



**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ**

CP (IB) NO.21/ALD/2021 with IVN.P.NO.4/2026

(An application 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 Nivedan Fin Invest Lease Limited

A Company Incorporated under the Companies Act.

Having its registered office at:

138-139, Main Road,

Ghazipur, Near Patparganj

Container Depot, East, Delhi - 110096.

..... APPLICANT/FINANCIAL CREDITOR

Versus

M/s Cosmos Infraestate Private Limited

A Company Incorporated under the Companies Act.

Having its registered office at:

2/100, Vijayant Khand,

Gomti Nagar, Lucknow (U.P)-226010.

.....CORPORATE DEBTOR

AND IN THE MATTER OF:

IDBI Trusteeship Services Limited

(Debenture Trustee of SWAMIH Investment Fund - I),

Having its registered office at Ground Floor,

Universal Insurance Building, Sir Phirozshah

Mehta Road, Fort, Bazargate,

Mumbai, Maharashtra - 400001.

..... APPLICANT

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Versus

1. M/s Nivedan Fin Invest Lease Limited

A company incorporated under the Companies Act, 1956,
Having its registered office at:
138-139, Main Road,
Ghazipur, Near Patparganj
Container Depot, East, Delhi-110096.
Email: nivedanfininvest@gmail.com

2. M/s Cosmos Infraestate Private Limited

A company incorporated under the Companies Act, 1956,
Having its registered office at:
2/100, Vijayant Khand,
Gomti Nagar, Lucknow,
Uttar Pradesh - 226010
Email: kailashchauhan17@gmail.com

... Respondents

Order pronounced on 13.05.2026

Coram:

Mr. Praveen Gupta : Member (Judicial)

Mr. Ashish Verma : Member (Technical)

Appearances:

Sh. Aman Kumar Dwivedi, Adv. : For the Financial Creditor

Sh. Udai Chandani, Adv. : For the Corporate Debtor

Sh. Prashant Kumar with
Ms. Nikita Menon, Advs. : For the Applicant in
Ivn. P .No.04/2026

ORDER

1. This Application/Petition **CP (IB) NO.21/ALD/2021** has
been filed on 11.01.2021 by M/s Nivedan Fin Invest Lease

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Limited (hereinafter referred as “**Applicant / Financial Creditor**”) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “**the IBC/Code**”) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 (hereinafter referred to as “**CIRP Rules**”) against M/s Cosmos Infrastate Private Limited (hereinafter referred to as “**Respondent/Corporate Debtor**”) in Form 1 containing all the information as required in Part I, II, III, IV and V of the Form showing a total financial debt of Rs. 1,00,00,000 /- along with Interest @ 3% Monthly: Rs. 65,28,476 and late fee charges of Rs. 15,16,85,237/-, showing total amount of default as Rs. 16,82,13,713/- till 11.12.2020 with the date of default as specified in the application being 29.02.2020.

2. The Respondent Corporate Debtor i.e. M/s COSMOS INFRAESTATE PRIVATE LIMITED with CIN No. U45400UP2008PTC035383 is having registered office at 2/100 VIJAYANT KHAND GOMTI NAGAR LUCKNOW UP 226010 IN and therefore, this tribunal has jurisdiction to decide this application/petition.

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3. Applicant states that the Respondent Corporate Debtor is engaged in the business of real estate/ Building Completion including the activities that contribute to the completion or finishing of a construction. As averred in the Application/Petition, the Corporate Debtor approached the financial creditor seeking financial assistance for an amount of Rs. 1,00,00,000/- (Rs. One Crore Only). A loan agreement, Memorandum of Understanding (MOU) and other necessary documents were executed on 30.06.2018 for sanctioning a loan of Rs. 1,00,00,000/- with interest at the rate of 3% per month for a maximum period of 12 months.
4. Under the MOU, it is stated that Corporate Debtor has acquired the right to develop a Housing Project i.e. 'Shivalik homes' on leased Plot No. 09, Opposite Zeta Sector, Surajpur, Greater Noida measuring 11920.40 sq Mtr under its own name and Respondent Corporate Debtor has also prepared documents in respect of allotment of some units in the aforesaid project to the Applicant Financial Creditor as a collateral security to the aforesaid loan. In case of failure by Corporate Debtor to pay the add-on profit and principal

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amount, the Applicant Financial Creditor shall be entitled to retain the flats given as collateral security.

