021 invoked the arbitration clause contained in Clause 10 of the MoU. However, the Corporate Debtor failed and neglected to reply to the said letter. Vide Order dated 23.05.2022, Hon'ble Mr. Justice Ajit Bharihoke ("**Ld. Arbitrator**") was appointed to adjudicate the disputes between the parties.



- (xviii) During the course of the arbitral proceedings, the Corporate Debtor, in its Statement of Defense admitted that it had received an amount of INR 12,30,25,023/- (Rupees Twelve Crore Thirty Lakh Twenty-Five Thousand and Twenty-Three Only) from the Financial Creditors. Based on such admission, the Financial Creditors filed an application under Section 31(6) of the Arbitration and Conciliation Act ("Arbitration Act"), 1996 read with Order XII Rule 6 of the Code of Civil Procedure, 1908 before the Ld. Arbitrator, seeking an Interim Award for a sum of INR 12,42,07,699/- (Rupees Twelve Crore Forty-Two Lakh Seven Thousand Six Hundred and Ninety-Nine Only) in favour of the Financial Creditors.
- (xix) It is submitted that the Ld. Arbitrator passed an Interim Award dated 09.08.2023, directing the Corporate Debtor to make a payment of INR 12,30,25,023/- to the Financial Creditors. Thereafter, the Corporate Debtor preferred a Petition under Section 34 of the Arbitration Act to challenge the Award titled "**Krrish Realtech Private Limited v. M.K. Jain**, (COMM) 82/2024]". The said Petition was dismissed as withdrawn by the Hon'ble Delhi High Court vide Order dated 13.02.2024.
- (xx) It is submitted that the Interim Award dated 09.08.2023 attained finality on 13.02.2024 i.e., the date of the dismissal of the Petition under Section 34 of the Arbitration Act filed by the Corporate Debtor. The debt therefore stands crystalized and the Corporate Debtor has defaulted in making payment of the debt amount.
- (xxi) It is submitted that the date of default in the present matter is deemed to be 13.02.2024 i.e., the date of the dismissal of the Petition under Section 34 of the Arbitration Act. The Financial Creditors have also preferred a Petition under Section 36 of the Arbitration Act seeking enforcement of the Interim Award dated 09.08.2023 before the Hon'ble High Court of Delhi which is pending adjudication.
- (xxii) It is submitted that the Corporate Debtor has defaulted in clearing the Financial Debt it owes to the Financial Creditors. The default on the part of the Corporate Debtor stands crystalized on 13.02.2024.
- Hence, the present Application.



5. **Submissions of the Respondent/Corporate Debtor:**

The Respondent/Corporate Debtor filed a Reply Affidavit dated 08.11.2024 and denied the submissions made in the present application as false and the present application is not maintainable.

- (i) It is submitted that the sum and substance of the Memorandum of Understanding dated 28.07.2018 is that Respondent/Corporate Debtor was developing the Project, and it does not have any title, interest and right over the Kelvin Plots and therefore, the Applicants invested funds with the Respondent/ Corporate Debtor with the purposes of securing a buy back arrangement for the Kelvin Plots. At the time when the fund was invested, there was no question of any interest to be paid by the Respondent/Corporate Debtor rather in terms of Clause 4 of the MoU, it was decided that in case the Respondent failed to obtain the Kelvin Plots on or before 15.09.2018, the Applicants shall retain the Security Inventory and may utilize/dispose of the same.
- (ii) It is an admitted case of the Applicants that the monies that were advanced by them were towards an investment in terms of Clause 5(a) and 5(b) of the MoU. The intent of the Applicants to enter into the MoU can be gathered that the Applicants had decided to invest in the project by purchasing the Kelvin Plots for investment purpose only and the MoU in terms of Clause 5 (a) envisaged a situation where Kelvin Plots if sold below Rs. 60,000.00 (Rupees Sixty Thousand only) per sq. yard, the Respondent would have the right of first refusal on the other hand, Clause 5 (b) envisages that in the event Kelvin Plots were sold above Rs. 60,000.00 (Rupees Sixty Thousand only) sq. yard, the parties shall share the profit revenue so generated. It is therefore clear that the Applicants had in fact invested the amount in the project as an investor and it cannot be said that the investment of the Applicants was a loan, and the funds advanced by the Applicants were an investment.
- (iii) It is further submitted that the MoU not only defines the Applicants as the "**investors**" and but also in terms Clause 1 of the MoU, it is expressly stated that "the investors have agreed to invest an initial amount of Rs. 15,00,00,000,00 (Rupees Fifteen Crores only) and in order to safeguard the interest of the Applicants in the Project, certain securities were created in favour of the Applicants.



