NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.481 of 2023

[Arising out of Order dated 29.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in C.P. (IB) 747 MB-IV/2022]

IN THE MATTER OF:

Sanjay D. Kakade
1205, Kakade Capital, Shirolepath,
Shivaji Nagar, Pune, 411005. **....Appellant**

Vs.

1. HDFC Ventures Trustee Company Ltd.
(on behalf of HDFC Investment Trust),
HDFC House, HT Park Marg, 165-166,
Backbay Reclamation, Church Gate,
Mumbai, 400020.

2. Edward Mauritius Ltd.
Sanne House, Twenty Eight, Cyber City,
Ebene, Mauritius, 72201.

3. Kakade Estate Developers Pvt. Ltd.,
Through Interim Resolution Professional,
1205, Kakade Capital, Shirolepath,
Shivaji Nagar, Pune, 411005 **....Respondents**

Present:

For Appellant:	**Mr. Abhinav Vasisht and Mr. Sanjiv Sen, Sr. Advocates, Mr. Tanmaya Mehta, Ms. Rashmi Gogai, Ms. Anjali Singh, Ms. Radha Gupta, Advocates.**
For Respondents:	**Mr. Arun Kathpalia, Sr. Advocate, Mr. Abhijeet Sinha, Mr. Aman Raj Gandhi, Ms. Nanki Gehrwal, Mr. Parthsarthy Bose, Ms. Panchi Agarwal, Ms. Manasi Joglekar, Mr. Aditya Shirolkar, Advocates for R-1&2.** **Mr. Tishampati Sen, Ms. Riddhi Sancheti, Mr. Anurag Anand, Mr. Himanshu Kaushal, Mr. Mukul Kulhari, Advocates for R-3.** **Mr. Krishnendu Datta, Sr. Advocate, Mr. Samar Kachwaha, Ms. Shivangi Nanda, Mr. Anmol Agarwal, Advocates for CoC.**

Cont'd.../

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by the Suspended Director of the Corporate Debtor has been filed challenging the order dated 29.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV admitting Section 7 application filed by the Respondent – HDFC Ventures Trustee Company Ltd. Brief facts of the case necessary to be noticed for deciding the Appeal are:

(i) A Share Subscription and Shareholders Agreement was entered on 14.05.2008 between the Promoters, the Appellant Sanjay D. Kakade being one of them and IL&FS Trust Company Ltd. Promoters as 'First Part', IL&FS Trust Company Ltd. as 'Second Part', IIRF Holdings XIV Limited as 'Third Part', Edward Mauritius Limited as 'Fourth Part', HDFC Ventures Trustee Company Limited as 'Fifth Part' and Kakade Estate Developers Private Limited as 'Sixth Part'. The Kakade Estate Developers was referred to as 'Company' under the Agreement. The Agreement contained various clauses dealing with shareholding and Subscription Shares. Clause 16.4 provides for 'Put Option'. Clause 17 dealt with 'Events of Default'. Clause 18 dealt with 'Consequences of Events of Default'. Clause 19 dealt with 'Consequences of Termination of Agreement vis-à-vis IL&FS Investors'. Clause 21 deals with 'Indemnity'. It also dealt with the

rights of convertible preference shares. A sum of Rs.72,86,65,720/- was subscribed towards equity shares (Rs.85,720/-) and compulsorily convertible preference shares (Rs.72,85,80,000/-).

(ii) On 11.07.2008, a Supplementary Agreement was entered into between the same persons under which additional sum of Rs.15 Crores was subscribed in respect of 15,000 preference shares.

(iii) The project could not be developed by the Promoters and they offered the Investors with proposal to develop and to provide exit to the Investors. The Binding Term Sheet was executed in the year 2015 between the Company, Promoters, IIRF Holdings XIV Ltd. and IL&FS Trust Company Limited. Under the Term Sheet an exit was to be provided to the Investors. The exit consideration was to carry an IRR of 17% from March 10th, 2015.

(iv) On arising dispute between the parties, reference was made to the Sole Arbitrator, Justice C. K. Thakkar (Retd.). Before the Arbitrator a Consent Term by the parties was filed. On basis of which Consent Terms arbitration proceedings were disposed of by Consent Award dated 19.01.2021. As per Consent Term, a sum of Rs.72,85,71,429/- was agreed to be paid to Respondent Nos. 1 and 2 on or before 25.08.2021 and a further sum of Rs.47,14,28,571/- was agreed to be paid to the Respondent Nos. 1 and 2 on or before expiry of 15 months from 25.11.2020. In terms of the Consent Terms, failure to pay one of the tranches, would render the amount

of Rs.120 Crores being payable along with interest at 15% per annum calculated from 25.08.2021 till date of payment.

(v) The amount as contemplated under the Consent Award were not paid. The Respondent Nos. 1 and 2 issued legal notices dated 27.08.2021, which legal notices were sent to the Company as well as the Promoters. The legal notice stated that Company as well as the Promoters are jointly and severally liable to pay the amount as per the Consent Award.

(vi) On 16.06.2022, Section 7 application was filed by Respondent No.1 and 2 against the Corporate Debtor – Kakade Estate Developers Private Limited claiming total default of Rs.133,75,89,041/- being amount payable under the Consent Award amounting to Rs.120 Crores and interest accrued thereupon till 31.05.2022. Date of default was 25.08.2021 as per the Part IV of the application, date when the Corporate Debtor failed to pay first tranche of Award under the Consent Award.

(vii) The Corporate Debtor filed a reply in Section 7 application. The Corporate Debtor also filed an IA No. 2740 of 2022. Both the parties were heard and by impugned order dated 29.03.2023 the Adjudicating Authority has admitted Section 7 application and has appointed Mr. Jayesh Natvarlal Sanghrajka as Interim Resolution Professional. Aggrieved by the order this Appeal was filed.

2. When the Appeal was heard by this Tribunal on 29.04.223, the following order was passed:

"O R D E R

19.04.2023: *Learned counsel for the Appellant submits that the Appellant is endeavouring to take steps to abide by the consent terms dated 25.11.2020. Learned counsel appearing for the CoC submits that no Expression of Interest shall be issued till the next date.*

As prayed, list this Appeal on ***06.07.2023****."*

3. Appeal was heard by this Tribunal on various occasions. On 09.08.2023 submission was advanced on behalf of the Appellant that the Appellant for obtaining the finance from 'Kotak Investment Advisory Limited' has started due-diligence and Appellant shall be able to make the payment to the Respondent. On 09.08.2023 following order was passed:

"ORDER

09.08.2023: *Learned Counsel for the Appellant submits that the Appellant for obtaining the finance from 'Kotak Investment Advisory Limited' has started due-diligence and is in the process of receiving term sheet by which the Appellant shall be able to make the payment to the Respondent.*

2. Learned Counsel for the Respondents submits that no offer has been received by the Appellant nor any timeline for making the payment.