5. Applicant further states that loan was duly acknowledged by the Corporate Debtor and interest @3% per month was also paid monthly till 01.07.2019. Respondent Corporate Debtor has also issued a cheque bearing no. 152235 dated 16.07.2019 in lieu of repayment of Principal amount of Rs. 1 Crore. However, the Respondent Corporate Debtor failed to maintain sufficient balance in its account and the cheque got dishonored and was returned by bank vide memo dated 18.07.2019.
6. The Applicant submits that based on the above facts and circumstances, he is a financial creditor as per definition of the financial creditor given in IBC, 2016. After narrating the above facts and circumstances of the case, the Applicant Financial Creditors submitted that the Respondent Corporate Debtor has failed to make repayment of financial facilities, therefore under such circumstances, it is just and equitable that the Corporate Insolvency Resolution Process (hereinafter referred to as “**CIRP**”) may be initiated against the Corporate Debtor as per the provision of the Section 7 of the IBC,2016.

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REPLY ON BEHALF OF THE RESPONDENT/CORPORATE DEBTOR

7. In response to the aforesaid Application, the Respondent Corporate Debtor has filed a reply vide diary no. 2049 dated 10.10.2025, countering all the allegations of default as raised by the Applicant Financial Creditors for initiating the corporate insolvency resolution process under section 7 of the IBC. The details and the arguments taken by the Respondent Corporate Debtor in the Reply are briefly discussed here as under: -

a. The Respondent submits that the Applicant does not fall within the ambit of 'financial creditor' as defined in section 5(7) of the Code and the investment made is also not a 'financial debt' as defined under section 5(8) of the Code, as the Applicant is an investor and has made a business investment in terms of the aforesaid Memorandum of Understanding (MOU).

b. The Respondent submits that none of essential ingredients to admit the Section 7 Application/Petition are satisfied in the instant case and there was nothing of the sort in the nature of debt advanced to the

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Respondent by the Applicant. Respondent also contends that the said transaction is a business investment of a fixed amount in terms of the MOU.

- c.** Respondent further submits that for a debt to become a financial debt, it must be disbursed against the consideration for the time value of money. In support of this contention, the Respondent has placed reliance on the judgement of the Hon'ble Apex Court in **Anuj Jain vs. Axis Bank Ltd. and Ors** (2020) 8 SCC 401.
- d.** The Respondent submits that no repayment mechanism was established in the MOU, therefore the onus remains upon the shoulders of the Applicant to show from the record as to when the repayment was supposed to be done. Hence, assumption of the default cannot be unilaterally established.
- e.** The Respondent also avers that in terms of clause 3, 4 and 5 of MOU, business investment was secured through collateral security and in case of default in repayment of maturity investment amount, the second party was entitled to sell the properties used as collateral security. Therefore, the present application is

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not maintainable as there cannot be any default in aforesaid terms.

- f.** The Respondent submits that the Applicant has not approached this Tribunal with clean hands as it has played fraud with the Corporate Debtor by obtaining signature on a blank paper which has been misused to create a loan agreement annexed with this Application.
- g.** The Respondent also avers that the Applicant never served any notice to it recalling the alleged loan if any disbursed by the Applicant. The Respondent further avers that the amount claimed by the Applicant is very much unreasonable, unwarranted and exaggerated for an amount of Rs. 1 crore paid by it even after calculating the unpaid amount of ad on profits and penalties.
- h.** The Respondent further submits that penal interest was not payable as no such agreement was executed. Applicant has levied compound interest as well as penal charges which are against the law of the land as well as against the principles of natural justice and has been levied unilaterally, arbitrarily and without justification.

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- i. Respondent also avers that the Applicant has misused the security cheque and went on to encash it before it got due or before the instruction was issued for encashment.
8. During the course of hearing, the Respondent Corporate Debtor has filed a compliance affidavit on 29.07.2023 wherein he avers that Shivalik Project -1 is completed in all aspects and a completion certificate is awaited from UPSIDC since May, 2017.
9. The Respondent has also filed a supplementary affidavit on 17.12.2024 in which he avers that the Applicant/Financial Creditors has taken over the physical possession of the property along with documents of the flats, by execution of MOU dated 30.06.2018. Respondent also admits that owing to delay in obtaining the completion certificate from UPSIDC, registration of conveyance deeds of all the flats, including that of the Applicant, is still pending.

SUPPORTING AFFIDAVIT FILED BY THE APPLICANT

10. The Applicant/Financial Creditor has also filed a supplementary affidavit on 16.02.2025 wherein he submits that the aforesaid flats in possession were a part of the

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security to loan agreement and were never handed over for payment of principal Amount of Rs. 1 crore. Furthermore, the said flats cannot be sold due to the non-issuance of the completion certificate by UPSIDC.

