



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

**Item No.02**

IB-906(ND)/2022

**IN THE MATTER OF:**

M/s. KOHINOOR APPARELS PVT LTD & ORS.

**..... Applicants/Financial Creditors**

**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. Piyush Singh, Mr. Akshay Srivastava,  
Mr. Adithya Ramani, Ms. Riddhi Jain, Advs.

For the Respondent : Mr. Krish Kalra, Adv.

**ORDER**

Order pronounced in open court vide separate sheets. **(IB)-906(ND)/2022** 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) – 906(ND)/2022**

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:**

**M/s. KOHINOOR APPARELS PVT LTD & ORS.**

**..... Applicants/Financial Creditors**

**VERSUS**

**M/s. ATS INFRASTRUCTURE LTD.**

**..... Respondent/Corporate Debtor**

**MEMO OF PARTIES**

**M/s. KOHINOOR APPARELS PVT LTD & ORS.**

**1. M/s. KOHINOOR APPARELS PRIVATE LIMITED**

*Having Its Registered Office at:*

D-17, Maharani Bagh, New Delhi-110065.

**..... Financial Creditor No. 1**

**2. Mr. VIPUL GUPTA**

**S/o Mr. S.P. Gupta**

**R/o K-115, S.D.A,**

Hauz Khas, South West Delhi-110016.

**..... Financial Creditor No. 2**

**3. Mr. VIPUL NAGPAL**

**S/o Mr. Darshan Lal Nagpal**

**R/o 1015B, Magnolias,**

Golf Course Road, Gurgaon, Haryana-122003.

**..... Financial Creditor No. 3**

**VERSUS**

**M/s. Kohinoor Apparels Pvt Ltd & Ors vs. M/s. ATS Infrastructure Ltd.**

**(IB) – 906(ND)/2022**

**Date of Order : 09.06.2023**



**M/s. ATS INFRASTRUCTURE LTD.**

*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. Piyush Singh, Mr. Akshay Srivastava, Ms.  
Riddhi Jain, Advocates

For the Respondent : Mr. Krish Kalra, Advocate

**ORDER**

**PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)**

**Description of the Parties:**

1. This Application has been filed by M/s. KOHINOOR APPARELS PVT LTD & 2 ORS., the Financial Creditors (FC)/Applicants on 14.11.2022, 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 INFRASTRUCTURE LTD., on the ground that the Corporate Debtor has defaulted to make a Payment of a sum of Rs. 11,42,34,311/- [(Rupees Eleven Crore Forty Two Lakh Thirty Four Thousand Three Hundred and Eleven Only)

**M/s. Kohinoor Apparels Pvt Ltd & Ors vs. M/s. ATS Infrastructure Ltd.**

**(IB) - 906(ND)/2022**

**Date of Order : 09.06.2023**



Rs.11,09,57,715/- of Principal amount along with Rs.32,76,596/- of Interest amount] as on 09.09.2022.

2. The Applicant Company namely M/s. KOHINOOR APPARELS PVT LTD was incorporated on 28.05.1993, as a Company Limited by Shares (Non- govt. Company) having CIN: U18109DL1993PTC053820, under the erstwhile Companies Act, 1956 with the Registrar of Companies, NCT of Delhi and Haryana. The Authorised Share Capital of the Applicant Company is Rs. 40,00,000/- (Rupees Forty Lakh Only) and the Paid-up Share Capital of the Applicant Company is Rs.35,00,000/- (Rupees Thirty Five Lakh Only). The Registered Office Address of the Applicant Company is D-17, Maharani Bagh, New Delhi, Delhi-110065.
3. The Respondent Company namely M/s. ATS INFRASTRUCTURE LTD was incorporated on 26.11.1996, as a Company Limited by Shares (Non- govt. Company) having CIN: U45201DL1996PLC083475, under the erstwhile Companies Act, 1956 with the Registrar of Companies, NCT of Delhi and Haryana. The Authorised Share Capital of the Respondent Company is Rs. 2,00,00,000/- (Rupees Two Crore Only) and the Paid-up Share Capital of the Respondent Company is Rs. 1,50,42,000/- (Rupees One Crore Fifty Lakh and Forty Two Thousand Only). The Registered Office Address of the Respondent Company is 711/92, Deepali, Nehru Place, New Delhi, Delhi-110019. Therefore, this Bench has jurisdiction to deal with this application. A true copy of the Respondent Company's Details/Master Data of the Respondent Company obtained from the website of the Ministry of Corporate Affairs is filed along with the application.
4. **Submissions of the Financial Creditors:**
  - a) The present application has been filed by the Financial Creditors in their individual capacities who had invested in the



real estate project namely, "ATS Pristine", situated at Plot No. SC-1/A-1, Sector-150, Noida (hereinafter referred to as the "Project") being constructed by ATS Housing Private Limited (hereinafter referred to as "AHPL") i.e. the associate company of the Corporate Debtor.