3. Learned Counsel for the Appellant submits that he shall make a written offer to the Respondents within seven days from today.

4. In view of the aforesaid, we direct this Appeal to be listed again on 29.08.2023. Liberty to mention to both the parties.

The statement recorded in the earlier date shall continue till the next date."

4. Subsequently again on 29.08.2023, statement was made that the Appellant has already in dialogue with two investors and term sheet has been given by one investor. Last opportunity of four weeks was granted to the Appellant to submit a proposal for settlement to the CoC. No settlement between the parties can be brought on the record as submitted by learned counsel for the Appellant. The Appeal was heard on 16.10.2023 and thereafter and judgment was reserved on 09.11.2023 after hearing was completed.

5. We have heard Shri Abhinav Vasisht, learned senior counsel and Shri Sanjeev Sen, learned senior counsel for the Appellant, Shri Arun Kathpalia, learned senior counsel and Shri Abhijeet Sinha, learned counsel for Respondent Nos. 1 and 2, Shri Krishnendu Datta, learned senior counsel for the Committee of Creditors and Shri Tishampati Sen, learned counsel for Respondent No.3.

6. Learned counsel for the Appellant challenging the order submits that the Respondent Nos. 1 and 2 who are 98.98% shareholders cannot be

classified as Financial Creditors of the Corporate Debtor and claim of such shareholders against transfer of their own share cannot be classified as financial debt. It is submitted that Consent Award was passed by the Arbitrator on Consent Terms signed between parties where the Corporate Debtor was liable to pay an exit consideration to Respondent No.2. Consent Decree *ipso facto* does not constitute financial debt. It is nature of the underlying transaction which is determinative of the fact that whether debt is a financial debt or not. There was no commercial borrowing for time value of money involved in the transaction. The underlying transaction is that the Respondent Investors will be paid money and in turn they will transfer shares which they own of the Corporate Debtor, to the Promoters or their nominees. The transaction is therefore one of consideration for exchange and sale/purchase of shares. Such a transaction does not constitute a financial debt under the IBC nor does it have a commercial effect of a borrowing not it is disbursement for time value of money. A shareholder cannot wear the hat of a financial creditor by buy back option or exit route for his own shares. The Respondent Nos. 1 and 2, who hold 98.98% of the total equity and preference share capital cannot be treated as Financial Creditors. They are in fact liable to be treated as Promoters of the Corporate Debtor. The Adjudicating Authority erred in construing the provisions of the Consent Award to be a guarantee or indemnity by the Corporate Debtor. The guarantee is not by the Corporate Debtor but only by the Promoters i.e. Respondent Nos.2 to 5. The Corporate Debtor has assumed joint and several liability under the Consent Decree but not as a Guarantor and further this liability

assumed under the Consent Decree is ultimately for sale/purchase of assets, and not for any commercial borrowing. The amount provided by Respondent No. 1 and 2 was in the nature of an investment and did not have the effect of a commercial borrowing. The Respondent No.1 and 2 under the Agreement have right to receive dividend, right to appoint Directors, right to vote in the matter, to nominate Directors of Respondent No.1 and 2 and certain other rights but terms and condition of the Agreement and even the Consent Terms do not make Respondent No.1 and 2 as Financial Creditors. It is submitted that the Adjudicating Authority has returned contradictory finding. The submission raised by the Corporate Debtor that Corporate Debtor has no obligation to pay in terms of the Agreement has been accepted. When the Adjudicating Authority found that no default has committed by the Corporate Debtor, there was no occasion to admit Section 7 application. The Corporate Debtor cannot be included in the expression 'Promoter'.

7. Learned counsel appearing for the Respondent No.1 and 2 refuting the submission of learned counsel for the Appellant submits that on account of default to provide an exit under the ARSSHA and SSSHA, the Financial Creditor became entitled to an internal rate of return (IRR) to the extent of 15% per annum, compounded annually. The Corporate Debtor has undertaken to indemnify the Financial Creditors for liabilities arising from breach of any undertaking, agreement or covenants and any failure by the Corporate Debtor or the Promoters of the Corporate Debtor to perform their obligations. The Corporate Debtor accepted and undertook liability to provide an exit to the Financial Creditors by Consent Terms and Consent Award. In

the Consent Terms, the Corporate Debtor and the Promoters are collectively defined as 'Promoter Respondents'. The Corporate Debtor unconditionally undertook to pay Rs.120 Crore in the manner agreed under the Consent Terms. The Corporate Debtor under Consent Terms undertook to repay as primary obligor in addition to being a Surety. The Corporate Debtor failed to honour the terms of the Consent Award and the Financial Creditor issued legal notices dated 27.08.2021 to the Corporate Debtor calling for repayment of the amount under the Consent Award. The Corporate Debtor admitted and acknowledged its liability but sought time to fulfil its obligations vide email dated 27.08.2021 and 06.09.2021. On failure of the Corporate Debtor to comply with its obligations, the Financial Creditor has filed Section 7 application. The Adjudicating Authority has considered the agreement and notices which impose an obligation on the Promoters of the Corporate Debtor to provide an exit route to the Financial Creditors, which obligation has the commercial effect of a borrowing as per Section 5(8)(f) of the IBC as the Corporate Debtor raised funds under the transaction for its project, repayable upon a specified tenure. The Corporate Debtor did not honour its promise of repayment in spite of several opportunities. The Expression of Interest has been issued on 02.11.2023. It is submitted that definition of Section 5(8)(f) is of wide import. The transactions subsumed under the provision were those having profit as their main aim. The transaction fulfills the test of 'commercial effect of a borrowing' under Section 5(8)(f) of the IBC. The Corporate Debtor had provided indemnity under the ARSSHA to the Financial Creditors against the breaches of the Promotes. The Corporate Debtor has unequivocally

accepted liability to repay the Financial Creditors under the Consent Award. The Corporate Debtor had accepted its liability in the present appeal when it sought time to approach the Financial Creditor for repayment as per the Consent Terms. The judgment relied by the Appellant during the submission are distinguishable and has no applicability.