SUPPLEMENTARY COUNTER AFFIDAVIT FILED BY THE RESPONDENT

11. The Respondent/ Corporate Debtor has in response to above supplementary affidavit of the Applicant, filed a supplementary counter affidavit vide diary no. 241 on 30.01.2026, wherein he has annexed the list of flats of which possession was claimed to have been handed over to the Applicant/Financial Creditor. The Respondent also avers that it is admitted by the Applicant that it has possession of 10 flats in different towers, which is evident from Annexure 4 (page no 44) to the present Application.
12. The Respondent further avers that with respect to bouncing of security cheque, four cases under section 138 of the Negotiable Instruments Act have already been filed by the Applicant/Financial Creditor, out of which in three cases, mediation has already been concluded and the entire amounts have been paid. Therefore, this application is a

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misuse of the process of law to create undue pressure upon the Corporate Debtor for the purpose of recovery of the invested amount.

- 13.** Here, it is pertinent to mention that the Applicant/Financial Creditor has not filed any rejoinder to the reply filed by the Respondent/Corporate Debtor, and therefore submissions made by the Respondent/Corporate Debtor in the Reply as discussed in para no.7 of this order has not been controverted by the Applicant/Financial Creditor. However, written submissions have been filed by both the Applicant and the Respondent, which are discussed in subsequent paras as below.

WRITTEN SUBMISSION

- 14.** In compliance with the order of this tribunal, Applicant and also the Respondent have filed their respective written submissions wherein submissions made earlier, as already discussed in the aforesaid paras, have been more or less reiterated and further arguments have been taken to support their respective contentions and therefore, are not discussed again for the sake of brevity. However, the same have been

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taken care of while giving our findings in passing the order as below.

FINDINGS AND ANALYSIS

- 15.** We have heard the Learned Counsels for the Applicant/Financial Creditor and the Respondent/Corporate Debtor and perused the averments made in the petition and reply. Since the registered office of the Corporate Debtor is in Uttar Pradesh, this Tribunal, which has territorial jurisdiction over the State of Uttar Pradesh, is competent for dealing with the prayers made in the present Application/Petition for initiation of Corporate Insolvency Resolution Process (CIRP) under Section 7 of the Code in respect of the Respondent/Corporate Debtor.
- 16.** Before delving into the specific issues concerning the admission or rejection of the present Application/Petition, we noted on the issue of limitation period in filing of the present Application/Petition that it was filed before this Tribunal on 11.01.2021. In Part-IV of the present Application, the Applicant/Financial Creditor has specified the date of default as 29.02.2020, being the date of the last transaction between the Financial Creditor and the Corporate Debtor as being the

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date on which the last amount of the interest was claimed to have been received as per the Applicant/Financial Creditor . Accordingly, we find that this Application, having been filed on 11.01.2021, is well within the limitation period of three years from the date of default i.e. 29.02.2020.

- 17.** Next issue to be decided herein is to ascertain whether the amount under dispute, alleged to be a debt under default is covered by the definition of Financial Debt as defined under the IBC. For this purpose, we need to see whether there is a “debt” owed by the Respondent/Corporate Debtor to the Applicant/Financial Creditor on account of disbursement of any loan having time value of money and whether there is a “default” with respect to such debt.
- 18.** As per the present Application filed by the Applicant in Form 1, initiation of CIRP is sought against the Respondent/Corporate Debtor based on the outstanding dues mentioned in Part-IV of the Application amounting to Rs. 16,82,13,713/- in total, with the date of default being 29.02.2020. The basis for filing the present Application is that the Corporate Debtor and the Financial Creditor entered into various agreements i.e. Memorandum of Understanding

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(MOU), Hypothecation/ Loan Agreement, Deed of Mortgage by Conditional Sale dated 30.06.2018 etc. for grant of alleged business loan to the tune of Rs. 1 Crore at the interest of 3% per month compounded monthly.

- 19.** In order to ascertain the existence of debt and default, we find that the Applicant has not attached any Record of Default (ROD) issued by the National E-Governance Services Limited (NeSL). Therefore, we have to rely on other documents attached to the present Application in order to ascertain the existence of the financial debt and the amount of default.
- 20.** In this regard, we find that the Applicant has attached an Annexure A-4 from page Nos. 24 to 44 of the Application stating to be a copy of the loan agreement dated 30.06.2018, executed between the Financial Creditor, i.e. the Applicant and the Corporate Debtor, i.e. the Respondent.
- 21.** On perusing Annexure A-4 from page nos. 26-44, as attached with the Application mentioned in the previous para, we find that there are a total of five documents attached therein. The first document is titled as 'Hypothecation/Loan Agreement' from page nos. 27 to 33, the second document is titled as 'Deed of Mortgage by Conditional Sale' from page nos. 34 to

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36, the third document titled as 'Memorandum of Understanding' from page nos. 38 to 41, the fourth document is titled as 'Memorandum of Deposit of Title Deeds' from page Nos. 42 to 43 and the fifth document on page no. 44 is a 'Possession Letter' for taking possession of 10 flats. First four documents are dated 30.06.2018. However, the fifth document, i.e., the Possession Letter, is undated.