- b) The Financial Creditors had invested in the Project by way of a Financial Arrangement entered into between the parties on the assurances given by the Corporate Debtor that their respective units shall be bought back at a contractually agreed sale consideration on expiry of the prescribed time period. It is on the basis on these assurances that the Financial Creditors invested in the Project and thereby opted for a "buy-back" scheme. As a result, the total amount due to the Financial Creditors consists of the "buy-back" amount which was to be paid by the Corporate Debtor along with interest classifying it as "debt" under Section 3(11) of the Code. A copy of the tabulated sheet reflecting the details of the investment made by the Financial Creditors and units allotted by the Corporate Debtor is filed along with the application.
- c) The Corporate Debtor along with AHPL had launched the Project with various representations and promises regarding the purchase of units rendering huge returns in terms of the "buy-back" scheme which was so being offered. The Corporate Debtor assured that in case the Financial Creditors invested in the Project and purchased units in the Project, the Corporate Debtor shall "Buy-Back" the same from the Financial Creditors within a stipulated time period which shall yield huge returns. Based on such representations made by the Corporate Debtor, the Financial Creditors invested in the Project in the year 2018 and booked 2 units each and 1 Villa, individually. Up to this point, the Financial Creditors continued to be overburdened by not only being departed from a significant amount of money that they had paid to the AHPL towards their unit but also by



the mala fide conduct of the Corporate Debtor as well which had undertaken the sole responsibility to "buy-back" the units of the Financial Creditors at a contractually agreed consideration amount. Against this, the Corporate Debtor in connivance with AHPL has been enjoying the hard-earned money of the Financial Creditors under the Financial Arrangement entered into between them, as they have gone about collecting a significant total sale consideration of the units from the Financial Creditors without adhering to its own contractual obligations. It is hereby abundantly clear that the Corporate Debtor is not in sound financial health and is not in a position to "buy-back" the units of the Financial Creditors. In the above circumstances, it is apprehended that the hard-earned money of the Financial Creditors has been illegally diverted to other projects or utilised for other purposes. It is stated that the Financial Creditors have frequently followed up with the Corporate Debtor with regard to the Buy-Back of the Units but to no avail. The Corporate Debtor is entering into sham agreements with no intention to repay the amounts due to the Financial Creditors.

d) Till date, the Financial Creditors have collectively paid an enormous amount of Rs. 11,09,57,715/- (Rupees Eleven Crore Nine Lakh Fifty Seven Thousand Seven Hundred and Fifteen Only) to AHPL, that is an associate Company of the Corporate Debtor on the assurances given by the Corporate Debtor of buying back the units at a premium price but to the utter shock and surprise of the Financial Creditors, the PDCs issued by the Corporate Debtor when presented to the respective bank of the Financial Creditors got dishonoured and were returned unpaid by the bank vide return memo stating "Funds Insufficient" and "Account Blocked".

**e) The Submissions of the Financial Creditor No.1 are as follows: M/s Kohinoor Apparels Pvt. Ltd.**



- i. Unit Bearing No. PH 1 in Tower 8 on the Top Floor, having a super area of 4200 + 768 sq. ft. terrace.
- ii. In the year 2018, the Managing Director of the Corporate Debtor, Mr. Getamber Anand, who is also a Director in AHPL induced the Financial Creditor No. 1 (hereinafter referred to as "FC-1") to invest in the Project being developed by AHPL. The FC-1 had made the said investment under a buy-back scheme whereby the Corporate Debtor was obligated to buy back the units booked by FC-1 at a premium price.
- iii. FC-1 was allotted the aforementioned unit in the Project being developed by AHPL vide two Allotment Letters dated 01.09.2018, against an investment of Rs. 1,50,00,000/- (Rupees One Crore Fifty Lakh Only) paid by FC-1 to AHPL. A copy of the Allotment Letters dated 01.09.2018 issued by AHPL to FC-1 is filed along with the application.
- iv. At the time of execution of the Agreement, the Corporate Debtor had also executed a Memorandums of Understanding with respect to the Buy-Back assurance with the Financial Creditor dated 01.09.2018 respectively (hereinafter referred to as the "MOUs") qua the Buy Back of the units. It is pertinent to mention here that the MOUs were signed by Mr. Getamber Anand in the capacity of the authorised representative of both AHPL and the Corporate Debtor. A copy of one of the MOUs dated 01.09.2018 is filed along with the application.
- v. As per clause 3 of the recital of the MOUs, the Corporate Debtor had admittedly agreed to buy-back the unit at a fixed sale consideration of Rs.1,92,88,000/-. As per Clause 3.1 of the MOUs, the Corporate Debtor unambiguously took the liability to purchase the units upon expiry of 36 (thirty-six) months from the date of execution of the MOUs. Therefore, in pursuance of liability, the Corporate Debtor undertook to issue a post-dated cheque of Rs. 1,62,88,000/- (Rupees One Crore Sixty Two Lakh and Eighty Eight Thousand Only) with TDS as