8. We have considered the submissions of learned Counsel for the parties and have perused the records.

9. From the submissions advanced by learned Counsel for the parties and materials on record, following issues arise for consideration in this Appeal:

(I) Whether by investment made by the Financial Creditor in the Corporate Debtor by means of Share Subscription-cum-Shareholders Agreements, Binding Term Sheet as well as Consent Terms dated 25.11.2020, resulting into Consent Award dated 19.01.2021 there was any financial debt in default, entitling the Financial Creditor to file any Application under Section 7 of the IBC?

(II) Whether the Adjudicating Authority erred in admitting Section 7 Application filed by the Financial Creditor?

10. Both issues being interconnected, same are being taken together for consideration.

11. The transaction between the parties and the sequence of events are not in dispute. Investment was made in the Corporate Debtor by means of Share

subscription and Shareholders Agreement, between the Financial Creditor, Promoters of the Corporate Debtor and the Corporate Debtor - Kakade Estate Developer Private Limited. The Company has been engaged in construction of commercial/ residential buildings/ setting up of residential township project on the land in village Bhugaon, District Pune. The Share Subscription and Shareholders Agreement dated 14.05.2008 was entered into by the Financial Creditor and the Company, where Financial Creditor agreed to subscribe shares in accordance with the terms and conditions of the Original Agreement. An Amended and Restated Share Subscription and Shareholders Agreement ("**Amended Agreement**") was entered between the Promoters, Financial Creditor, Company and the Corporate Debtor on 14.05.2008. The Financial Creditor, by virtue of Clause 2 of the Agreement, agreed to pay a sum of Rs.72,86,65,720/-. For shares, under Clause 14, there was certain encumbrance to sell or transfer the shares. The Financial Creditor had pre-emption right in their favour in event of any of the Promoters of the Corporate Debtor desires to transfer his shares. Clause-16 of the Agreement provided for 'Exit Mechanism' to the Investors. Put Option was also contained in Clause 16.4. As per Clause-16.4, Promoters were under unconditional obligation to buy shares on an as if converted basis at the Fair Market Value as determined under Clause 19.9. Clause 16.4, is as follows:

> *"16.4 Put Option*
>
> *(a) In the event the Promoters and the Company are unable to provide an exit to the IL&FS Investors and/ or the HIREF Investors and/ or their Affiliates before March 31, 2015 in any manner as specified in*

Clauses 16.1 to 16.2 above, without prejudice to any other rights or remedies available to the IL&FS Investors and/or the BIREF Investors, the IL&FS Investors and/or the HIREF Investors shall have the option to require the Promoters to buy their Shares and the Promoters shall be under an unconditional obligation to buy such Shares on an as if converted basis at the Fair Market Value as determined under clause 19.9 below. For this purpose the IL&FS Investors and/or the HIREF Investors and/or their Affiliates shall serve to the Promoters as put option notice ("Put Option Notice"), and the Promoters shall be obliged to perform their respective obligation as aforesaid, within 60 days from the date of receipt of the Put Option Notice.

(b) If the Promoters fail to comply with their obligations to buy Shares held by the IL&FS Investors and/or the HIREF Investors and/or their Affiliates, then each of the IL&FS Investors and/or the HIREF Investors shall forthwith (i) takeover the control and the management of the Company and may consider partial sale of division or assets of the Company and may consider partial sale of division or assets of the Company to recover the IL&FS Investors Capital Investment and HIREF Investors Capital Investment at the Fair Market Value under this Agreement, and (ii) have lien over the Shares held by the Promoters and their Affiliates. The Promoters hereby irrevocably and by way of security for its obligation contemplated herein appoints one nominee Director of the IL&FS Investors and one nominee Director of the HIREF Investors as their constituted attorney to execute and deliver any

documentation and do any act or thing required in connection with creation of lien on the Shares held by the Promoters."

12. Clause-17 dealt with 'Events of Default' and Clause-18 'Consequences of Event of Default'. Clause-19 provided for 'Consequences of Termination of this Agreement Vis-à-vis IL&FS Investors'. Paragraph 19.1 (a) and 19.6(a), which are relevant are as follows:

"19.1 Upon the exercise by the IL&FS Investors, of their right to terminate this Agreement pursuant Clause 18, the Non-defaulting Shareholders shall, without prejudice to any other rights they may have under this Agreement or otherwise, have the right, at their sole discretion to either:

(a) Require the Defaulting Shareholders Group to purchase from the Non-defaulting Shareholders all the Shares held by the Non-defaulting Shareholders at a price that provides the Non-defaulting Shareholders an Internal rate of return of 15% per annum compounded annually, or the Fair Market Value, whichever is higher, subject to applicable laws. Provided if the Non-defaulting HIREF Shareholders have also exercised their right under Clause 19.6(a), the Defaulting Shareholders Group shall purchase all the Shares held by the Non-defaulting Shareholders and Non-defaulting HIREF Shareholders; and

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19.6 The Non-defaulting HIREF Shareholders shall, without prejudice to any other rights they may have

under this Agreement or otherwise, have the right, at their sole discretion to either:

(a) require the Defaulting Shareholders Group to purchase from the Non-defaulting HIREF Shareholders all the Shares held by the Non-defaulting HIREF Shareholders at a price that provides the Non-defaulting HIREF Shareholders an Internal Rate of Return of 15% per annum compounded annually, or the Fair Market Value, whichever is higher, subject applicable laws. Provided if the Non-defaulting Shareholders have also exercised their similar right under Clause 19.1(a), the Defaulting Shareholders Group shall purchase either all the Shares held by the Non-defaulting HIREF Shareholders and the Non-defaulting Shareholders; and"

13. Clause-21 provided for 'Indemnity', which was given by the Company and the Promoters to indemnify the IL&FS Investors and the HIREF Investors. The Agreement contained other details of terms and conditions.

