



IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V

Item No.-303

IB-1057/PB/2020

IA-4010/2023

IN THE MATTER OF:

Improve Vyapaar Pvt. Ltd.

Vs.

VVA Developers Pvt. Ltd.

....Applicant

.....Respondent

SECTION

U/s 7 IBC

Order delivered on 19.10.2023

CORAM:

**SHRI MAHENDRA KHANDELWAL,
HON'BLE MEMBER (JUDICIAL)**

**DR. BINOD KUMAR SINHA,
HON'BLE MEMBER (TECHNICAL)**

PRESENT:

For the Applicant :

For the Respondent :

ORDER

Order pronounced in open Court vide separate sheets. IA-4010/2023 in CP-IB-1057/PB/2020 stands **disposed off**.

Sd/-

**(DR. BINOD KUMAR SINHA)
MEMBER (T)**

Sd/-

**(MAHENDRA KHANDELWAL)
MEMBER (J)**



**THE NATIONAL COMPANY LAW TRIBUNAL
COURT V, NEW DELHI**

I.A No. 4010/2023

IN

Company Petition No. (IB) – 1057/(PB)/2020

*Under Section 60(5) of the Insolvency and Bankruptcy
Code, 2016 read with Rule 11 of NCLT Rules, 2016.*

IN THE MATTER OF:

IMPROVE VYAPAAR PRIVATE LIMITED

.... FINANCIAL CREDITOR

VERSUS

VVA DEVELOPERS PRIVATE LIMITED

.... CORPORATE DEBTOR

AND IN THE MATTER OF-

VVA DEVELOPERS PRIVATE LIMITED
44/5, Kapashera Village, Near City Park Hotel,
South West Delhi, New Delhi- 110037

.... APPLICANT

VERSUS

IMPROVE VYAPAAR PRIVATE LIMITED
Flat No. 15G, Vaswani Marg,
Off JP Road, Seven Bungalows,
Andheri West Mumbai- 400058

.... RESPONDENT

Order Pronounced on: 19.10.2023



CORAM:

**SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)
DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

For the Applicant : Mr. Susshil Daga, Ms. Akshita Koolwal

For the Respondent :

ORDER

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

1. This application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 seeking directions of this Adjudicating Authority to keep the main matter bearing CP (IB) 1057/PB/2020 in abeyance till the time Ex. Appl. (OS). No. 108/2023 is adjudicated upon by the Hon'ble Delhi High Court.
2. The applicant in the present application has prayed for the following reliefs: -
 - a) *Allow the present application & keep the present application bearing CP (IB) 1057/PB/2020 in abeyance till the time Ex. Appl. (OS). No. 108/2023 is adjudicated upon by the Hon'ble Delhi High Court.*
 - b) *Pass any other such further order(s) as this Hon'ble Tribunal deem fit and proper in the facts and circumstances of the case.*
3. Briefly stated the facts of the case as mentioned in the instant application, which are just and necessary for adjudication, are as follows: -
 - i. That, the Arbitration proceedings were initiated by the Financial Creditor against the Corporate Debtor vide Case Ref No. DAC/1609-3-17 wherein an Award dated 06.11.2017 was passed by the Ld. Arbitrator partly allowing the claim of the Financial Creditor to the extent of recover a sum of Rs. 4,25,82,711/- along with