Rs. 1,62,880/- (Rupees One Lakh Sixty Two Thousand Eight Hundred and Eighty Only) and 8 Post dated Cheques for Rs. 3,75,000/- (Rupees Three lakh and Seventy Five Thousand Only) drawn on Kotak Mahindra Bank, Sector 18, Noida duly signed by the Chairman and Managing Director of the Corporate Debtor, Mr. Getamber Anand.

vi. Vide letter dated 01.03.2021, the Corporate Debtor extended the 'Holding Period' as defined in the MOU dated 01.09.2018 till 31.10.2021 and issued 9(nine) new post dated cheques, including 8 for Rs. 63,000/- (Rupees Sixty Three Thousand Only) and 1 Post Dated Cheque dated 31.10.2021 for Rs. 1,85,32,800/- (Rupees One Crore Eighty Five Lakh Thirty Two Thousand and Eight Hundred Only) in addition to TDS for Rs. 1,87,200/- (Rupees One Lakh Eighty Seven Thousand and Two Hundred Only) drawn on Kotak Mahindra Bank, Sector 18, Noida. These were issued for a total amount of Rs. 1,90,36,800/- (Rupees One Crore Ninety Lakh Thirty Six Thousand and Eight Hundred Only) and in lieu of the same transaction was asked to hand over the cheque dated 30.09.2020 for Rs. 1,62,88,000/- (Rupees One Crore, Sixty Two lakh and Eighty Eight Thousand Only) back to the Corporate Debtor. A copy of the letter dated 01.03.2021 issued by the Corporate Debtor to FC-1 is filed along with the application.

vii. Vide letter dated 10.03.2022, the Corporate Debtor again sought an Extension of the "Holding Period' up to 30.06.2022 and in lieu of the same, agreed to pay the Financial Creditor 1, an amount of Rs. 2,07,07,335/- (Rupees Two Crore Seven Lakh Seven Thousand Three Hundred and Thirty Five Only). Pursuant to which, they issued a fresh cheque dated 30.06.2022 for Rs. 2,07,07,335/- (Rupees Two Crore Seven lakh Seven Thousand Three Hundred and Thirty Five Only) and agreed to pay TDS at Rs. 2,09,165/- (Rupees Two lakh



Nine Thousand One Hundred and Sixty Five Only). Further, he was asked to hand over the cheque dated 31.10.2021 for rupees 1,85,32,800/- (Rupees One Crore Eighty Five Lakh Thirty Two Thousand and Eight Hundred Only). A copy of the letter dated 10.03.2022 issued to FC- 1 is filed along with the application.

viii. It is imperative to state now that the said cheque dated 30.06.2022 for Rs. 2,07,07,335/- (Rupees Two Crore Seven Lakh Seven Thousand Three Hundred and Thirty Five Only) was dishonoured upon presentation and was returned with the remark "Account Blocked" vide return memo dated 09.09.2022. Thus, the Principal Amount of the said amount along with interest stands due and payable by the Corporate Debtor to the Financial Creditor towards the "buy-back" of the unit bearing no. PH1. A copy of the said return memo along with the dishonoured cheque has been filed along with the application.

**f) The Submissions of the Financial Creditor No.2 are as follows: Mr. Vipul Gupta**

- i. Unit bearing No. 3 PH2 on the top Floor, in Tower-3, having super area of 4200+920 sq. ft. terrace.
- ii. The Financial Creditor No. 2 (hereinafter referred to as "FC-2") was allotted the aforementioned unit in the Project being developed by AHPL vide Allotment Letter dated 14.05.2018, against an investment of Rs. 99,00,000/- (Ninety Nine Lakh Only) paid by FC- 2 to AHPL with a buy-back scheme in place wherein the Corporate Debtor had agreed to buy the said unit at a premium price. A copy of the Allotment Letter dated 14.05.2018 issued by AHPL to FC-2 is filed along with the application.
- iii. At the time of execution of the Agreement, the Corporate Debtor had also executed a Memorandum of Understanding with respect to the Buy-Back assurance with the Financial Creditor dated 14.05.2018 respectively (hereinafter referred



to as the "MOU") qua the Buy Back of the units. It is pertinent to note that this particular transaction was merely cloaked under the sham of transfer of funds as the basis for the MOUs and Allotment letters, they were executed on the same day and funds were mainly taken from the Financial Creditors and the same money, promised to be returned at a later date by the associate organisations. A copy of one of the Memorandum of Understanding dated 14.05.2018 executed between the Financial Creditor, the Corporate Debtor and AHPL are filed along with the application.