14. The Supplementary Share Subscription-Cum-Shareholders Agreement was again entered on 12.07.2008, which clearly mentioned that the Company requires further funding to the extent of Rs.50 Crores in order to carry out objectives of the Business Plan. It is useful to extract following relevant portion of the Agreement:

"WHEREAS:

The parties hereto have signed the revised and restated Shareholders and share subscription agreement dated 14th

May 2008 and accordingly subscribed to the shares of Kakade Estate Developers Private Limited in the agreed proportions as per Schedule 7 of the said Agreement. The company now requires further funding to the extent of Rs.Fifty crores in order to carry out the objectives of the Business Plan i.e. approval of township, and actual execution of the township as per the designs prepared by the Company architects"

15. The Binding Term Sheet was also entered subsequently in 2015 between the Financial Creditor, i.e. Investors, Promoters and the Company (Corporate Debtor). The Binding Term Sheet provided for an Exit Proposal to the Investors. It further provided that Exit Consideration shall carry an IRR of 17%. Clause-3 of the Binding Term Sheet is as follows:

"III <u>Exit Proposal</u>

The promoters led by Sanjay Kakade have approached IL&FS and HIREF to facilitate an exit with the following proposal

(i) IL&FS Investment in KEDPL is valued at Rs.1829.52 MN (IL&FS Exit Consideration)

(ii) HIREF's investment in KEDPL is valued at Rs.1,568.16 (HIREF Exit Consideration)

(iii) IL&FS Exit Consideration and HIREF Exit Consideration cumulatively is referred to as Exit Consideration

(iv) Exit Consideration shall be net of all taxes

(v) The Promoters have agreed to purchase or cause the Company to purchase the IL&FS and HIREF investments in the Company at IL&FS Exit Consideration and HIREF Exit Consideration in the

Company. The above Exit Consideration shall carry an IRR of 17% (Carrying Cost) from March 10th, 2015.

(vi) The payment shall be made in the following manner

Due Date for Payment of Exit Consideration	Consideration to be Received in Cash (In Million Rupees)	Cumulative Consideration to be Received in Cash (In Million Rupees)
On April 30th, 2015 or sanction of project debt whichever is earlier	400	400
By November 2015	400	800
By June, 2016	1,000	1,800
By March 2017	1,550	3,350
By June, 2017	Remaining Exit Consideration including Carrying Cost	Exit Consideration including Carrying Cost

(vii) KP-SK LLP (defined herein below) to undertake the obligation of facilitating an exit to IL&FS and HIREF if the Promoters and/ or the Company fail to provide exit as contemplated herein.

(viii) Exit Consideration paid to IL&FS and HIREF to be in proportion to their respective Exit Consideration."

16. It was further provided in the Clause that any breach under the Binding Term Sheet shall be considered a breach by the Promoters, the Company and KP-SK and any breach under the Term Sheet shall be considered as breach under the SSHA and IL&FS SSHA.

17. The Promoters and the Company having not been able to comply with the Terms of Share Subscription and Shareholders Agreement and Binding Term Sheet, dispute between the parties was referred to Arbitrator appointed by the Bombay High Court. Before the Arbitrator a Consent Term was entered

between the parties on 25.11.2020. On the basis of which Consent Terms a Consent Award was passed by Arbitrator on 19.01.2021. The Consent Terms noticed in detail the investments made under different Agreements by the Investors. Both, the Company and Promoters, consented to pay an aggregate amount of Rs.260 crores to the Claimant and HIREF Investors, which Agreement provided the manner of payment. Clause-9 of the Consent Terms is as follows:

> *"**9. Exit to the Claimants and HIREF Investors from the Respondent No.1 Company:***
>
> *(i) Respondent Nos. 1 to 5 ("Promoter Respondents") shall pay an aggregate amount of Rs.260,00,00,000/- (Rupees Two Hundred Sixty Crores only) to the Claimants and HIREF Investors as detailed out in the **Second Schedule** hereunder, without any deduction, set off or adjustment of any nature whatsoever ("**Decretal Amount**"). The time shall always be of the essence.*
>
> *(ii) The first tranche of the Decretal Amount, being an amount of Rs.1,57,85,71,429/- (Rupees One Hundred Fifty Seven Crores Eighty Five Lakhs Seventy One Thousands Four Hundred Twenty Nine only) ("First Tranche Amount") shall be paid by Promoter Respondents and/or any of its affiliates/ nominees to the Claimants and HIREF Investors on or before expiry of 9 months from the date of execution of these Consent Terms, time being of essence ("First Tranche Due Date") and the second tranche of the Decretal Amount, being an amount of Rs.1,02,14,28,571/- (Rupees One Hundred Two*

Crores Fourteen Lakh Twenty Eight Thousand Five Hundred Seventy One only) ("Second Tranche Amount") shall be paid by Promoter Respondents and/or any of its affiliates/ nominees to the Claimants and HIREF Investors on or before expiry of 15 months, time being of essence from the date of execution of these Consent Terms ("Second Tranche Due Date"). The proportion in which the First Tranche Amount and the Second Tranche Amount shall be paid to the Claimants and HIREF Investors respectively is set out in Second Schedule.

(iii) Further, immediately upon receipt of each tranche of the Decretal Amount, the Claimants and HIREF Investors shall transfer such number of securities of Respondent No.1 held by the Claimants respectively ("Investor Securities") as set out in Second Schedule to the Promoter Respondents and/ or their nominees/ affiliates as directed by the Promoter Respondents."

18. Clause 9(viii) also contained a guarantee on behalf of the Promoters for purpose of the obligation to Respondent Nos.1 to 5 under the Consent Terms. Respondent No.1 in the Consent Terms was the Company (Corporate Debtor). The Consent Terms further provided the payment of interest, in event the payment is not paid within time. The Consent Terms contained a stipulation that Company and the Promoters jointly and severally liable to pay the Decretal Amount. Clause-9 (ix), (x) and (xi), which are relevant are as follows:

"(ix) In the event (a) the First Tranche Amount is not paid in full (along with accrued interest, if any) on or before the First Tranche Due Date and as provided herein,

subject to the proviso below, and/or (b) there is breach of any of the terms, other obligations, covenants, undertakings and/or representations made/ given by the Promoter Respondents under these Consent Terms ("Other Bench"), the entire Decretal Amount shall become immediately due and payable, an event of default shall be deemed to have occurred, and the Claimants and HIREF Investors shall in sch case be entitled to exercise all rights and remedies available to them under law or in contract to enforce their rights under these Consent Terms and Respondent Nos.1 to 5 and/or their affiliates/ nominees, shall be jointly and/or severally liable to pay the Decretal Amount along with an interest of 15% per annum, calculated from the First Tranche Due Date or the date on which any other breach of this Consent Order occurs (as applicable) till the date of payment thereof ("First Tranche Default Interest") to the Claimants and HIREF Investors respectively and the Claimants and HIREF Investors shall be entitled to exercise all rights and remedies available to them under law or in contract to enforce their rights under these Consent Terms, including but not limited to execution of the present Consent Terms / Award against the Respondent Nos.1 to 5, jointly and/or severally, against any of their assets. This is without prejudice to other rights of the Claimants and HIREF Investors, whether under contract, law or otherwise. Provided that, if 50% of the First Tranche Amount (along with accrued interest if any) is paid on or before the First Tranche Due Date and there has been no Other Breach, then Claimants and the HIREF