22. From these documents, it is not clear as to why four separate documents for the payment of Rs. 1 cr. by the Applicant to the Corporate Debtor have been executed, having different terms and conditions, and even different terminologies having been used with respect to the disbursement of Rs. 1 crore by the Applicant to the Respondent.

23. In the first document dated 30.06.2018, i.e. 'Hypothecation/ Loan Agreement', Rs. 1 crore disbursed by the applicant to the Respondent has been termed as a loan facility available for a maximum period of 12 months, carrying an interest at the rate of 3% p.m., compounding on a monthly rest or such modified rates as indicated by the company. Other terms and conditions mentioned in this loan agreement are regarding the manner in which this loan is to be repaid. The second

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document, i.e. 'Deed of Mortgage by Conditional Sale' is also related to the payment of loan of Rs. 1 crore by the Applicant to the Respondent on monthly interest of 3% for which a collateral security has been given by the Respondent by mortgaging the Plot No. 09, Opposite Zeta Sector, Surjapur, Greater Noida, measuring 11920.40 sq. Meters duly mutated in the name of Cosmos Infraestate Private Limited, i.e. Respondent. In this deed of mortgage, it has been specifically provided in para no. 3 that, if the Borrower or his heirs, executors, administrators or assigns fail to repay the said amount of Rupees 1,00,00,000/- (Rupees One Crore Only) within the said period, then the grant and transfer of the said property to the Lender, i.e. the Applicant, hereby made, shall become absolute in favour of the Lender, its executors, administrators or assigns.

- 24.** Apart from the above loan agreement and deed of mortgage providing collateral security for the said loan, there is a third document i.e. Memorandum of Understanding (MOU). On going through this M.O.U., which is also executed on 30.06.2018 itself, we find that the same amount of Rs. 1 crore has been stated to be paid for the purpose of business

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investment for a maximum period of 12 months, extendable with mutual consent of parties, on an add-on profit of 3% per month. The relevant part of this M.O.U is reproduced as under:

“WHEREAS, the First Party has represented that it has already acquired right to develop a HOUSING PROJECT on Plot No. 09, Opposite Zeta Sector, Surajpur, Greater Noida measuring 11920.40sq Mtrs. and also that the said project will be developed under its own banner, the name of Cosmos Infraestate Pvt. Ltd WHEREAS the Lease Deed in respect of this plot has been executed in the office of the Sub-Registrar, GREATER NOIDA, Gautam budh Nagar on dated 06-07-2011 in the name of Cosmos Infraestate Pvt. Ltd

AND WHEREAS the FIRST PARTY has right of development and sales for the Group Housing project "Shivalik Homes".

AND WHEREAS, the First Party requested to the Second Party for a business investment of Rs. 1,00,00,000 /- (Rupees One Crore Only) in the above mention project, for the maximum period of 12 months which may be extended with mutual consent of the parties on an add-on profit of 3% per month on the following terms & conditions laid down between both parties. The First

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Party will return back business investment + add-on profit within 12 Months.

NOW THIS DEED WITNESSED AS UNDER:

1. That the First Party has received from Second Party a sum of Rs. 1,00,00,000/- (Rupees One Crore Only) in following manner:-

| S.no | Amount | Mode Of Payment | Details | Dated |
|------|-------------------|-----------------|---------|------------|
| 1 | Rs. 1,00,00,000/- | RTGS | UTR No. | 30-06-2018 |

2. That the First Party Has received above mentioned amount from the Second party as Short Term Business Investment for a period of One Year, at the rate of 36% p.a. add on profit which will be paid monthly.

25. During the course of the hearing, Ld. Counsel for the applicant was asked to explain the justification for executing the said M.O.U. showing the amount of Rs. 1 crore paid by the applicant as business investment when it has been claimed to be a loan in the Application filed under section 7. The explanation of the Ld. Counsel of the Applicant as submitted by him about this document is that it was executed for collateral security purposes for taking possession of 10 flats in the upcoming project Shivalik Homes-1 of the Respondent, for which a Memorandum of Deposit of Title