- iv. The present application has been filed by the Financial Creditors on account of the default committed by the Corporate Debtor to pay the "buy-back" amount towards the units of the Financial Creditor on expiry of the prescribed period as per the MOUs and extension letters executed thereafter. As per Clause 3 of the recital of the MOUs, the Corporate Debtor had admittedly agreed to buy-back the unit at a fixed sale consideration of Rs. 2,61,03,000/- (Rupees Two Crore Sixty One Lakh and Three Thousand Only).
- v. It is crucial to state that as per Clause 3.1 of the MOUs, the Corporate Debtor unambiguously took the liability to purchase the units upon the expiry of 36 (thirty-six) months from the date of execution of the MOUs. Therefore, in pursuance of liability, the Corporate Debtor undertook to issue a post dated cheque for Rs. 2,58,41,970/- (Rupees Two Crore Fifty Eight Lakh Forty One Thousand Nine Hundred and Seventy Only) drawn on Kotak Mahindra Bank, Sector 18, Noida duly signed by the Chairman and Managing Director of the Corporate Debtor, Mr. Getamber Anand.
- vi. Vide letter dated 14.08.2020, the Corporate Debtor extended the 'Holding Period' as defined in the MOU dated 14.05.2018 till 11.08.2021 and issued a new post dated cheque for Rs. 2,90,72,340/- (Rupees Two Crore Ninety Lakh Seventy Two



Thousand Three Hundred and Forty Only) and agreed to also pay TDS at Rs. 2,93,660/- (Two lakh Ninety Three Thousand Six Hundred and Sixty Only). A copy of the letter dated 14.08.2020 is filed along with the application.

- vii. It is pertinent to mention that while encashing the cheque dated 11.08.2021 for Rs. 2,90,72,340/- (Rupees Two Crore Ninety Lakh Seventy Two Thousand Three Hundred and Forty Only), it got dishonoured upon presentation and was returned vide Return memo dated 08.11.2021 stating the reason to be "Funds Insufficient". The return memo for the said dishonoured cheque is filed along with the application.
- viii. Further, to buy more time and to escape the liability arising out of a dishonoured cheque, vide letter dated 20.12.2021, the Corporate Debtor additionally extended the Holding Period' as defined in MOU dated 14.05.2018 up to 22.08.2022 and in order to give effect to the further extension of time, issued a new post dated cheque in favour of FC-2 for a total sum of Rs. 3,34,24,380/- (Rupees Three Crore Thirty Four Lakh Twenty Four Thousand Three Hundred and Eighty Only) drawn on Kotak Mahindra Bank, Sector 18, Noida. Additionally, the Developer AHPL, agreed to also allot additional units bearing No. 10262, with area 1800 sq ft in another project "ATS Dolce" as additional security to honour the aforementioned transaction and agreed further to not sell this particular unit until the completion of the transactions and was issued an Allotment Letter dated 11.10.2021 in lieu of the same security/collateral agreement.
- ix. Further, the Financial Creditor was asked to return the erstwhile post dated cheque for Rs. 2,90,72,340/- (Rupees Two Crore Ninety Lakh Seventy Two Thousand Three Hundred and Forty Only) to the Corporate Debtor. A copy of the extension letter dated 20.12.2021 and the allotment letter dated 11.10.2021 are filed along with the application.



- x. It is imperative to state now that the said cheque dated 22.08.2022 for Rs. 3,34,24,380/- (Rupees Three Crore Thirty Four Lakh Twenty Four Thousand Three Hundred and Eighty Only) drawn on Kotak Mahindra Bank, Sector 18, Noida was dishonoured upon presentation and was returned with the remark "Account Frozen" vide return memo dated 20.09.2022. Thus, the Principal Amount of the said amount along with interest stands due and payable by the Corporate Debtor to the Financial Creditor towards the "buy-back" of the unit bearing no. PH3. A copy of the said return memo along with the dishonoured cheque are filed along with the application.