Investors shall in writing give a grace period of 90 (ninety) days from the First Tranche Due Date ("First Tranche Grace Period") to the Promoter Respondents to comply with their obligation to jointly and severally pay the remaining 50% of the First Tranche Amount along with the First Tranche Default Interest on the remaining 50% of First Tranche Amount till the payment thereof during the First Tranche Grace Period in the event the Promoter Respondents fail to pay the remaining 50% of the First Tranche Amount along with First Tranche Default Interest to the Claimants and the HIREF Investors on before expiry of the First Tranche Grace Period or there is an Other Breach, as the case may be, the reminder of the Decretal Amount ("Balance Decretal Amount") shall become immediately due and payable and an event of default shall be deemed to have occurred, and the Claimants and HIREF Investors shall in such case be entitled to exercise all rights and remedies available to them under law or in contract to enforce their rights under these Consent Terms and Respondent Nos.1 to 5 and/or their affiliates/ nominees, shall be, jointly and/ or severally liable to pay the Balance Decretal Amount along with an interest 15% per annum, calculated from the date on which Grace Period expires or the date on which any Other Breach occurs (as applicable) till the date of payment thereof ("Balance Decretal Amount Default Interest"), to the Claimants and HIREF Investors respectively and the Claimants and HIREF Investors shall be entitled to exercise all rights and remedies available to them under law or in contract to enforce their rights under

these Consent Terms, including but not limited to execution of the present Consent Terms/ award against the Respondent Nos.1 to 5, jointly and/ or severally, against any of their assets. This is without prejudice to other rights of the Claimants and HIREF Investors, whether under contract, law or otherwise.

(x) In the event the Second Tranche amount (along with accrued interest if any) is not paid in full on or before the Second Tranche Due Date or there is breach of any of other terms, obligations, covenants, undertakings and/or representations made/ given by the Respondents under these Consent Terms, the Second Tranche Amount shall become immediately due and payable, an event of default shall be deemed to have arisen and the Claimants and HIREF Investors shall in such case be entitled to exercise all rights and remedies available to them under law or in contract to enforce their rights under these Consent Terms and Respondent Nos.1 to 5 and/or their affiliates/ nominees, shall be jointly and/or severally liable to pay, the Second Tranche Amount along with an interest of 15% per annum, calculated from the Second Tranche Due Date or the date on which any other breach of this Consent Order occurs (as applicable) till the date of payment thereof ("Second Tranche Default Interest") to the Claimants and HIREF Investors respectively and the Claimants and HIREF Investors shall in such case be entitled to exercise all rights and remedies available to them under law or in contact to enforce their rights under these Consent Terms, including but not limited to execution of the present Consent Terms/ Award

against the Respondent Nos.1 to 5, jointly and/ or severally, against any of their asset. This is without prejudice to other rights of the Claimants and HIREF Investors, whether under contract, law or otherwise.

(xi) It is clarified that notwithstanding the provision for payment of First Tranche Default Interest or any part thereof, as the case may be, and/or Second Tranche Default Interest, the time shall always be of the essence and shall be treated to be so. It is further clarified that if there is a default in payment of the First Tranche Amount, the First Tranche Default Interest, the Second Tranche Amount or the Second Tranche Default Interest, the Claimants and the HIREF Investors shall not be entitled to demand payment of a sum higher than the Default Interest and the Decretal Amount from Respondent 1 to 5 for such default."

19. A Demand Notice dated 27.08.2021 was issued by the Financial Creditor to the Corporate Debtor and Promoters, demanding the payment of amount due under the Consent Award. No payments having been made by the Corporate Debtor, an Application under Section 7 was filed by the Financial Creditors. The Part-IV Item No.1 is as follows:

Particulars of Financial Debt			
1.	*Total amount of debt granted date(s) of disbursement*	*(i)*	*Under the Amended and Restated Share Subscription Cum Shareholders Agreement dated 14th May 2008 executed between (i) the Financial Creditors; (ii) IIRF Holdings XIV Limited; (iii) IL &FS Trust Company Limited; (iv) the Corporate Debtor (v) Mr.*

			Sanjay Dattatray Kakade; (vi) Mrs. Usha Sanjay Kakade; (vii) Kharadi Properties Private Limited; (viii) Kakade Retailing Private Limited ("ARSSHA"), the Financial Creditors gave a sum of Rs. 72,86,65,720/- (Rupees Seventy Two Crores Eighty Six Lakhs Sixty Five Thousand Seven Hundred and Twenty only) to the Corporate Debtor, for the implementation of the real estate development project at Village Bhugaon, District Pune, based on the representations, covenants, terms and conditions as stated therein. A copy of the said ARSSHA is annexed hereto and marked as Exhibit "B";
		(ii)	*Under the Supplementary Subscription Cum Shareholders Share Agreement of 11th July 2008 executed between (i) the Financial Creditors; (ii) IIRF Holdings XIV Limited; (iii) IL &FS Trust Company Limited; (vi) the Corporate Debtor (v) Mr. Sanjay Dattatray Kakade; (vi) Mrs. Usha Sanjay Kakade; (vii) Kharadi Properties Private Limited; (viii) Kakade Retailing Private Limited. ("Supplementary SSHA"), the Financial Creditors gave a further sum of Rs. 15,00,00,000/- (Rupees Fifteen Crores only) to the Corporate Debtor, for the implementation of the real estate development project at Village Bhugaon, District Pune, based on the representations, covenants, terms and conditions as stated therein. A copy of the Supplementary SSHA is annexed hereto and marked as Exhibit "C".*

		The manner in which the amounts were given by the Financial Creditors as mentioned in the aforesaid documents is set out in Exhibit "D" hereto. *(iii) Given that there was a "Default" under the ARSSHA and Supplementary SSHA and the Corporate Debtor, Mr. Sanjay Dattatray Kakade, Mrs. Usha Sanjay Kakade, Kharadi Properties Private Limited and Kakade Retailing Private Limited had failed in their obligation to develop the Project and provide an exit to the Financial Creditors, a binding term sheet was executed in 2015 ("Term Sheet"). The Corporate Debtor, Mr. Sanjay Dattatray Kakade, Mrs. Usha Sanjay Kakade, and Kharadi Properties Private Limited and Kakade Retailing Private Limited once again failed to provide an exit under the Term Sheet. The Term Sheet Contemplated an exit consideration of Rs. 156,81,60,000/- (Rupee One Hundred and Fifty Six Crores and Eighty One Lakhs Sixty Thousand only) which carried an IRR of 17% from 10th March 2015 which would increase to 21% in case of a default. A copy of the Term Sheet is annexed hereto and marked as Exhibit "E".* *The Corporate Debtor had committed several "Defaults" under the ARSSHA and Supplementary SSHA and the Term Sheet. In particular, the Corporate Debtor failed to provide the exit to the Financial Creditors in terms of the ARSSHA read*