- (iv) A perusal of recitals E, F and G of the MoU would demonstrate that the Applicants were cognizant of the fact that the Applicants were investors and not lenders.
- (v) It is submitted that a perusal of the record and admissions of the Applicant would demonstrate that the present case is not a case of advancement of a loan but rather a case of investment in the land (Kelvin Plots in the instant case) as an investor. It is also relevant to note that the Applicant has not filed any financial statements on record to demonstrate that money so advanced was a loan advanced to the Corporate Debtor.
- (vi) It is also an admitted fact that the Applicant was never an allottee or a home buyer but was a speculative buyer in as much as the Applicant was aware that the money that was being so invested in the Kelvin Plots, belonged to a third party i.e. Kelvin Buildcon Pvt. Ltd. and the Corporate Debtor did not any have title over Kelvin Plots. The money was invested for clearing title of the Kelvin Plots, which were to be resold by the Applicants/ Financial Creditors at a higher price to reap returns on their initial investment.
- (vii) It is submitted that it is no more res-integra that when an MoU/Agreement contains reciprocal rights and obligations, which in turn also envisages the parties being a profit share owner, who in the event of the fulfilment of obligations would receive the residual gain, the amount so invested cannot be said to be a 'Financial Debt' as defined by the Code. The MoU does not have the commercial effect of borrowing which is apparent from a reading of the MoU and its terms. A perusal of the documents on record and the underlying transaction would also demonstrate that the investment was not for time value of money rather it was to get a clear title of Kelvin Plots only.
- (viii) It is submitted that the Applicants were never an allottee or a home buyer but was a speculative buyer/investor and therefore in the humble submission of the Respondent/ Corporate Debtor would not fall under the purview of Section 5(8) of the Code. It is well settled that where the Applicants are a speculative investor, he cannot claim status and benefits as financial creditor under Explanation (i) of Section 5(8)(f) of the IBC and is not interested in the financial well-being growth and vitality of the Corporate Debtor but is just interested in investment and has come in the garb of an allottee, such petition needs to be dismissed.



6. Analysis and Findings

- (i) We have heard the submissions of Ld. Counsel appearing for the Applicant and the Ld. Counsel appearing for the Respondents. We have also perused the records.
- (ii) It is an admitted fact that the Applicants/Financial Creditors invested a total sum of Rs. 14,37,60,844/- (Rupees Fourteen Crore Thirty-Seven Lakh Sixty Thousand Eight Hundred and Forty-Four Only) to the Corporate Debtor. However, the Corporate Debtor failed to allot the Kelvin Plots to the Financial Creditors. Thereafter, the Ld. Arbitrator vide Order dated 09.08.2023 crystalized the debt amount to Rs. 12,30,25,023/- (Rupees Twelve Crore Thirty Lakh Twenty Five Thousand and Twenty Three Only). The present application under Section 7 of the Code is based on the said arbitral award dated 09.08.2023 passed in favour of the Financial Creditors and against the Corporate Debtor.
- (iii) This Adjudicating vide Order dated 16.07.2024 directed the Applicant to file an affidavit as to maintainability of the present application under Section 7 of the Code. The relevant part of the Order is reproduced as under:

“It is stated by the Ld. Counsel appearing for Financial Creditor that Financial Creditor obtained an arbitral award on 09.08.2023 on the basis of which the present application has been filed.

He further stated that the Applicant invested certain amount as per the MoU entered into between the parties.