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Deeds for these 10 flats and a possession letter has also been filed. The 10 flats given in the possession letter are as follows:

| S. No. | Tower No. | Flat No. | Area (Sq/ Ft.) | Floor | Flat Cost (Rs.) |
|--------|-----------|----------|-------------------|------------------|--------------------|
| 1 | A | 1901 | 1015 | 19 th | 15,22,500 |
| 2 | D | 102 | 635 | 1 st | 9,52,500 |
| 3 | D | 401 | 635 | 4 th | 9,52,500 |
| 4 | D | 402 | 635 | 4 th | 9,52,500 |
| 5 | D | 403 | 635 | 4 th | 9,52,500 |
| 6 | D | 404 | 635 | 4 th | 9,52,500 |
| 7 | D | 405 | 635 | 4 th | 9,52,500 |
| 8 | D | 406 | 635 | 4 th | 9,52,500 |
| 9 | D | 407 | 635 | 4 th | 9,52,500 |
| 10 | D | 408 | 635 | 4 th | 9,52,500 |
| | | | | | 1,00,95,000 |

26. The above explanation of the Ld. Counsel of the Applicant about the M.O.U having been executed only for collateral security purpose in respect of the loan of Rs. 1 crore claimed to have been disbursed by it, has not been found to be satisfactory because for the first document i.e. the loan agreement as discussed in para no. 19 to 21 above, a Deed of Mortgage has already been executed as per which the entire land on which Shivalik Homes-1 project has been constructed, has been mortgaged as a collateral security , and therefore there was no necessity for obtaining another

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collateral security of getting possession of 10 flats in the same project for the same amount of loan of Rs. One Crore.

- 27.** Considering the aforesaid facts, it is clear that the M.O.U. executed on 30.06.2018 is for a different purpose, i.e. for getting a business investment of Rs. 1 crore, with an add on profit of 3% per month and not for any collateral security for the loan of Rs. 1 crore as nowhere in the said M.O.U, the loan amount of Rs. 1 Crore has been mentioned. In fact, possession of these 10 flats was taken as a collateral security for making a business investment of Rs. 1 crore and it has been clearly mentioned in para 5 of the said M.O.U. stating that first party i.e. Respondent shall book the above mentioned flats in the name of second party, i.e. the Applicant, as security for the repayment of business investment and the payment received from the Second Party, i.e. the Respondent shall be adjusted as total price of the said flats. It is also mentioned in para 5 that in the event of failure of the First Party to pay the add-on profit and principal amount as agreed herein, the Second Party shall be entitled to retain the flats given as security to the Second Party. As per para 4 of the said M.O.U., the Second party i.e. the

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Applicant, has also been given a right for invoking the security in case of failure of the First Party i.e. Respondent to repay the business investment stating that in case the Second Party i.e. the Applicant invokes the security, then it will be entitled to sell the unit to the prospective buyer in open market and out of realizable sale price, it will be entitled for maturity amount along with add on profit up to date and it will retain investment maturity amount first out of funds received from sale of unit and remaining amount will be paid to First Party i.e. Respondent.

28. From these terms of the said M.O.U. as discussed above, it is very clear that the said M.O.U. is not at all connected with the disbursement of any loan amount of Rs. 1 crore by the Applicant to the Respondent but this M.O.U. is executed very clearly for the purpose of making business investment of Rs. 1 crore with add on profit to be earned at the rate of 3% per month and for securing this business investment, clear terms have been provided in the said M.O.U. for adjusting the amount of business investment of Rs. 1 crore out of the total price of 10 flats for which possession was taken as collateral security and amount of investment along with the profit has

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been provided to be recovered by selling these 10 flats in case of failure of the Respondent to repay the said business investment.

29. Now, the question arises as to what was the purpose for executing two separate set of documents, one as a loan agreement and another as an M.O.U. for business investment for the same amount of Rs. 1 crore paid by the Applicant to the Respondent. In this regard, we could not get any satisfactory explanation from the Applicant as discussed in para 26 above of this order. However, the Respondent in his reply filed on 10.10.2025 has explained in para 8 and 9 of said reply as under:

“8. That the petitioner/applicant has not come before Hon'ble Court with clean hands in as much it has concealed material facts. The alleged Financial Creditor has even played fraud with the Corporate Debtor by taking blank papers signed from the Corporate Debtor for getting the memorandum of understanding printed on it for supplying a copy of the memorandum of understanding to the corporate debtor. However the petitioner/applicant never returned the blank signed papers nor provided a copy of memorandum of understanding and now after going through the petition

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the corporate debtor has realized that the petitioner/applicant has misused the blank signed papers to create a loan agreement. The Corporate debtor is contemplating legal remedy against the said illegal act. 9. It is submitted that there cannot be two reasons for one transaction. Initially the petitioner/applicant and corporate debtor were in talks for investment. The deal was finalized for investment of a fixed amount. Now in order to suit his convenience the petitioner/applicant has termed the said transaction as loan. The documents relied by the petitioner/applicant is itself contradictory to each other.”

The above reply of the Respondent has not been controverted by the Applicant by filing any rejoinder.