- pendente lite and future interest @18% p.a. on balance Principal amount of Rs. 2,66,60,760/- from the Corporate Debtor. Subsequently, the Financial Creditor had initiated recovery proceedings against the Corporate Debtor before the Hon'ble Delhi High Court vide OMP (ENE) (COMM.) 56/2018 which is pending adjudication.
- ii. That the Corporate Debtor had filed an Ex. Appl. (OS). No. 108/2023 before the Hon'ble Delhi High Court seeking permission of the Hon'ble Court to allow the Corporate Debtor to liquidate by way of sale, disposal, and creation of third party rights through allotment, sale, registration of deed, etc. in relation to the properties/units (as mentioned in the said Application) situated in the Housing Project of the Corporate Debtor Namely Aspen Heights located at Alwar Bypass Road, Bhiwadi, Rajasthan- 301019 for the purposes of satisfying the Award.
 - iii. That the matter bearing OMP (ENF.) (COMM.) 56/2018 was listed before the Hon'ble Delhi High Court on 25.07.2023 wherein counsel for the Corporate Debtor had submitted that the Corporate Debtor has an unencumbered inventory of about 18 flats in Tower A1 and A2 in its housing project namely, Aspen Heights located at Alwar Bypass Road, Bhiwadi, Rajasthan-301019. It was further submitted that the Completion Certificates with respect to the said 18 flats have also been received.
 - iv. Accordingly, it was prayed by Counsel for the Corporate Debtor that the said units be allowed to be liquidated under the supervision of the Hon'ble Delhi High Court for the purposes of satisfying the Arbitral Award. That the Counsel for the Financial Creditor had sought some time from the Hon'ble Court to obtain instructions with respect to the same. Accordingly, the matter was adjourned to 14.09.2023 for further proceedings.
 - v. Accordingly, it is prayed before this Adjudicating Authority that the present matter may be kept in abeyance till the time Ex. Appl. (OS). No. 108/2023 is adjudicated upon by the Hon'ble Delhi High Court. It is submitted that the Corporate Debtor is a profitable and solvent company and is ready and willing to satisfy the Award dated 06.11.2017 as per the directions of the Hon'ble Delhi High Court. It is



submitted that no prejudice shall be caused to the parties if the present matter is kept in abeyance till the time Ex. Appl. (OS). No. 108/2023 is adjudicated upon by the Hon'ble Delhi High Court. That the present Application is being filed *bonafide* and in the interests of justice.

4. We have gone through documents on record filed by the Applicant and arguments advanced by counsel for the Applicant.
5. In the present case, it is observed that the applicant is seeking to keep the main matter under Section 7 bearing CP (IB) 1057/PB/2020 in abeyance till the time Ex. Appl. (OS). No. 108/2023 is adjudicated upon by the Hon'ble Delhi High Court. From the facts of the present case, it can be seen that the proceedings before the Hon'ble Delhi High Court, is for the purpose of satisfaction of arbitral award in favor of the Financial Creditor.
6. However, it is pertinent to mention that, the provisions of Insolvency and Bankruptcy Code, 2016 envisages a time bound proceedings, and it is not appropriate for this Adjudicating Authority to keep in consideration the proceedings related to satisfaction of arbitral award before the Hon'ble Delhi High Court. Additionally, the purpose and objective of IBC, is to provide a time bound resolution of the Corporate Debtor, and if the present application is allowed, the very purpose of IBC would be defeated.
7. Moreover, proceedings under IBC is not a recovery proceeding. If an application under Section 7 of IBC, 2016, fulfils the criteria of debt, default, and the minimum pecuniary threshold then it is not appropriate for this Adjudicating Authority to go beyond these criteria. In the judgment of ***M. Suresh Kumar Reddy v Canara Bank and Ors.***, the Hon'ble Supreme Court has held that the existence of a financial debt and proof of default on the part of Corporate Debtor are the only factors to be considered by the Adjudicating Authority to admit an Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**Code**").



8. Accordingly, in light of the above observations and in accordance with the provisions of the IB Code, IA 4010 of 2023 cannot be admitted and is hereby dismissed.
9. Therefore, **IA 4010 of 2023** in **COMPANY PETITION IB (IBC)/1057(PB)2020** stands accordingly disposed of. Let a copy of the order be served to the parties.

Sd/-
(DR. BINOD KUMAR SINHA)
MEMBER (TECHNICAL)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)



IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V

Item No.-303
IB-1057/PB/2020

IN THE MATTER OF:

Improve Vyapaar Pvt. Ltd.

....Applicant

Vs.

VVA Developers Pvt. Ltd.

.... Respondent

SECTION

U/s 7 IBC

Order delivered on 19.10.2023

CORAM:

SHRI MAHENDRA KHANDELWAL,
HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA,
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

Order pronounced in open Court vide separate sheets. CP-IB-1057/PB/2020 stands **dismissed**.