**g) The Submissions of the Financial Creditor No.3 are as follows: Mr. Vipul Nagpal**

- i. Unit/ Residential Villa Bearing No. RH 07, having super area of 8500 sq. ft plus 1032 sq. ft Lawn Area
- ii. The Financial Creditor No. 3 (hereinafter referred to as "FC-3") was allotted the aforementioned unit in the Projects being developed by AHPL vide Allotment Letter dated 16.04.2018, against an investment of Rs. 1,25,00,000/- (Rupees One Crore and Twenty Five Lakh Only) paid by FC-3 to AHPL. A copy of the said Allotment Letter dated 16.04.2018 issued by AHPL to FC-3 is filed along with the application.
- iii. At the time of execution of the Agreement, the Corporate Debtor had also executed a Memorandum of Understanding with respect to the Buy-Back assurance with the Financial Creditor dated 16.04.2018 respectively qua the Buy Back of the units. The terms of each MOU were identical to the other one with minor variations such as the difference of details of the units allotted to the Financial Creditors and the details of the post-dated cheque so issued by the Corporate Debtor with respect to the "buy-back" assurance given by the Corporate Debtor. It is pertinent to mention here that the



MOUs were signed by Mr. Getamber Anand in the capacity of the authorised representative of both AHPL and the Corporate Debtor. It is also pertinent to note that this particular transaction was merely cloaked under the sham of transfer of funds as the basis for the MOUs and Allotment letters, they were executed on the same day and funds were mainly taken from the Financial Creditors and the same money, promised to be returned at a later date by the associate organisations. A copy of one of the Memorandum of Understanding dated 16.04.2018 executed between the Financial Creditor, the Corporate Debtor and AHPL are filed along with the application.

- iv. The present application has been filed by the Financial Creditor on account of the default committed by the Corporate Debtor to pay the "buy-back" amount towards the units of the Financial Creditor on expiry of the prescribed period as per the MOUs. As per Clause 2 of the recital of the MOUs, the Corporate Debtor had admittedly agreed to buy-back the unit at a fixed sale consideration of Rs. 5,01,55,000/- (Rupees Five Crore One Lakh and Fifty Five Thousand Only).
- v. It is crucial to state that as per Clause 7.1 of the MOU, the Corporate Debtor unambiguously took the liability and envisaged completing the transaction by 16.07.2020. Therefore, in pursuance of liability, the Corporate Debtor undertook to issue 10 (Ten) post-dated cheques for a total amount of Rs. 5,01,55,000/- (Rupees Five Crore One Lakh and Fifty Five Thousand Only) including 9 (Nine) post-dated cheques for Rs. 9,00,000/- (Rupees Nine Lakh Only) and 1(One) post-dated cheque for Rs. 4,20,55,000/- (Rupees Four Crore Twenty Lakh and Fifty Five Thousand Only) drawn on Kotak Mahindra Bank, Sector 18, Noida duly



signed by the Chairman and Managing Director of the Corporate Debtor, Mr. Getamber Anand.

- vi. Vide an extension letter dated 16.12.2021, the Corporate Debtor extended the 'Holding Period' as defined in the MOU till 31.08.2022 and issued 2(Two) new post dated cheques for a total sum of Rs. 5,68,26,000/- (Rupees Five Crore Sixty Eight Lakh and Twenty Six Thousand Only) and undertook to deposit Rs. 5,74,000/- (Rupees Five Lakh and Seventy Four Thousand Only) as TDS. Additionally, the FC-3 was asked to hand over the erstwhile post dated cheque for Rs. 4,20,55,000/- (Rupees Four Crore Twenty Lakh and Fifty Five Thousand Only) to the Addressee Company No. 1 which was duly complied with. A copy of the letter dated 16.12.2021 is filed along with the application.
- vii. It is imperative to state now that the said cheque dated 31.08.2022 for Rs. 1,51,91,550/- (Rupees One Crore Fifty One Lakh Ninety One Thousand Five Hundred and Fifty Only) and Ch. No. 032784 dated 31.08.2022 for Rs. 4,16,34,450/- (Rupees Four Crore Sixteen Lakh Thirty Four Thousand Four Hundred and Fifty Only), drawn on Kotak Mahindra Bank, Noida was dishonored upon presentation and was returned with the remark "Account Blocked" vide Return Memo dated 30.09.2022.
- viii. The Principal Amount of the said amount along with interest stands due and payable by the Corporate Debtor to the Financial Creditor towards the "buy-back" of the unit bearing no. PH1. A copy of the said return memo along with the dishonoured cheques is filed along with the application.
- h) It is also submitted that not only has the Corporate Debtor failed to pay the amounts due to the Financial Creditors but is also running around in circles by sending extension letters and adding on to the agony of the Financial Creditors who invested their monies into the said Project. It is further submitted that



the Corporate Debtor is in gross and utter violation of the terms contained in the MOU and the subsequent extension letters sent thereafter by not fulfilling their owed payment obligations.

- i) It is hereby crucial to mention that the total amount due and payable by the Corporate Debtor to the Financial Creditors is inclusive of compound interest @25% per annum to be compounded monthly calculated from the date of dishonour of each of the post-dated cheques till the date such amount is actually received. The compound interest is being backed by Clause 6.3(c) of the MOUs whereby it has been clearly stated that the Corporate Debtor, in the event of default due to dishonour of cheques, shall pay an additional sale consideration amount @25% per annum which shall be compounded monthly from the date of dishonour of the cheques till the date such amount is actually received by the Financial Creditors.