- 30.** On analysing the above facts and circumstances of the case, we are of the considered opinion that the claim of the Applicant of having given a loan of Rs. 1 crore to the Respondent has not been found to be supported by any credible documentary evidence, as the loan agreement dated 30.06.2018 filed by the Applicant itself is being contradicted by another M.O.U. executed on the same date, i.e. 30.06.2018, in which the said amount has been shown as business investment. The submission of the Corporate

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Debtor in respect of having taken blank paper signed by the Corporate Debtor for getting the M.O.U. printed on it and not returning the blank signed paper, which remained with the applicant after printing of M.O.U. and thereafter misusing the blank signed paper to create a loan agreement, are not being controverted by the Applicant by filing of any rejoinder. In absence of any further explanation/clarification filed by the Applicant in response to the Reply of the Respondent, the credibility of the loan agreement documents filed by Applicant from page no. 27 to page no. 33 of the Application has been considerably reduced looking to the fact that another M.O.U. of the same date, i.e. 30.06.2018 has also been attached from page nos. 38 to 41 of the same Application showing the same very amount as business Investment.

- 31.** We have also perused Bank Account Statement of Applicant/ Financial Creditor from which it is evident that there has been disbursal of the investment amount of Rs. 1 crore on 30.06.2018 which is also substantiated by the second page of the M.O.U. (reproduced in para 24 above of the order) that the Respondent/ Corporate Debtor has received the above-mentioned amount from the Applicant/Financial Creditor as

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a short-term Business Investment for a period of one Year to be repaid along with add on profit at the rate of 36 % p.a. to be paid monthly to the tune of Rs. 3,00,000/- per month. It has been further noted that Applicant/ Financial Creditor has also not disputed the above-mentioned terms of M.O.U., though it is argued by the Ld. Counsel for the Applicant that this M.O.U. was entered into for securing the loan by way of possession of flats if the loan was not repaid but could not be explained as to why the amount of Rs.1,00,00,000/- disbursed was termed as business investment in the M.O.U. and instead of mentioning charging of interest , why the earning on the said amount was mentioned as to be paid as add on profit.

32. At this juncture, it is also important to consider clauses 3, 4 and 5 of M.O.U. in which it is clearly stated that in case of failure to pay the maturity investment amount on due date, the Applicant/ Financial Creditor is entitled to claim ownership of the units marked as security for due repayment of investment maturity amount. However, neither the repayment mechanism of the business investment, including repayment of principal amount nor the due date of repayment

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of the business investment has been clearly specified in the aforesaid MOU dated 30.06.2018. Even as regards the repayment of alleged loan, nothing has been clearly specified in the loan agreement attached with the Application

33. We have also considered the provisions of Section 5(8) of the Code, 2016 to examine whether disbursal of amount of Rs. 1,00,00,000/- by the Applicant/Financial Creditor can be covered under the definition of 'Financial Debt' as per the provisions of this section or any amount of the nature covered under clauses (a) to (i) of Section 5(8) for accepting whether this amount is to be taken as a loan as claimed by the Applicant or as an investment as claimed by the Respondent. Relevant provisions of Section 5 (8) along with its clauses have been reproduced herein for the sake of convenience as under:

*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 de-materialised equivalent;

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

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

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

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

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

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

(ii) 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;

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(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;”

- 34.** According to the aforesaid provision for a debt to be a financial debt, there should be a disbursement of debt, interest component and consideration, which is time value of money.
- 35.** In the present case, apart from there being a loan agreement, there is an MOU for the same amount of Rs. 1 crore disbursed by the Applicant to the Respondent in which the amount of Rs. 1 crore has been termed as a business investment made by the Applicant/Financial Creditor in “Shivalik Homes” Project of the Respondent/Corporate Debtor for a maximum period of 12 months (may be extended with mutual consent of the parties) in return for an add-on profit of 36% per annum, i.e. Rs. 36,00,000. It is pertinent to mention that add-on profit cannot be construed to be as interest for the purpose of financial debt. In the MOU, the term of repayment of principal as well as add on profit amount giving any specific date or period is not clearly mentioned except writing in

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general that “*The First Party i.e. the Respondent will return back business investment + add-on profit within 12 months*”.

On examining the above details, it is clear that the business investment of amount of Rs. 1 crore paid by the Applicant is not covered by the definition of financial debt in its main provision, as well as details of receipt as given in clauses (a) to (i).

36. The Hon’ble NCLAT in **M/s Jagbasera Infratech Private Ltd. v. Rawal Variety Construction Ltd.** CA (AT)(Ins) No. 150 of 2019 categorically held that any sum invested in the capacity of Promoter or Investor does not fall within the ambit of Section 5(8) of the Code. In the present case as well, the amount disbursed by the Applicant was in the nature of an investment made on guaranteed profit basis, therefore, in view of above precedent, business investment cannot be termed a ‘financial debt’ within the meaning of Section 5(8) of the Code.