Sd/-
(DR. BINOD KUMAR SINHA)
MEMBER (T)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (J)



**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT-V NEW DELHI BENCH**

COMPANY PETITION IB (IBC) NO. 1057 of 2020

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

**Improve Vyaapaar Private Limited
Flat No. 15G, Vaswani Marg,
Off JP Road, Seven Bungalows,
Andheri West Mumbai- 400058**

...Applicant/Financial Creditor

Versus

**VVA Developers Private Limited
44/5, Kapashera Village, Near City Park Hotel,
South West Delhi, New Delhi- 110037**

...Respondent/Corporate Debtor

Order pronounced on: 19.10.2023

Coram:

**SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)
DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)**

Appearances:

For the Applicant : Mr. Susshil Daga, Ms. Akshita Koolwal
For the Respondent : Adv Lakshay Agarwal

ORDER

PER: DR. BINOD KUMAR SINHA, MEMBER (TECHNICAL)



1. This is an application filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity “the Code”) read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, by Improve Vyapaar Private Limited (hereinafter referred to as ‘Financial Creditor’), represented by Mr. Amit Arora, seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against VVA Developers Private Limited [CIN: U45400DL2007PTC162293] (“Corporate Debtor”). The instant application was filed on 12.11.2020.
2. The Corporate Debtor was incorporated on 26.09.2002, having CIN: U45400DL2007PTC162293, under the Companies Act, 1956. Its registered office is at 44/5, Kapashera Village, Near City Park Hotel South West Delhi- 110037. Therefore, this Bench has jurisdiction to deal with this application.
3. The present application is filed before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make payment of a sum of Rs. 6,55,77,375/- (Rupees Six Crores Fifty-Five Lakhs Seventy-Seven Thousand Three Hundred and Seventy-Five only) including interest @18% p.a. of Rs. 2,29,94,664/- (Rupees Two Crores Twenty-Nine Lakhs Ninety-Four Thousand Six Hundred and Sixty-Four only) on the Principal amount of Rs. 4,25,82,711/- (Rupees Four Crores Twenty-Five Lakhs Eighty-Two Thousand Seven Hundred Eleven Only) as on 06.11.2020.

Submissions of learned Counsel appearing for the Applicant are as under: -

4. The details of transactions leading to the filing of this petition as averred by the Applicant is as follows:
 - a) In the present case, a memorandum of understanding dated 18.09.2012 was executed between VVA Developers Private Limited ("Corporate Debtor") and Improve Vyapaar Private Limited ("Financial Creditor") to give effect to a commercial arrangement/ understanding between the Financial Creditor and the Corporate Debtor wherein the Financial Creditor had booked an area



of 88200 Sq. Ft. in an upcoming high rise apartments residential project of the Corporate Debtor.

- b) The Corporate Debtor undertook to apportion the said 88200 Sq. Ft. space booked by the Operational Creditor as 2BHK units as per the planning of the Corporate Debtor. Hence, the Financial Creditor is covered under the meaning of a home buyer and therefore, is a Financial Creditor in the instant matter.
- c) That subsequently a revised MoU dated 18.03.2013 was executed between the parties and pursuant to both MOUs the Financial Creditor had paid a sum of Rs. 3,19,10,760/- in two tranches of Rs. 1,59,55,380/- (Rupees One Crore Fifty-Nine Lakhs Fifty-Five Thousand Three Hundred and Eighty only) each to the Corporate Debtor vide 2 cheques bearing number 924579 dated 18.09.2012 and 639004 dated 18.03.2013 to the Corporate Debtor.
- d) That as per the terms of the MoU, the Corporate Debtor had agreed to sell the apportioned area of the Financial Creditor to the public and the sale proceeds of the area booked by the Financial Creditor were to be paid to the Financial Creditor by the Corporate Debtor after receiving from the third party to whom such area is sold. Moreover, in any event wherein the Corporate Debtor fails to sell the area booked by the Financial Creditor, then the Corporate Debtor would be liable to refund the entire amount received from the Financial Creditor along with additional 18% interest back to the Financial Creditor.
- e) That the Corporate Debtor failed to honour its obligations envisaged in the MoU and failed in refunding the amount to the Financial Creditor, resultantly the Financial Creditor sent a legal Notice dated 16.08.2016 seeking payment of Rs. 6,38,39,149/- (Rupees Six Crores Thirty-Eight Lakhs Thirty-Nine Thousand One Hundred and Forty-Nine only).
- f) That since the Corporate Debtor failed to respond to the legal notice sent by the financial Creditor, resultantly, the Financial Creditor, by way of invoking



arbitration clause of the MoU, sent a notice dated 30.08.2016 to the Corporate Debtor for appointment of Arbitrator.