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

- a) It is vehemently denied that the Answering Respondent is liable to pay Rs. 11,42,34,3111- to the alleged Financial Creditors in terms of the Memorandum of Understandings dated 01.09.2018, 14.05.2018, and 16.04.2018 ("MOUs") executed between the alleged Financial Creditor, Answering Respondents and M/s. ATS Housing Private Limited ("AHPL") therefore, the question of any default of the alleged debt having been committed by the Answering Respondent does not arise for consideration.
- b) It is submitted that even though it is denied that the sum of Rs. 11,42,34,311/- is a financial debt, however, the payment of the said alleged sum was, in any event, subject to the alleged Financial Creditors duly complying with the terms and conditions enshrined under the aforesaid MOUs. However, since the alleged Financial Creditors failed to perform its obligations under the subjected MOUs, the Answering Respondent is under no



obligation to purchase the residential villa bearing No. PH1, 3PH2, and RH07 ("Unit") in one of its Projects namely, 'ATS Pristine' situated at Plot No. SC-1/A-1, situated in Sector 150, Noida, Uttar Pradesh ("Project") from the alleged Financial Creditors by paying the alleged amount of Rs. 11,09,57,715/-.

- c) The alleged Financial Creditors, in the present Application, have incorrectly submitted and misled this Adjudicating Authority into believing that the alleged sum of Rs. 11,09,57,715/- has arisen out of a single transaction. In this regard, it submitted that the said alleged sum has arisen out of three different and independent MOUs read along with Allotment Letters dated 01.09.2018, 14.05.2018, and 16.04.2018 ("Allotment Letters") respectively.
- d) In the present case, upon bare reading of the terms and conditions of the MOUs, it is evident that firstly the alleged Financial Creditors are merely a seller of the Units to the Answering Respondent, and as a sequitur, the Answering Respondent is merely a buyer and that the sums of Rs. 11,09,57,715/- along with interest of Rs. 32,76,596/- accrued thereon classified as financial debt is only sale consideration, which was also payable by the Answering Respondent to the alleged Financial Creditors subject to compliance of the terms of the MOUs and the Allotment Letters. This line of argument is even bolstered by the usage of the words 'Sale Consideration' as the consideration for the sale of Units in the MOUs.
- e) It is submitted that the Allotment Letter is merely a Sale Agreement and the sum of Rs. 3,72,75,000/- is the amount paid by the alleged Financial Creditors to the AHPL towards the sale of the Unit, as mentioned in the Allotment Letters. The said sum was not disbursed against the time value of money.
- f) It is trite law that for a transaction to qualify as a financial debt under the Code, it must have the element of profit or factoring discount, to give it an effect of borrowing. In terms of Explanation 1 of Section 5(8) of the Code, an amount raised from an allottee



under a real estate project shall be deemed to be an amount having the commercial effect of borrowing. In this regard, even if for the sake of argument, the alleged Financial Creditors are considered as an 'allottee' for the purpose of Section 5(8) of the Code, the alleged Financial Creditor has neither placed on record nor alleged so as to substantiate that the alleged debt of Rs. 11,09,57,715/- and interest of Rs. 32,76,596/- accrued thereon was remitted by the alleged Financial Creditors to the Answering Respondent. It is also denied that there is any admitted debt due to the alleged Financial Creditors either under the MOUs or otherwise. On the contrary, the alleged Financial Creditors have failed to act in accordance with the MOUs and is evidently seeking to sidestep their defaults by wrongly alleging criminal offenses and other defaults against the Answering Respondent.

- g)** The cheques which have been alleged to have been dishonored were not issued towards the alleged liability that has been referred in the purported Application and was issued in good faith and not for the purpose as stated by the alleged Financial Creditors. In any event, there is no debt or liability due against Answering Respondent as alleged by the alleged Financial Creditors which is evident from the facts as detailed hereunder as well.
- h)** In furtherance to the preceding paragraph, it is submitted that the Answering Respondent is not undergoing any financial crunch as alleged by the alleged Financial Creditors in the purported Application and is financially stable and solvent to continue carrying on its business operations. It is submitted that Answering Respondent is a renowned real estate project developer with extensive experience in the area of real estate, no purpose shall be achieved if the present application is admitted and the existing management of the Answering Respondent is replaced. In fact, in case the present application is admitted not only would the same prejudice the Answering Respondent but will also hinder and prejudice the interest of several homebuyers who have



invested their hard-earned money in the project of the Answering Respondent.