37. After examining the facts of the case along with the accompanying documents attached with the Application as discussed so far, it is clearly found that there is no RoD in this case issued by the NeSL to establish the financial debt

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and default in its repayment and the loan agreement as attached with the Application has not been found to be a credible document to establish any genuine loan having been disbursed by the Applicant to the Respondent because for the amount of Rs. 1 crore disbursed by the Applicant to the Respondent on 30.06.2018. There are two types of documents attached with the Application in support of showing a financial debt and the amount in default, one is a loan agreement dated 30.06.2018 for giving a loan of Rs. 1 crore with the interest @ 3% pm and the second is MOU of the same date i.e. 30.06.2018 for making business investment of the same disbursed amount i.e. Rs. 1 crore in the Shivalik Home-1 Project of the Respondent with add on profit to be paid to the Applicant @ 3% per month.

- 38.** No satisfactory explanation could be given by the Applicant for executing two different types of documents for same disbursed amount i.e. Rs. 1 crore on 30.06.2018 as we have already discussed in para 26 above of this order. It is also worthwhile to mention that in lieu of payment of Rs. 1 crore as business investment, the Applicant has also been given possession of 10 flats as collateral security and the same is

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supported by a possession letter attached by the Applicant on page no. 44 of the instant Application. It is also mentioned in para 5 of the MOU that the amount of Rs. 1 crore paid by the Applicant is to be adjusted against the price of these 10 flats. The allegation of the Respondent made in its Reply filed against the instant Application that on payment of Rs. 1 crore by the Applicant, the MOU for business investment was executed and the loan agreement now attached with application was fraudulently made by the Applicant on certain blank signed papers taken from the Respondent for drafting of MOU and the same was not returned after making of MOU, has not been controverted by the Applicant by filing of any rejoinder in response to the reply of the Respondent. Therefore, we categorically hold that the loan agreement filed by the Applicant along with the instant Application is not a document worthy of putting any reliance to establish any financial debt and its default and the amount of Rs. 1 crore paid by the Applicant to the Respondent has been found to be invested in Shivalik Home-1 project of the Respondent against which possession of 10 flats in the said project has also been taken as collateral security against the said

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investment and as per para 5 of the MOU, the amount of Rs. 1 crore is to be adjusted against the price of these 10 flats. Therefore, the Applicant has failed to establish any financial debt or default.

- 39.** Apart from examining the genuineness of the claim of the Applicant about Rs. 1 crore paid by it to be a financial debt or not, we have also gone into the issue of whether the instant Application has been filed for any insolvency resolution of a Corporate Debtor for its revival and continuation of its business or only for recovery of an amount of Rs. 1 crore paid by the Applicant be as it may be loan or business investment.
- 40.** It has been held by the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. and Anr. Vs. Union of India (Writ Petition (Civil) no. 99 of 2018 dated 25.01.2019)*** that as per the preamble of Code 2016, IBC is a beneficial legislation for the purpose of reorganization and resolution of corporate persons in a time bound manner and to balance the interest of all the stakeholders. In this decision, as observed by the Hon'ble Supreme Court in para 12, IBC is a beneficial legislation aimed at revival of the corporate debtor and not a mere debt recovery instrument. The Code is first and foremost

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a code for reorganisation and insolvency resolution of corporate debtors. The same is reproduced as under: -

*“12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. **The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.** The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. **Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests***

[Emphasis Supplied]

41. Also, in **Gujarat Urja Vikas Nigam Limited vs Mr. Amit Gupta (Civil Appeal no. 9241 of 2019 dated 08.03.2021)**, Hon’ble Supreme Court observed that primary focus of IBC is to ensure revival and continuation of Corporate Debtor. Similarly, in **GLAS Trust Co. LLC v. BYJU Raveendran(Civil Appeal No. 9986 of 2024 dated 23.10.2024)**, this Court reaffirmed that IBC must not be misused by individual

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creditors as a tool for coercion or recovery, especially where the corporate debtor is viable and operational.

42. In the present case, the Respondent being a real estate developer/builder has been in the process of constructing two projects Shivalik Homes 1 and Shivalik Homes 2. Shivalik Homes-1 is the project for which only a small sum of Rs. 1 crore was taken and about the nature of this amount used in this project, it has already been discussed in aforesaid paras of this order. It is also worth to mention that this project has been fully completed and only issuance of completion certificate from the competent authority is pending. In this regard, an affidavit dated 29.07.2023 is also filed by the Respondent and the same is reproduced for a ready reference along with the photographs of the completed project.