- g) That subsequent to the dispute being referred to the Arbitrator, the Financial Creditor filed a claim for recovery of Rs. 7,07,87,397/- (Rupees Seven Crores Seven Lakhs Eighty-Seven Thousand Three Hundred and Ninety-Seven only) with interest @18% p.a. thereafter which the arbitrator passed an award dated 06.11.2017 wherein the arbitrator partly allowed the claim of the Financial Creditor and held that the Financial Creditor is entitled to recover a sum of Rs. 4,25,82,711/- with pendentelite and future interest @18% p.a. on balance Principal amount of 2,66,60,760/- from the Corporate Debtor.
- h) That it is pertinent to mention herein that the amount of claim of the Financial Creditor is crystallized vide the Award of the Arbitrator dated 06.11.2017 and subsequent dismissal of challenge to the Award under section 34 of Arbitration and Conciliation Act, 1996 by the Hon'ble Delhi High Court on 26.02.2018 and thereafter dismissal of appeal challenging the order dated 26.02.2018 on 11.09.2018 by the Hon'ble Delhi High Court.
- i) That since the order dated 11.09.2018 is a decree in respect of the outstanding amount of the Financial Creditor on the Corporate Debtor and the same is not satisfied by the Financial Creditor, therefore the same falls within the ambit of financial debt.
- j) That the Corporate Debtor has not made payment of the amount of Financial Debt crystallized by way of the Arbitration Award till date. Hence, this Application.

Submissions of learned Counsel appearing for the Corporate Debtor are as under:

5. The details of the submissions made by the Corporate Debtor are as follows:

- a) That the Applicant's claim lies upon one MOU dated 18.09.2012 executed between the Applicant and Respondent in lieu of provisional booking of flats

CP IB 1057/PB/2020

Order Delivered on: 19.10.2023



in the project of the Respondent. The Applicant has fraudulently and mischievously given the devious color to the MOU as a Financial Contract in contravention to Rule 3(1)(d) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, whereas in reality the MOU is in the nature of an expression of interest. Without prejudice to the other arguments of the Respondent, even if it is assumed without admission that the "debt" as alleged is squarely covered by *Dena Bank Vs. C. Shivkumar Reddy & Another (2021) 10 SCC 330* and is a "financial debt", yet *Dena Bank (supra)* is not applicable to the present case since the Financial Creditor therein had not filed any execution proceedings qua the recovery certificate which was issued by the DRT on 25.05.2017. Accordingly, the issue qua execution of decree was not dealt with by the Hon'ble Supreme Court in *Dena Bank (supra)*. However, in the present case, the Applicant has already preferred an execution qua the allegedly crystallized "debt" before the Hon'ble High Court of Delhi and accordingly the present application u/s 7 which is filed with the sole motive of recovery is nothing but an abuse of process of law. The said issue is squarely covered by the Hon'ble NCLAT in *Shaikh Mohammed Tariq Vs Aegis Forging Ltd. [Company Appeal (AT) (Ins) 1342 of 2022]* and the said order dated 15.11.2022 has attained finality as the same has not been challenged. That the Petitioner herein is not bereft of its legal recourses and therefore the present petition is liable to be dismissed as it is clearly for the reasons other than for initiation of CIRP.

- b) That as per the own averments including Form 1 filed by the Applicant, "*the Financial Debt fell due for the first time on 06.11.2017 i.e. the date on which the claim of the Financial Creditor was crystallized by way of the Arbitral Award dated 06.11.2017.*" However, it is a matter of record that the present Application was filed on 12.11.2020 which is beyond the period of limitation of 3 years. Hence, the present petition is liable to be dismissed at the outset. Further, it is a well settled principle of law of pleadings that the limitation period shall be checked based upon the pleadings of the party and any



inconsistent or contrary submissions made later on shall have no effect without proper amendment of pleadings.