## 6. **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. 11,42,34,311/- [(Rupees Eleven Crore Forty Two Lakh Thirty Four Thousand Three Hundred and Eleven Only) Rs.11,09,57,715/- of Principal amount along with Rs.32,76,596/- of Interest amount] is a financial debt under Section 5(8)(f) of the Code or not?
- iii. It is submitted that the Financial Creditor No. 1 and the Corporate Debtor entered into MoU on 01.09.2018 to which M/s. ATS Housing Private Limited was also a party. In the said MoU, M/s. ATS Housing Private Limited has been described as a “developer”, M/s. Kohinoor Apparels Private Limited has been described as a “seller” and M/s. ATS Infrastructure Private Limited has been described as a “purchaser”.

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

- a. *“The Developer had allotted a residential apartment bearing no. PH1 having total sale price of Rs. 4,025.76/- per square feet admeasuring 4,200 square feet Plus 768 square feet of Terrace Area of the super area on the Top floor of Tower/Building no. 8 and the right to exclusively use 2 parking spaces with each apartment in its group housing residential scheme located at the admeasuring 93072 sq. meter situated at Plot No. SC-1/A-1, Sector-150, Noida, Uttar Pradesh (hereinafter referred to as the “Land”) in the name ‘ATS Pristine’ (hereinafter referred to as*



“Project”), along with all the rights, interests, liberties, easements, privileges, appurtenances whatsoever and free from all encumbrances (as hereinafter defined) to the seller (hereinafter referred to as “Apartment”), in terms of the respective Application Form, Allotment Letter and their respective Terms & Conditions all dated 23.08.2018 (hereinafter referred to as the “Allotment Letter”).

- b. The Seller had paid to the Developer a sum of Rs. 1,48,50,000/- (Rupees One Crore Forty Eight Lakh and Fifty Thousand Only), by way of Cheque No. 076611, dated 25/08/2018 drawn on Canara Bank, Delhi, the receipt of which is acknowledged by the Developer, and the Seller has agreed to deposit by way of tax deducted at source a sum of Rs. 1,50,000/- (Rupees One Lakh and Fifty Thousand Only) (all collectively hereinafter referred to as “Purchase Consideration”) for purchase of the Apartments.
- c. AND NOW WHEREAS the SELLER has agreed to further sell the said Apartments and/or its rights under the Allotment Letters to the Purchaser as per the terms of this Agreement, and the Purchaser has agreed to purchase the said Apartment or the rights of the Seller under the Allotment Letters from the Seller for Rs. 1,92,88,000/- (Rupees One Crore Ninety Two Lakh and Eighty Eight Thousand Only) (hereinafter referred to as “Sale Consideration”).
- d. The Parties are entering into this Agreement to (i) record the understanding between the Purchaser and the Seller towards the transfer of the Apartment from Seller to Purchaser; and (ii) certain amendments to the terms and conditions of the Allotment Letters executed between the Developer and the Seller.”
- iv. It is further submitted that the Financial Creditor No. 2 and the Corporate Debtor entered into MoU on 14.05.2018 to which M/s. ATS Housing Private Limited was also a party. In the said MoU, M/s. ATS Housing Private Limited has been described as a “developer”, Mr. Vipul Gupta has been described as a “seller” and



M/s. ATS Infrastructure Private Limited has been described as a “purchaser”.

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

- a. *“The Developer had allotted a residential apartment bearing no. 3PH2 having total sale price of Rs. 4,500/- per square feet admeasuring 4,200 square feet Plus 920 square feet of Terrace Area of the super area on the Top floor of Tower/Building no. 3 and the right to exclusively use 2 parking spaces with each apartment in its group housing residential scheme located at the admeasuring 93,072 sq. meter situated at Plot No. SC-1/A-1, Sector-150, Noida, Uttar Pradesh (hereinafter referred to as the “Land”) in the name ‘ATS Pristine’ (hereinafter referred to as “Project”), along with all the rights, interests, liberties, easements, privileges, appurtenances whatsoever and free from all encumbrances (as hereinafter defined) to the seller (hereinafter referred to as “Apartment”), in terms of the respective Application Form, Allotment Letter and their respective Terms & Conditions all dated 14.05.2018 (hereinafter referred to as the "Allotment Letter").*
- b. *The Seller had paid to the Developer a sum of Rs. 99,00,000/- (Rupees Ninety Nine Lakh Only), by way of Cheque No. 000012, dated 14/05/2018 drawn on Kotak Mahindra Bank, Delhi, the receipt of which is acknowledged by the Developer, and the Seller has agreed to deposit by way of tax deducted at source a sum of Rs. 1,00,000/- (Rupees One Lakh Only) (all collectively hereinafter referred to as "Purchase Consideration") for purchase of the Apartments.*
- c. *AND NOW WHEREAS the SELLER has agreed to further sell the said Apartments and/or its rights under the Allotment Letters to the Purchaser as per the terms of this Agreement, and the Purchaser has agreed to purchase the said Apartment or the rights of the Seller under the Allotment Letters from the Seller for*