“2. I say that the group housing project being built by the corporate debtor namely "Shivalik Homes"-1, located at Plot No HRA-09, UPSIDC, Site-C, Surajpur, Greater Noida (U.P) was completed in May 2017. Copy of the photograph of the group housing is annexed with the affidavit as Ex-A (colly).

3. I say that the Corporate Debtor after completion of the project applied for the "Completion Certificate" way back on 18.05.2017. However, till date due to the lackadaisical approach of the UPSIDC the project has not received the

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"Completion Certificate". The corporate debtor has been pursuing the department relentlessly but the department for reasons best known to them have failed to respond. The Corporate Debtor is contemplating approaching the Hon'ble High Court for redressal of its grievances. Copy of the various communication sent to the UPSIDC is annexed as Ex-B (colly).

4. I say that otherwise the project is complete in all respect and only awaiting "Completion Certificate". The said delay in issuance of completion certificate is solely due to lackadaisical approach of the UPSIDC. That on the date of execution of the MOU with the financial creditor the status of the project was complete awaiting "Completion Certificate."

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43. Second project i.e. Shivalik Homes 2 is funded under SWAMIH Fund to the extent of Rs. 210 crores for which a Debenture Trust Deed dated 17.03.2024 was executed by the M/s IDBI Trusteeship Services Limited. At present Shivalik Homes 2 is in the process of construction. None of the

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homebuyers in either of the projects are before us as being aggrieved on account of there being any delay in completion of either of the projects being constructed by the Respondent/Corporate Debtor.

44. While the present Application being under consideration seeking initiation of CIRP against the Respondent/Corporate Debtor, an intervention petition bearing IVN P.No. 04 of 2026 has also been filed by M/s IDBI trusteeship Services limited as a Debenture trustee under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 seeking inter alia for allowing to intervene and make appropriate submissions in the present Company Application/Petition CP(IB) No. 21/ALD/2021 and in alternative to take the present Application on record and consider the facts and submissions in the present Application before passing an order in the instant Company Application/Petition.

45. After taking into account the entire facts of the case in totality as discussed in the affidavit dated 29.07.2023 of the Respondent/Corporate Debtor as well as the above-mentioned intervention application, we find that:

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- (i) Construction of the first project i.e. Shivalik Homes-1 has been completed despite pendency of its completion certificate for which its application is pending with the competent authority and there is no evidence produced that the pendency is due to any fault being from the side of the Respondent/Corporate Debtor.
- (ii) Construction of the second project i.e. Shivalik Homes-2 is under progress for which fund is invested through a Government-backed SWAMIH FUND, and hence initiation of CIRP against the Respondent/Corporate Debtor, which would also include project Shivalik Homes-2 wherein Swamih Fund has invested monies, would adversely affect a Government funded project.

46. In view of the above facts and circumstances of the case, we find that the Respondent/Corporate Debtor at present is actively involved with its business of doing construction activities and its one project is completed and only the completion certificate is pending and the second project is under construction which is funded by a Government backed fund for which the debenture trustee company itself has prayed for not to initiate CIRP as the construction is going on

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satisfactorily , we are of the opinion that as the huge funds are invested in these projects by Government backed fund along with homebuyers and there is no adverse evidence against the Respondent/Corporate Debtor as far as running of its business is concerned , rather one of the largest Financial Creditors that too backed by Government funded SWAMIH FUND, has provided information that the project under construction by the Respondent/Corporate Debtor is going on smoothly , hence initiation of any CIRP against such solvent Corporate Debtor would be adversarial in nature. It has been held in **Swiss Ribbon (supra)** that the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests.

47. In view of the above facts of the case and the above referred judgements of Hon'ble Apex Court as being a settled law that the IBC is a beneficial legislation and cannot be used to recover the debts of Creditor but to resolve and reorganize the corporate persons and balance the interest of all stakeholders and it has also been consistently reinforced that the IBC is not a recovery tool, we are not inclined for allowing the instant application for initiation of CIRP against the

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Respondent/Corporate Debtor as this Application is found to have been filed tacitly for recovery of Rs. 1 crore paid to the Respondent/Corporate Debtor that too not in a clear term as being a loan or business investment, and accordingly the instant Application is hereby dismissed.

- 48.** The intervention application no. 4 of 2026 has been considered to the extent of the facts stated in this intervention application.
- 49.** In view of the fore going discussions, **CP (IB) No. 21/ALD/ 2021** is hereby dismissed.
- 50.** Since, the **CP (IB) No. 21/ALD/ 2021** has been ordered to be dismissed, therefore no further orders are required to be passed in **IVN.P. No. 04 of 2026** which therefore stands disposed off.

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(Ashish Verma)
Member (Technical)

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(Praveen Gupta)
Member (Judicial)

Date: 13.05.2026