- c) Apart from the averments made by the Respondent in its reply qua its solvency and profitability, the Counsel for the Applicant during the course of arguments on 18.05.2023 had admitted that the Respondent is a "viable and going concern", however it does not have "intention" to pay the award/ decretal amount in the execution proceedings, due to which the Applicant has approached this Hon'ble Adjudicating Authority to recover its dues. It is therefore evident that the present Application has been filed as a money recovery tool, which is violative of the object and purpose of the IB Code, 2016. Such applications u/s 7 IBC are inherently not maintainable in light of plethora of judgments passed by the Hon'ble Supreme Court of India.
- d) It is pertinent to mention that the Financial Creditor on one hand has claimed the MoU to be a commercial agreement to claim it to be a financial debt while on the other hand also claims itself to be a homebuyer as well. That the said stands are inter-contrary to each other. However, without prejudice to the other averments, it is stated that the amounts paid by the alleged Financial Creditor does not amount to be provided to the Corporate Debtor as an "allottee" and therefore the amounts cannot even otherwise be categorized as a financial debt under Section 5(8)(f) Proviso. Therefore, as has been held in the judgment of *Manish Kumar v. Union of India & Anr. [(2021) 5 SCC 1]*, the Petitioner has failed to show as to how the Petitioner falls within the definition of an allottee, wherein there was no allotment of apartment by any stretch of imagination. Admittedly, a super area was agreed with right to the Corporate Debtor to sell off even such area to third parties. Therefore, the sale of super area only would not amount the Petitioner to be called as an allottee until and unless a documented booking of apartments were made in its favour. The documented booking as per the MoU itself was not or never done. In fact, that could have been done by the Corporate Debtor in favour



of the third parties. In no manner can it be said that the said MoU is an allotment agreement for the sale of apartments, which would be applicable in the present case.

- e) Without prejudice to the other contentions and averments by the Corporate Debtor, even if assuming without admitting that the Financial Creditor is an allottee, it is submitted that the Project under which the alleged area was allotted i.e. 88,200 sq. ft., is over an area of about 50 Bighas (1 Bigha is equal to 26,910.66 sq ft.), as is evident from the MOU dated 18.09.2012 and MOU dated 18.03.2013, while the alleged allotment of area to the Financial Creditor is about 88200 sq.ft. which is way less than the requisite threshold under the IB Code. Therefore, it appears that the present Application is filed without even fulfilling the minimum criteria as required under Section 7 as the Financial Creditor neither constitutes 10% of the total allottees as required under the 2nd proviso to Section 7 of IB Code, 2016 nor contains the total number of 100 allottees. Hence, in the absence of the fulfillment of the minimum mandatory criteria, the present Application is not maintainable in light of the judgment in *Manish Kumar (supra)*.
- f) That without prejudice of the other grounds taken independently, even if assuming without admitting that the Petitioner herein is an allottee, it is amply clear that the instant case would be of a speculative investor on bare perusal of the terms of the MoU. The amounts allegedly provided to the Corporate Debtor were not concretely as a homebuyer interested in flats or units or apartments but more concerned about the profit that it may or may not accrue in case the same is sold to third parties. Not only this, but the speculative investment is also furthered from the fact that the Corporate Debtor was free to sell off the said area to third parties and the Petitioner was concerned about the rates with minimal interest in the unit itself.
- g) Therefore, this being the case of speculative investment is liable to be dismissed at the threshold. In view of the above facts and circumstances, the



present Application under Section 7 of the IBC, 2016 of the Applicant is liable to be dismissed.

Analysis and Findings

6. We have heard the Learned Counsels for the Applicant and the Corporate Debtor and perused the averments made in the petition, reply and written submissions. Since the registered office of the Corporate Debtor is in Delhi, this Tribunal which has territorial jurisdiction over the Union Territory of Delhi, is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of the respondent Corporate Debtor under Section 7 of the Code.
7. In order to affirm that this petition falls within the ambit of Section 7, we need to see whether there is a “debt” owed to the Financial Creditor and whether there is a “default” with respect to such debt.
8. In the present case, a memorandum of understanding dated 18.09.2012 was executed between the Applicant and the Respondent wherein the Applicant Creditor had booked an area of 88200 Sq. Ft. in an upcoming high rise apartments residential project of the Corporate Debtor. The Corporate Debtor undertook to apportion the said 88200 Sq. Ft. space booked by the Operational Creditor as 2BHK units as per the planning of the Corporate Debtor. Therefore, the Applicant claims that the Applicant is covered under the meaning of a home buyer and therefore, is a Financial Creditor in the instant matter.
9. However, subsequently a revised MoU dated 18.03.2013 was executed between the parties and pursuant to both MOUs the Financial Creditor had paid a sum of Rs. 3,19,10,760/- in two tranches of Rs. 1,59,55,380/- (Rupees One Crore Fifty-Nine Lakhs Fifty-Five Thousand Three Hundred and Eighty only) each to the Corporate Debtor vide 2 cheques dated bearing number 924579 dated 18.09.2012 and 639004 dated 18.03.2013 to the Corporate Debtor. As per the terms of the MoU, the Corporate Debtor had agreed to sell the apportioned area of the Financial Creditor to the public and the sale proceeds of the area booked