		with the Supplementary SSHA Agreement on or before 31st March 2014. *As per Clause 16.4(a) read with Clause 19.6(a) of the ARSSHA, the Corporate Debtor inter- alia became liable to pay to the Financial Creditors the amount given under ARSSSHA together with an internal rate of return (IRR) of 15% p.a. compounded annually (or the Fair Market Value, whichever is higher, subject to applicable laws). Thus, the minimum payment due under the ARSSSHA was the amount given plus 15% p.a. compounded annually (IRR). As a direct consequence of the said Default under the aforesaid Agreements and the Term Sheet, the Corporate Debtor became liable to pay to the Financial Creditors a sum representing the principal amount, i.e. Rs. 87,86,65,720/- (Rupees Eighty Seven Crores Eighty Six Lakh Sixty Five Thousand Seven Hundred and Twenty only), along with an amount, computed at 15% Internal Rate of Return (IRR) compounded annually, or the Fair Market Value, whichever was higher, subject to applicable laws, as per Clause 16.4(a) read with 19.6(a) of the ARSSSHA ("Obligation"). Upon the fulfilment of the said "Obligations", the borrowing transaction under the said Agreements as also the instruments issued thereunder would come to an end.* *Consequent to the failure of the Corporate Debtor to fulfill the said Obligation under the said Agreements, the Financial Creditors invoked the remedies under Clause 16.4(a) read with 19.6(a) of the ARSSSHA inter-alia against the Corporate*

		Debtor vide their Legal Notice dated 1st August 2019 and the resultant disputes were referred to arbitration before the Learned Sole Arbitrator, Justice CK Thakker (Retd.), Former Chief Justice of the Hon'ble Supreme Court of India. *In the said arbitral proceedings, the parties arrived at a settlement, signed consent terms dated 25th November 2020 ("Consent Terms") and the consent award dated 19th January 2021 ("Consent Award") came to be passed in terms of the Consent Terms.* *By and under Consent Award passed in terms of the Consent Terms executed between the parties hereto on 25th November 2020 passed in the Arbitration proceedings before the Learned Sole Arbitrator Justice CK Thakker (Retd.), Former Chief Justice of the Hon'ble Supreme Court of India, a total sum of Rs. 72,85,71,429/- (Rupees Seventy Two Crores Eighty Five Lakhs Seventy One Thousand Four Hundred and Twenty Nine only) ("First Tranche Amount") was agreed to be paid inter-alia by the Corporate Debtor to the Financial Creditors on or before the expiry of 9 months from the execution of the aforesaid Consent Terms and further, a sum of Rs. 47,14,28,571/- (Rupees Forty Seven Crores Fourteen Lakhs Twenty Eight Thousand Five Hundred and Seventy One only) ("Second Tranche Amount") was agreed to be paid inter-alia by the Corporate Debtor to the Financial Creditors on or before the expiry of 15 months from the execution of the aforesaid Consent Terms. The First Tranche Amount and Second Tranche Amount are*

		hereinafter collectively referred to as "the Amount". In terms of the Consent Award, upon commission of any default in the payment of the First Tranche Amount, the entirety of "the Amount" (as defined above) fell due immediately. The rights and entitlements of the Financial Creditors under the ARSSSHA and Supplementary SSHA continued to subsist and the ARSSSHA and Supplementary SSHA continued to be valid, subsisting and binding with full force and effect under the Consent terms. Copies of the Consent Award and the Consent Terms are attached hereto and marked as Exhibit "F" and Exhibit "G" respectively. *The Corporate Debtor, having failed to pay the First Tranche Amount, the entire amount of Rs.120,00,00,000/- (Rupees One Hundred and Twenty Crores only) along with interest at the rate of 15% p.a. thereon (till payment) under the Consent Award has become due and payable.* *Thus, total amount of Financial Debt is Rs.133,75,89,041/- (Rupees One Hundred Thirty three Crore Seventy Five Lakh Eight Nine Thousand and Forty One Only) (computed as on 31st May 2022).*

20. In Part-IV, the amount claimed to be in default and the date on which the default occurred were also explained, which are as follows:

1.	*Total amount claimed to be in default and the date on which the*	*The Corporate Debtor has committed various events of default under the ARSSSHA and Supplementary SSHA ("Definitive Agreements")*

	default occurred (Attach the workings for computation of amount and days of default in tabular form)	*and the said Consent Award executed between the Financial Creditors and the Corporate Debtor.* *The event of default under the said Consent Award was committed on 25th August 2021, when inter-alia the Corporate Debtor failed to pay the amount of the First Tranche Amount of Rs. 72,85,71,429/- (Rupees Seventy Two Crores Eighty Five Lakh Seventy One Thousand Four Hundred and Twenty Nine). Since the said event of default remained uncured at the end of the Corporate Debtor, the Financial Creditors, in accordance with the Consent Award, vide notices dated 27th August 2021 called upon, inter alia, the Corporate Debtor to pay the entire amount due under the Consent Award, i.e. the sum of Rs.120,00,00,000 (Rupees One Hundred and Twenty Crores) along with 15% interest thereon calculated from 25th August 2021 to the date of payment thereof to the Financial Creditors. However, the Corporate Debtor has failed to pay the aforesaid sum and accordingly a payment default has occurred on 25th August 2021 and the entire amount due and payable under the Consent Award has become due and payable forthwith.* *The total amount in default to the Financial Creditors by the Corporate Debtor as on 31st May 2022 is Rs.133,75,89,041 (Rupees One Hundred Thirty Three Crore Seventy Five Lakh Eight Nine Thousand and Forty One only).* *The computation is annexed hereto and marked as Exhibit "H".* *Copy of the 'Event of Default' notices issued by the Financial Creditors dated 27th August, 2021 are annexed hereto as Exhibit "I" and "J".*

21. In Part-V, the details of particulars of financial debt with documents, records and evidence of default was elaborated. Under Item No.5, which deals with Financial Contract, following were stated:

5.	The latest and complete copy of the financial contract reflecting all amendments and waivers to date (Attach a Copy) (i) ARSSHA (Exhibit "B") (ii) Supplementary SSHA (Exhibit "C") (iii) Term Sheet (Exhibit "E") (iv) Consent Award (Exhibit "F") (v) Consent Terms (Exhibit "G")

22. We having noticed the relevant Clauses of Share Subscription-cum-Shareholders Agreement and Consent Terms, now we come to the issue as to whether the amount invested by the Financial Creditors can be said to be 'financial debt' or not?