The Applicant is directed to file an affidavit as to how the present applicant filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 meets the criteria of the financial debt and also on the issue of maintainability of the present application within one week.”

- (iv) In compliance with the order dated 16.07.2024, the Applicant filed an affidavit dated 14.08.2024. The Applicants were directed to file another affidavit vide Order dated 03.09.2024 by this Adjudicating Authority. The relevant part of the Order is reproduced as under:

“In compliance with the order dated 16.07.2024, the Applicant has filed an affidavit w.r.t. the maintainability of the Section 7 of the Application.



We may add that the Applicant was asked to file maintainability affidavit particularly w.r.t. the status as investors as per the MoU entered between the parties.

Since an affidavit filed by Applicant is silent on this point. The Applicant is granted one-week further time to file an affidavit w.r.t the status.”

- (v) In compliance with the order dated 03.09.2024 the Applicants/Financial Creditors filed an affidavit dated 07.09.2024 w.r.t. maintainability of the Section 7 application and submitted that for a claim to be considered as a financial debt, the following requirements need to be satisfied:

a. *“The factum of disbursement and existence of a claim as per Section 3(6) of the Code.*

In terms of Section 3(6) of the Code, where claim is defined to mean a right of payment. Since, it is an admitted fact that the Arbitral Award dated 09.08.2023 got finalized upon dismissal of Appeal under Section 34 filed by the Respondent vide Order dated 13.02.2024. Therefore, the right in favour of the Financial Creditors stood crystalized on 13.02.2024.

b. *The debt as defined under Section 3(11) of the Code is disbursed against the time value of money.*

*Section 5(8), IBC describes financial debt as a debt which is disbursed against the consideration for time value of money. It is submitted that in the present case, the amount furnished by the Financial Creditors, with the Corporate Debtor was disbursed against the consideration for the time value of money. The consideration for the time value of money can be demonstrated through the fact that Recital E of the MoU records that the Corporate Debtor is in need of funds and to financially assist the Corporate Debtor, the Financial Creditors are to infuse a sum of Rs. 15,00,00,000/- (“**Amount**”) into the Corporate Debtor. The terms of the MoU, the Corporate Debtor was under an obligation to procure and allot the Kelvin Plots in favour of the Financial Creditors by the cut-off date i.e. 15.09.2018. In return of the Investment, the Financial Creditors were to get something equivalent i.e. the Kelvin Plots and that too at a pre-determined price/discount i.e. free from market fluctuations.*



The parties envisioned that the market value of the said plots after allotment would be not less than Rs. 60,000/- (Rupees Sixty Thousand Only) per sq. yds as envisaged in Clause 5(a) of the MoU. Therefore, the Corporate Debtor even carved out a 'Right of First Refusal' for itself, in case the Financial Creditors decided to sell the Kelvin Plots below Rs. 60,000/- (Rupees Sixty Thousand only) per sq. yd.

The Financial Creditors were not merely acting as “facilitators” since, the Kelvin Plots were not directly coming to the Financial Creditors from the Corporate Debtors, but the Corporate Debtor was utilising the funds infused by the Financial Creditors for its own benefit as well as to procure the Kelvin Plots in its own name. Therefore, the Corporate Debtor could utilise the invested Amount before using the invested Amount to procure the Kelvin Plots. As per the Predetermined Price the total price of the Kelvin Plots was around 35,30,37,622/- (8186.022 sq yd. x 43,127) and the transaction at hand was not a simple transaction of ‘facilitation’, since the value of the Kelvin Plots was much more than the amount given by the Financial Creditors to the Corporate Debtor.

That further, if the Corporate Debtor procured Kelvin Plots at a price lower than Rs. 43,127/- per square yard (inclusive of EDC and IDC), then the profit was also to be pocketed by the Corporate Debtor. Therefore, the financial assistance was being utilised by the Corporate Debtor for its business purposes, with an aim and vision of earning a profit out of the entire transaction. Therefore, it is submitted that the transaction in question is covered by the definition of ‘financial debt’ as provided under Section 5(8)(f) of the Code.

c. The nature of the underlying transaction.