by the Financial Creditor were to be paid to the Financial Creditor by the Corporate Debtor after receiving from the third party to whom such area is sold. Moreover, in any event wherein the Corporate Debtor failed to sell the area booked by the Financial Creditor, then the Corporate Debtor would be liable to refund the entire amount received from the Financial Creditor along with additional 18% interest back to the Financial Creditor.

10. That the Corporate Debtor failed to honor its obligations envisaged in the MoU and failed in refunding the amount to the Financial Creditor, resultantly the Financial Creditor sent a legal Notice dated 16.08.2016 seeking payment of Rs. 6,38,39,149/- (Rupees Six Crores Thirty-Eight Lakhs Thirty-Nine Thousand One Hundred and Forty-Nine only). Since, the respondent failed to respond to the legal notice sent by the financial Creditor, resultantly, the Financial Creditor, by way of invoking arbitration clause of the MoU, sent a notice dated 30.08.2016 to the Corporate Debtor for appointment of an Arbitrator.
11. That subsequent to the dispute being referred to the Arbitrator, the Financial Creditor filed a claim for recovery of Rs. 7,07,87,397/- (Rupees Seven Crores Seven Lakhs Eighty-Seven Thousand Three Hundred and Ninety-Seven only) with interest @18% p.a. thereafter which the arbitrator passed an award dated 06.11.2017 wherein the arbitrator partly allowed the claim of the Financial Creditor and held that the Financial Creditor is entitled to recover a sum of Rs. 4,25,82,711/- with pendent lite and future interest @18% p.a. on balance Principal amount of 2,66,60,760/- from the Corporate Debtor. The said Award has become absolute in view of the appeal decided in favor of the Applicant, but the Corporate Debtor has not made payment of the amount of Financial Debt crystallized by way of the Arbitration Award till date, leading the Applicant to file the present application.
12. Going by the aforementioned facts of the present case, it is to be determined whether the applicant herein is a Financial Creditor in terms of Section 5(7) and the money owed to the Applicant on the basis of the debt crystalized by way of Arbitration Award, is a Financial Debt under Section 5(8). According to



Section 5 (7) of IBC, 2016 "*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."

13. In **Section 5 (8)** "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) *any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;*

(c) *any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*

(d) *the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*

(e) *receivables sold or discounted other than any receivables sold on non-recourse basis;*

(f) *any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; 1 [Explanation. -For the purposes of this sub-clause, - (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]*

(g) *any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*



(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

[Explanation. -For the purposes of this sub-clause, - (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and (ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

14. The Applicant inter-alia has claimed to be a homebuyer under Section 5(8)(f). But when we examine the facts of the present case in the light of the provisions of Section 5 (8)(f) of the IB Code, 2016, we find that the debt claimed by the Applicant is not a ‘Financial Debt’ falling within Section 5(8)(f). In the instant case, the money was not disbursed as a loan with a consideration for the time value of money, but was paid as an advance for booking an area of 88200 Sq. Ft. in an upcoming high rise apartments residential project of the Corporate Debtor. The purpose of the MoU between the Applicant and the Respondent was to sell the apportioned area of the Applicant to the public and the sale proceeds of the area booked by the Applicant were to be paid to the Applicant. Therefore, in light of the agreement between the Applicant and the Respondent, it can be concluded that the Applicant was not an allottee in a real estate project, but a speculative buyer.