23. Section 5, sub-section (8) of the Code defined 'financial debt' in following words:

> *"(8) "financial debt" means a debt alongwith 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;

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-clause (a) to (h) of this clause;"

28. The Hon'ble Supreme Court in ***(2019) 8 SCC 416 – Pioneer Urban Land and Infrastructure Limited and Anr. vs. Union of India and Ors.*** had occasion to consider the concept of 'financial debt' and the meaning of the 'financial debt' as contained in the IBC. Hon'ble Supreme Court had occasion to consider sub-clause (f). We may reproduce paragraphs 72 to 77 of the judgment, which are as follows:

> *"**72.** Shri Krishnan Venugopal took us to ACT Borrower's Guide to the LMA's Investment Grade Agreements by Slaughter and May (5th Edn., 2017). In this book "financial indebtedness" is defined thus:*
>
> > *"Definition of Financial Indebtedness (Investment Grade Agreements)*
> >
> > *"Financial indebtedness" means any indebtedness for or in respect of:*
> >
> > *(a) moneys borrowed;*
> >
> > *(b) any amount raised by acceptance under any acceptance credit facility or 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 would, in accordance with GAAP, be treated as a balance sheet liability [(other than any liability in respect of a lease or hire purchase contract which would, in accordance with GAAP in force [prior to 1-1-2019]/[prior to []]/[] have been treated as an operating lease)];*

(e) receivables sold or discounted (other than any receivables to the extent they are sold on a non-recourse basis);

(f) any amount raised under any other transaction (including any forward sale or purchase agreement) of a type not referred to in any other paragraph of this definition having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price [and, when calculating the value of any derivative transaction, only the marked to market value (or, if any actual amount is due as a result of the termination or close-out of that derivative transaction, that amount) shall be taken into account];

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

(i) the amount of any liability in respect of any guarantee or indemnity for any of the items referred to in Paras (a) to (h) above."

73. *When compared with Section 5(8), it is clear that Section 5(8) seems to owe its genesis to the definition of "financial indebtedness" that is contained for the purposes of investment grade agreements. Shri Venugopal argued that even insofar as derivative transactions are concerned, it is clear that money alone is given against consideration for time value of money and a transaction which is a pure sale agreement between "borrowers" and "lender" cannot possibly be said to fit within any of the categories*

mentioned in Section 5(8). He relied strongly on the passage in Slaughter and May's book which is extracted hereinbelow:

> *"Any amount raised having the "commercial effect of a borrowing"*
>
> *A wide range of transactions can be caught by Para (f), including for example forward purchases and sales of currency and repo agreements. Conditional and credit sale arrangements could also be covered here as could certain redeemable shares.*
>
> *The precise scope of this limb can be uncertain. Ideally, from the borrower's perspective, if there are additional categories of debt which should be included in "financial indebtedness", these should be described specifically and this catch-all paragraph, deleted. A few strong borrowers do achieve that position. Most, however are required to accept the "catch all" and will therefore need to consider which of their liabilities might be caught by it, and whether specific exclusions might be required."*

74. *What is clear from what Shri Venugopal has read to us is that a wide range of transactions are subsumed by para (f) and that the precise scope of para (f) is uncertain. Equally, para (f) seems to be a "catch all" provision which is really residuary in nature, and which would subsume within it transactions which do not, in fact, fall under any of the other sub-clauses of Section 5(8).*

75. *And now to the precise language of Section 5(8)(f). First and foremost, the sub-clause does appear to be a residuary provision which is "catch all" in nature. This is clear from the words "any amount" and "any other transaction" which*

means that amounts that are "raised" under "transactions" not covered by any of the other clauses, would amount to a financial debt if they had the commercial effect of a borrowing. The expression "transaction" is defined by Section 3(33) of the Code as follows:

> ***3. (33) "transaction"** includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;*
>
> *As correctly argued by the learned Additional Solicitor General, the expression "any other transaction" would include an arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay instalments at various stages of construction, so that they themselves then fund the project either partially or completely.*

***76.** Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing. We were referred to Collins English Dictionary & Thesaurus (2nd Edn., 2000) for the meaning of the expression "borrow" and the meaning of the expression "commercial". They are set out hereinbelow:*

> *"borrow.—vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard. to lend. 4. (intr) Golf. To*

putt the ball uphill of the direct path to the hole : make sure you borrow enough."

* * *

"commercial.—adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser : commercial television. 3. having profit as the main aim : commercial music. 4. (of chemicals, etc.) unrefined and produced in bulk for use in industry. 5. a commercially sponsored advertisement on radio or television."

77. *A perusal of these definitions would show that even though the petitioners may be right in stating that a "borrowing" is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression "borrow" is wide enough to include an advance given by the homebuyers to a real estate developer for "temporary use" i.e. for use in the construction project so long as it is intended by the agreement to give "something equivalent" to money back to the homebuyers. The "something equivalent" in these matters is obviously the flat/apartment. Also of importance is the expression "commercial effect". "Commercial" would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is "raised" under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have "commercial" interests in the*

> *same—the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even without adverting to the Explanation introduced by the Amendment Act."*

29. The ratio of the judgment of the Hon'ble Supreme Court is that sub-clause (f) of Section 5(8) would subsume within it amounts raised under transactions which are not necessarily loan transactions so long as they have the commercial effect of a borrowing. In paragraph 76, the Hon'ble Supreme Court had quoted with approval the meaning of expression "borrow" and "commercial" from *Collins English Dictionary*. The condition which is essentially required to be fulfilled is disbursement against the consideration for the time value of money. When we come to sub-clause (f), the transaction has to have a commercial effect of a borrowing. We may further notice subsequent judgment of the Hon'ble Supreme Court in ***(2022) 9 SCC 186 – Kotak Mahindra Bank Limited vs. A Balakrishnan and Anr.***, where the Hon'ble Supreme Court had again occasion to consider Section 5, sub-section (8). Paragraphs 52, 53, 54 and 55, which are relevant for our purpose are as follows:

> *"**52.** The three-Judge Bench of this Court in Pioneer Urban Land & Infrastructure Ltd. v. Union of India [Pioneer Urban Land & Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1] was considering a*

challenge to the amendments made to the IBC vide which Explanation to sub-clause (f) of clause (8) of Section 5 IBC was inserted, which provides that 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. This Court held that "the expression "and includes" speaks of subject-matters which may not necessarily be reflected in the main part of the definition".