Though the MoU describes the Financial Creditors as 'Investors', the Financial Creditors were not 'Investors' in the Corporate Debtor and that this is an anomaly, which ought to be read against the Corporate Debtor, who was the draftsmen of the said MoU. If the disbursement of INR 12,30,25,023/- (Rupees Twelve Crore Thirty Lakh Twenty-Five Thousand and Two Three Only) was an ‘investment’, then the Corporate Debtor ought



to have allotted shares in favour of the Financial Creditors, in terms of Section 43 of the Companies Act, 2013. Further, if the disbursement of INR 12,30,25,023/- was an investment, then the MoU would also not have provided for allocation of securities in favour of the Financial Creditors.

Clause 2 of the MoU stipulates that instead of returning the Amount borrowed from the Financial Creditor, the Corporate Debtor, in return for the borrowing, would allot Kelvin Plots in favour of the Financial Creditors at a predetermined price i.e. a price free from any market fluctuations/ discount. The status of the Financial Creditors is not that of a 'homebuyer since, the Financial Creditors were not purchasing any plot or apartment belonging to the Corporate Debtor. The Corporate Debtor had agreed to procure Kelvin Plots (in its own name) and then to allot the same to the Financial Creditors. At the time of infusion of funds, the Corporate Debtor was not even the owner of the Kelvin Plots in question. Therefore, there was no builder-buyer relationship between the Financial Creditors and the Corporate Debtor. It is clear that the transaction between the Financial Creditors and the Corporate Debtor is purely a commercial borrowing and the Financial Creditor stands compensated by procuring an asset at a discount."

- (vi) The Ld. Counsel for the Applicants submitted that the Corporate Debtor is in default of repayment of debt and the present Section 7 is maintainable. As per Section 2(12) a default occurs when the debt or instalment of the amount of debt, which has become due and payable is not repaid by the debtor. Since, the Corporate Debtor sought to challenge the Interim Award under Section 34 of Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), before the Hon'ble High Court of Delhi which was dismissed as withdrawn by the Hon'ble High Court of Delhi on 13.02.2024, resulting in crystallization of the claim amount. Thus, the amount became due and payable by the Corporate Debtor on 13.02.2024. The fact of non-payment of debt by the Corporate Debtor is evident from the fact that an execution petition under Section 36 of the Arbitration Act, filed by the Financial Creditors against the Corporate Debtor, titled as **M.K. Jain & Ors. v. Krrish Realtech Private Limited [OMP (ENF) (Comm.) No. 239/2023]**, is pending before the Hon'ble Delhi High Court.



(vii) The Ld. Counsel for the Applicant submitted that the Clauses of the MoU describes the Applicants as 'Investors' but the nature of underlying transaction stipulates that instead of returning the Amount borrowed from the Financial Creditor, the Corporate Debtor, in return for the borrowing, would have allotted the Kelvin Plots in favour of the Financial Creditors at a predetermined price i.e. a price free from any market fluctuations/discount. Reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of **Global Credit Capital Limited & Anr. v. Sach Marketing Pvt. Ltd. & Anr.**, reported in 2024 SCC Online SC 649 wherein it was held that while deciding whether a transaction forms a financial debt or an operational debt, it is important to determine the real nature of the transaction on a plain reading of the agreement. It is thus submitted that the Corporate Debtor is in default of payment of the debt amount due and payable to the Financial Creditor.

(viii) On the contrary, the Ld. Counsel for the Respondent/Corporate Debtor submitted that the present application is not maintainable as the Applicant is a speculative investor, and he cannot claim status and benefits as financial creditor under Explanation (i) of Section 5(8)(f) of the IBC and is not interested in the financial well-being growth and vitality of the Corporate Debtor and is just interested in investment and has come in the garb of an allottee, such petition ought to be dismissed. Reliance has been placed on the judgment of Hon'ble NCLAT in the case of **Naman Infradevelopers Pvt Ltd. v. Metcalfe Properties Pvt. Ltd**, Company Appeal (AT) (INS) 74/2024 while observing that a speculative investor cannot be a financial creditor has held as follows:

*"5. The judgement relied upon by the Appellant does not relate to the facts of the case as the Appellant was never an allottee or a home buyer but was a speculative buyer, hence would not fall within the purview of Section 5(8) of the Code, hence we are in agreement with the order passed by the Adjudicating Authority as it had rightly relied upon **Mansi Brar Fernandes Versus Sudha Sharma and Anr** (Civil Appeal No.3826/2020) which affirms the order of the Appellate Tribunal in the matter of **Nidhi Rekhan Vs M/s Samyak Projects Pvt Ltd**, Company Appeal (AT)(Ins) No.1035/2020 wherein it was held that where the appellant is a speculative investor, he cannot claim status and benefits as financial creditor under Explanation (i) of Section 5(8)(f) of the IBC and is*



not interested in the financial well-being growth and vitality of the Corporate Debtor but is just interested in investment and has come in the garb of an allottee, such petition needs to be dismissed.

6. We are in agreement to say the status of ‘Financial Creditor’ cannot be accorded to the Appellant, it being a speculative investor and had filed an Application under Section 7 of the Code for recovery of its money with profit and interest.”

(ix) The Ld. Counsel for the Respondent submitted that when an MoU/Agreement contains reciprocal rights and obligations, which in turn also envisages the parties being a profit share owner, who in the event of the fulfilment of obligations would receive the residual gain, the amount so invested cannot be said to be a ‘Financial Debt’ as defined by the Code. The MoU does not have the commercial effect of borrowing which is apparent from a reading of the MoU and its terms. The relevant recitals of the MoU are reproduced as under:

*“(F) KRPL and **the Investors** have had several discussions in this regard and KRPL has agreed to facilitate and structure a deal whereby **the Investors** could buy the Kelvin Plots. KRPL and **the Investors** have now decided to reduce their understanding in writing on the terms and conditions mentioned below.*

*(G) Based on the representations and needs of KRPL, **the Investors** have agreed to invest a sum of INR 15,00,00,000/- (INR Fifteen crore only) into KRPL (**the initial investment**).*

.....

1) The investors have agreed to invest an initial amount of Rs. 15,00,00,000/- (JNR Fifteen Crores only) into KRPL on the terms and conditions contained therein

*2) KRPL as facilitator for and on behalf of **the Investors** shall approach Kelvin Buildcon Pvt. Ltd. with a commercial deal and prevail upon them to surrender the Kelvin plots to KRPL who in turn shall re-allot such surrendered plots afresh to the Investors at the rate of Rs. 43,127/- (INR Forty-three thousand one hundred and twenty-seven only) per square yard (inclusive of EDC and JDC). KRPL undertakes to complete this transaction with Kelvin Buildcon Pvt. Ltd. and re-allot the Kelvin plots to the Investors by or before 15.09.2018. KRPL*



undertakes not to allot or create any third-party interest in the Kelvin plots from the date of its surrender to KRPL till the allotment of the Kelvin plots to the Investor. As regards the amounts payable for the Kelvin plots **by the Investors**, the initial investment amount of INR 15,00,00,000/- shall be adjusted against the payments jar the Kelvin Plots. It is further clarified that if KRPL negotiates with Kelvin Buildcon Pvt. Ltd. for a price higher than Rs.43,127/- per square yard (inclusive of EDC and IDC) for the Kelvin plots, the difference shall be borne solely by KRPL.

3)

a) As a consideration for facilitation of the deal with Kelvin Buildcon Pvt. Ltd., **the Investors** have agreed to pay KRPL a sum of INR 20,30,38,570/- (INR Twenty crores thirty lakhs thirty eight thousand five hundred and seventy only), which, shall be payable within a period of 6 (six) months from the date of allotment of Kelvin plots. In the event the Investors are unable to pay the balance amount of INR 20,30,38,570/- within the aforementioned six month period, they shall be given a further interest free grace period of a further two months. Subject however to the fact that an amount of INR

5 (a) Upon allotment of the Kelvin Plots in favour of the Investors, the Investors shall become the sole, absolute legal owners of the kelvin Plots/ Security Inventory (as the case may be), and the Investors shall be at liberty to resell the said plots/apartments in the market with KRPL having the first right of refusal ('FRR'). FRR shall only be exercisable (the proposed sale is below Rs. 60,000/- (INR Sixty thousand only) per square yard. The Investors shall notify KRPL in writing with a 7 (seven) days advance notice in writing about the prospective sale and KRPL shall have the right to exercise the FRR within a period of seven days from the receipt of such communication, failing which the Investors are free to sell the Kelvin plots in the open market.