*Rs. 2,61,03,000/- (Rupees Two Crore Sixty One Lakh and Three Thousand Only) (hereinafter referred to as "Sale Consideration").*

*d. The Parties are entering into this Agreement to (i) record the understanding between the Purchaser and the Seller towards the transfer of the Apartment from Seller to Purchaser; and (ii) certain amendments to the terms and conditions of the Allotment Letters executed between the Developer and the Seller."*

- v.** It is further submitted that the Financial Creditor No. 3 and the Corporate Debtor entered into MoU on 16.04.2018 to which M/s. ATS Housing Private Limited was also a party. In the said MoU, M/s. ATS Housing Private Limited has been described as a "developer", Mr. Vipul Nagpal has been described as a "seller" and M/s. ATS Infrastructure Private Limited has been described as a "purchaser".

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

- a. "The Developer had allotted a residential villa bearing no. RH-07 having the super area of 8500 sq. ft. plus 1032 sq. ft. Lawn Area along with the right to exclusively use of 2 parking spaces in its group housing residential scheme located at the land admeasuring 93,072 sq. meter situated at Plot No. SC-1/A-1, Sector-150, Noida, Uttar Pradesh (hereinafter referred to as the "Land") in the name 'ATS Pristine' (hereinafter referred to as "Project"), along with all the rights, interests, liberties, easements, privileges, appurtenances whatsoever and free from all encumbrances (as hereinafter defined) to the seller (hereinafter referred to as "villa"), in terms of the respective Application Form, Allotment Letter and their respective Terms & Conditions all dated 16.04.2018 (hereinafter referred to as the "Allotment Letter").*
- b. The Seller had paid to the Developer a sum of Rs. 1,23,75,000/- (Rupees One Crore Twenty Three Lakh and Seventy Five Thousand Only), by way of Cheque No. 000203 dated*



16/04/2018 drawn on HDFC Bank Limited for Rs. 1,23,75,000/- (Rupees One Crore Twenty Three Lakh and Seventy Five Thousand Only), the receipt of which is acknowledged by the Developer, and the Seller has agreed to deposit by way of tax deducted at source a sum of Rs. 1,25,000/- (Rupees One Lakh and Twenty Five Thousand Only) (all collectively hereinafter referred to as "Purchase Consideration") for purchase of the villa.

- c. AND NOW WHEREAS the SELLER has agreed to further sell the said villa and/or its rights under the Allotment Letters to the Purchaser as per the terms of this Agreement, and the Purchaser has agreed to purchase the said villa or the rights of the Seller under the Allotment Letters from the Seller for Rs. 5,01,55,000/- (Rupees Five Crore One Lakh and Fifty Five Thousand Only) (hereinafter referred to as "Sale Consideration").
- d. The Parties are entering into this Agreement to (i) record the understanding between the Purchaser and the Seller towards the transfer of the villa from Seller to Purchaser; and (ii) certain amendments to the terms and conditions of the Allotment Letters executed between the Developer and the Seller.”

- vi. From the perusal of the abovementioned clauses of the MoU, it appears that the MoU is in the nature of the sale agreement.
- vii. We are of the view that the alleged compound interest @25% per annum to be compounded monthly calculated from the date of dishonour of each of the post-dated cheques till the date such amount is actually received 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 compound interest of @25% is completely ex-facie illegal and exorbitant. Without prejudice, after perusing the relevant clauses of the MoU, the Financial Creditors are speculative investors 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 into the project as a speculative investor and for mere recovery of monies files exorbitant claims. Therefore, the benefit of section 5(8)(f) of IBC 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.

**viii.** 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;”***

**ix.** From the perusal of the recitals of the Allotment Letters executed between the Developer and the seller as well as the MoU, we do not find any clause which would show that any “Financial Debt” is owed to the present Applicant and therefore by no means the present Applicants can be called as a “Financial Creditor”.

**x.** 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—**

**(a) money borrowed against the payment of interest;**

**(b) \*\*\*\*\***

**(c) \*\*\*\*\***

**(d) \*\*\*\*\***

**(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) \*\*\*\*\*”**

- xi.** We have perused the various clauses of the Allotment Letters as well as the MoU very carefully. We have not come across any clause which shows that the money in question was borrowed against payment of interest and that the amount involved in the transaction is having the commercial effect of borrowing.
- xii.** 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 Applicants are not Financial Creditors holding any financial debt which is in default of payment by the Corporate Debtor.
- xiii.** 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.



## 7. **Order**

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

- i.** The Application bearing **(IB)-906(ND)/2022** filed by the Applicants, under section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Respondent, 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)**