15. Moreover, the amounts allegedly provided to the Corporate Debtor were not advanced as a homebuyer interested in purchasing flats or units or apartments but as a speculator concerned about the profit that it may or may not accrue in case the same is sold to third parties. Additionally, the nature of transaction being nothing but speculative investment is also furthered from the fact that the Corporate Debtor was free to sell off the said area to third parties and the



Applicant was concerned about receiving the returns with minimal interest than in taking over the respective dwelling units itself. Therefore, the Applicant cannot claim to be a financial creditor falling within the purview of Section 5 (8) (f) read with Explanation as laid down by 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.”

16. Also the subsequent order of Hon'ble Supreme Court in **Mansi Brar Fernandes versus Sudha Sharma and Anr. [Civil Appeal No. 3826/2020]** which affirms the order of Hon'ble Appellate Tribunal in the matter of **Nidhi Rekhan vs M/s Samyak Projects Private Limited, Company Appeal (AT) (Ins) no 1035 of 2020** stating that:

“the purported allottee Mrs. Nidhi Rekhan, is actually a speculative investor earning a high rate of interest on her investment and is by no means interested in the construction, completion and possession of the said flats no. A-1201 and E-1301. Therefore, we have no hesitation in holding that Mrs. Nidhi Rekhan/Appellant cannot claim to be a “financial creditor” as defined under explanation of section 5(8)(f) of the IBC.”

“Thus, in our clear opinion, the Appellant, who is a speculative investor, 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 her investment and has come in the garb of an allottee. In such a situation, the Appellant is certainly not a financial creditor holding financial debt, which is in default of payment by the Corporate Debtor, and consequently we conclude that the Impugned Order does not require any interference. The appeal is, therefore, dismissed. There is no order as to costs.



17. We are of the view that the status of “Financial Creditor” cannot be accorded to a person who, comes in the project as a speculative investor and later on files an application under Section 7 of the Code for mere recovery of monies with exorbitant interest. As is clear from the terms of the MoU dated 18.03.2023, the Corporate Debtor was to sell the area booked by the Applicant and pay the proceeds to the Applicant, failing which the Corporate Debtor was made liable to refund the entire amount received from the Applicant along with additional interest at the rate of 18% per annum back to the Applicant. Thus, the Applicant, in any case was interested in refund of its money along with high rate of interest thereon rather in receiving delivery of flats/apartments/dwelling units. That is why, the Applicant invoked the Arbitration clause and on being successful in obtaining an award/decreed in its favour, confirmed in appeal, has filed the Execution Application OMP (ENF.) (COMM.) 56/2018 for recovery, which is pending adjudication.
18. It is very clear from the facts of the instant case, that since the Respondent has not made payment of the amount crystalized by way of Arbitration Award, this application was filed by the Applicant, which clearly indicates that the instant case is merely for the recovery of money which was paid by the Applicant to the Respondent. In the instant case, the applicant does not fall within the meaning of financial creditor, as it cannot claim the monies owed by the Corporate Debtor as ‘financial debt’ in terms of section 5(8)(f) of IBC. In the present case, as it is evident, that the Applicant was a speculative investor, and had not invested in the said project as a homebuyer interested in flats or units or apartments but was more concerned about the profit that it may accrue in case the same is sold to third parties.
19. In the judgment of **Ankit Goyat v. Sunit Agarwal & Anr. COMP APP (AT) (INS) No. 1020 of 2019** dated 12th August 2021, wherein the issue was related to assured returns with an option to the Petitioner therein to either retain the unit or to take the proceeds, the Hon’ble NCLAT held as under:



"... In a normal Builder Buyer Agreement if the Buyer does not accept the possession, the EMD is forfeited. In this case, the Buyer gets his money plus 25% assured return even if he chooses not to retain the apartment. This Agreement is only a camouflage of actually financing the construction of the flat. Hence, we hold that the Home Buyer sought to benefit from this 'lucrative Agreement' and is squarely covered by the ratio of the Hon'ble Supreme Court in 'Pioneer Urban Land and Infrastructure Ltd. ' (Supra). The I&B Proceedings is not a recovery proceeding and we place reliance on the ratio of the decision of this Tribunal in 'Binani Industries Limited' Vs. 'Bank of Baroda & Anr.' Company Appeal (AT) (Insolvency) No. 82 of 2018 wherein it is observed that the IBC is not a recovery proceeding. In fact, the I&B Code prohibits and discourages recovery in several ways."