(b) In the even the prospective resale is over Rs. 60,000/- per square yard, the Parties agree any amount in excess of Rs. 60,000/- per square yard shall be shared equally between the Investors and KRPL



without any objection or dispute. By way of abundant caution, it is clarified that should KRPL not exercise its FRR, any sale of the concerned plots below INR 60,000/- per square yard shall be retained exclusively by the Investors."

- (x) It is submitted that the Applicant has already filed an execution petition before the Hon'ble Delhi High Court in OMP (COMM) 82/2024 seeking execution of the Award dated 09.08.2023, therefore the intent of the Applicant is to arm twist the Corporate Debtor and recover monies allegedly due to it. The provisions of the Code are intended to bring the corporate debtor to its feet and are not of money recovery proceedings as such. The intent of the applicant has only been to invoke the provisions of the Code so as to enforce recovery against the Corporate Debtor.
- (xi) The Ld. Counsel for the Respondent/Corporate Debtor submitted that the Applicant was never an allottee or a home buyer but was a speculative buyer in as much as the Applicant was aware that the money that was being so invested in the Kelvin Plots, belonged to a third party i.e. Kelvin Buildcon Pvt. Ltd. and the Corporate Debtor did not any have title over Kelvin Plots. The money was invested for clearing title of the Kelvin Plots.
- (xii) In the case of **Meehika Buildcon LLP v. City Star Infrastructure Ltd.**, Comp. App. (AT) (Ins) 47/2024, the Hon'ble NCLAT has held that when monies so invested, are for the purpose of clearing title, an application under Section 7 would not be maintainable and observed as under:
- "6. We have heard Counsel for the parties and after perusal of record, are of the considered opinion that the Appellant has not advanced the money as loan rather the money has been given to the Respondent for the purpose of clearing their title over the land in question which was to be shared by both of them in the ratio of 30% / 70%. It is pertinent to mention that the Appellant has not filed any financial statement on record in order to show that the money which has been given as per term sheet has been shown as a loan advanced to the Respondent"*
- 7. In such circumstances, we do not find any reason to interfere with the well-considered findings of the Tribunal whereby the application filed by the Appellant has been rejected..."*



(xiii) On perusal of the relevant terms of the MoU, the affidavits filed by the Applicant with respect to the maintainability and the judgments cited by both the parties, we are of the considered view that the present application has been filed by the Applicant in terms of the Arbitration Award dated 09.08.2023 for recovery of monies from the Corporate Debtor. It is an admitted position that the debt has been crystallized by the Ld. Arbitrator and the proceedings for its execution are pending before the Hon'ble Delhi High Court. The argument taken by the Applicant that even though in the MoU, the expression 'investor' is used but the amount was not for investment purpose and was in the nature of financial borrowing and the disbursement of the debt amounts to time value of money. In view of the specific clauses of the MoU, this argument cannot be accepted as the MoU contains reciprocal rights and obligations, and the nature of the transaction was to share the profits, the Applicant would have received a residual gain in the event of the fulfilment of obligations. Therefore, the amount so invested cannot be said to be a 'Financial Debt' as defined under Section 5(8) of the Code. In view of the same, we do not deem fit to initiate Corporate Insolvency Resolution Proceedings against the Corporate Debtor.

Therefore, the present application filed under Section 7 of the IBC is **not maintainable** and is liable to be **dismissed**.

7. **Order**

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

- i. The Application bearing **(IB)-348(ND)/2024** filed by the Applicant under section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Respondent, is **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)