20. Therefore, in light of the above observations, we hold that the Applicant being a speculative investor, is neither a Financial Creditor (Homebuyer) and nor the debt owed to the Applicant is a 'Financial Debt' as defined under Section 5 (8) of the Code. It also appears from the contentions projected on behalf of the Applicant herein that the instant application is being pursued as an alternative to recovery of the amount due under the Arbitral Award, but the Applicant has camouflaged it as an application filed as a Financial Creditor falling within the purview of Section 5(8)(f). In our considered view, an application under Section 7 cannot be filed as an alternative to an execution petition for recovery of amounts receivable under an arbitral award, which the instant applicant has attempted to do. This view is also supported by the **Hon'ble NCLAT in Sh. Sushil Ansal Vs. Ashok Tripathi and Ors. CA (AT) (Ins) No. 452 of 2020** wherein it is held as under: -

20. A 'decree-holder' is undoubtedly covered by the definition of 'Creditor' under Section 3(10) of the 'I&B Code' but would not fall within the class of creditors classified as 'Financial Creditor' unless the debt was disbursed against the consideration for time value of money or falls within any of the clauses thereof as the definition of 'financial debt' is inclusive in character. A



'decree' is defined under Section 2(2) of the Code of Civil Procedure, 1908 ("CPC" for short) as the formal expression of an adjudication which conclusively determines the rights of the parties with regard to the matters in controversy in a lis. A 'decree holder', defined under Section 2(3) of the same Code means any person in whose favour a decree has been passed or an order capable of execution has been made. Order XXI Rule 30 of the CPC lays down the mode of execution of a money decree. According to this provision, a money decree may be executed by the detention of judgment-debtor in civil prison, or by the attachment or sale of his property, or by both. Section 40 of the 'Real Estate (Regulation and Development) Act, 2016' lays down the mode of execution by providing that the RERA may order to recover the amount due under the Recovery Certificate by the concerned Authority as an arrear of land revenue. In the instant case, RERA has conducted the recovery proceedings at the instance of Respondent Nos.1 & 2 against the Corporate Debtor which culminated in issuance of Recovery Certificate and passing of order under Section 40 of the 'Real Estate (Regulation and Development) Act, 2016' directing the concerned Authority to recover amount of Rs.73,35,686.43/- from the Corporate Debtor as an arrear of land revenue. As already stated elsewhere in this Judgment, Respondent Nos.1 & 2 instead of pursuing the matter before the Competent Authority sought triggering of Corporate Insolvency Resolution Process against the Corporate Debtor resulting in passing of the impugned order of admission which has been assailed in the instant appeal. The answer to the question whether a decree-holder would fall within the definition of 'Financial Creditor' has to be an emphatic 'No' as the amount claimed under the decree is an adjudicated amount and not a debt disbursed against the consideration for the time value of money and does not fall within the ambit of any of the clauses enumerated under Section 5(8) of the 'I&B Code'

23. We accordingly summarise our finding as under:



(i) Respondent Nos. 1 and 2 can no more claim to be allottees of a Real Estate Project after issuance of Recovery Certificate dated 10th August, 2019 by 'UP RERA' directing recovery of Rs.73,35,686.43/- due thereunder as arrears of land revenue by the Competent Authority. On their own showing they are the decree-holders seeking execution of money due under the Recovery Certificate which is impermissible within the ambit of Section 7 of the 'I&B Code'. Clearly their application for triggering of Corporate Insolvency Resolution Process is not maintainable as allottees.

(ii) Decree-holder, though included in the definition of 'Creditor', does not fall within the definition of 'Financial Creditor' and cannot seek initiation of Corporate Insolvency Resolution Process as 'Financial Creditor'.

20. In view of the conspectus of facts and applicable law as discussed above, the present application filed under section 7 of the IB Code 2016 filed by the Applicant against the Corporate Debtor lacks merits, is not maintainable, and is liable to be dismissed.

21. In the light of the above, the instant petition bearing **COMPANY PETITION IB (IBC)/1057(PB)2020** being devoid of merit, is hereby dismissed.

Sd/-
DR. BINOD KUMAR SINHA
Member (Technical)

Sd/-
MAHENDRA KHANDELWAL
Member (Judicial)