53. *Applying these principles to clause (8) of Section 5 IBC, it could clearly be seen that the words "means a debt along with interest, if any, which is disbursed against the consideration for the time value of money" are followed by the words "and includes". Thereafter various Categories (a) to (i) have been mentioned. It is clear that by employing the words "and includes", the legislature has only given instances, which could be included in the term "financial debt". However, the list is not exhaustive but inclusive. The legislative intent could not have been to exclude a liability in respect of a "claim" arising out of a recovery certificate from the definition of the term "financial debt", when such a liability in respect of a "claim" simpliciter would be included in the definition of the term "financial debt".*

54. *In any case, we have already discussed hereinabove that the trigger point for initiation of CIRP is default of claim. "Default" is non-payment of debt by the debtor or the corporate debtor, which has become due and payable, as the case may be, a "debt" is a liability or obligation in respect of a claim which is due from any person, and a "claim" means a right to payment, whether such a right is reduced to judgment or not. It could thus be seen that unless there is a "claim", which may or may not be reduced*

to any judgment, there would be no "debt" and consequently no "default" on non-payment of such a "debt". When the "claim" itself means a right to payment, whether such a right is reduced to a judgment or not, we find that if the contention of the respondents, that merely on a "claim" being fructified in a decree, the same would be outside the ambit of clause (8) of Section 5 IBC, is accepted, then it would be inconsistent with the plain language used in the IBC. As already discussed hereinabove, the definition is inclusive and not exhaustive. Taking into consideration the object and purpose of the IBC, the legislature could never have intended to keep a debt, which is crystallised in the form of a decree, outside the ambit of clause (8) of Section 5 IBC.

***55.** Having held that a liability in respect of a claim arising out of a recovery certificate would be a "financial debt" within the ambit of its definition under clause (8) of Section 5 IBC, as a natural corollary thereof, the holder of such recovery certificate would be a financial creditor within the meaning of clause (7) of Section 5 IBC. As such, such a "person" would be a "person" as provided under Section 6 IBC who would be entitled to initiate the CIRP."*

30. What Hon'ble Supreme Court has emphasized in the above judgment is that in the various categories under (a) to (i) of sub-section (8) of Section 5, the legislature has only given instances, which could be included in the term "financial debt". However, the list is not exhaustive but inclusive. We may first consider as to whether the investment made by Financial Creditors have commercial effect of borrowing or not. We have noticed above that raising of amount by the Company through Share Subscription-cum-Shareholders

Agreement was a commercial borrowing, since the said transaction has direct effect with the business, which was carried out by the Corporate Debtor, i.e. construction of building and township. We have also noticed the Supplementary Share Subscription-Cum-Shareholders Agreement dated 12.07.2008, where the Agreement clearly noted that ***"the Company now requires further funding to the extent of Rs.50 in order to carry out objectives of the Business Plan, i.e. approval of township, and actual execution of the township as per the designs prepared by the Company architects"***. Thus, the raising of the amount through the above Agreement has the commercial effect of borrowing, which is clearly demonstrated by the above statements contained in the Supplementary Agreement. The use of expression "further funding" indicates that transaction has commercial effect of borrowing. Now the question remains to be considered is as to whether the investment by the Financial Creditors can be said to be an investment by disbursal against consideration of time value of money? The expression 'time value of money' encompasses in itself the concept of time value of the disbursement. We have already noticed the various clauses of amended and restated Share Subscription-cum-Shareholders Agreement dated 14.05.2008 and we have extracted the relevant clauses, where Company and Promoters were obliged to purchase all the shares held by the non-defaulting Shareholders at a price that provides the non-defaulting Shareholders at an internal rate of return of 15% per annum compounded annually or the Fair Market Value, whichever is higher. Clauses 19.1(a) and 19.6(a) as extracted above, contains clear indication that investment was with an eye to earn

profits and the investment was for consideration for the time value of money. Binding Term Sheet, which we have also noticed above also contains several clauses, which indicate that proposals were given by the Promoters to develop the Project and provide an exit to the Investors and the Exit Consideration was carrying IRR of 17%.

31. It is further relevant to notice that Section 7 Application filed by the Financial Creditor was not based only on the Consent Award passed by the Arbitrator on 19.01.2021, but all previous transactions were also basis of the Application. The Application filed under Section 7 cannot be said to be an Application for execution of Consent Decree, rather Section 7 Application was filed on account of default committed by the Company in not honouring its obligation under different Agreements as noted above.

32. We now need to notice certain judgments, which have been relied by learned Counsel for the Appellant in support of his submission that in the Application filed under Section 7, there was no 'financial debt' and the Application deserved to be rejected. The Appellant has relied on judgment of the Hon'ble Supreme Court in ***(2020) 10 SCC 538 – Radha Exports (India) (P) Ltd. vs. K.P. Jayaram***. The above case arose out of an Application under Section 7, which was admitted by the Adjudicating Authority. However, Appeal against the same was allowed and the Application filed under Section 7 stood rejected as barred by limitation. In the above case, the Respondent had requested the Company to convert a sum of Rs.90 lakhs from out of the said outstanding loan as share application money for issuance of shares in the

name of Respondent No.2. the facts and sequence of events as noticed in paragraph 9,10, 11, 12 and 13 are as follows:

> *"**9.** On or about 6-10-2007, Respondent 2 resigned from the Board of the appellant Company. At the time of resignation, Respondent 2 requested the appellant Company to treat the share application money of Rs 90,00,000 as share application money of Mr M. Krishnan and to issue shares of the value of Rs 90,00,000 in the name of Mr M. Krishnan. The amount of share application money of Rs 90,00,000 transferred to Mr M. Krishnan was to be treated as a personal loan from Respondent 2 to the said Mr M. Krishnan.*
>
> ***10.** By another letter dated 11-1-2011 addressed to the Deputy Commissioner of Income Tax, Company Circle V(3), Chennai, being Annexure A-4 to the reply filed by the appellant Company, Respondent 2 confirmed that she had requested the appellant Company to allot shares in the name of the said Mr M. Krishnan against her share application money, which the said M. Krishnan had agreed to treat as his personal loan from Respondent 2 and pay her the amount at a later date.*
>
> ***11.** The appellant Company claims to have issued shares of the value of Rs 90,00,000 in the name of Mr M. Krishnan in 2008. According to the appellant Company, there is thus, no further liability to be discharged by the appellant Company to the respondents. After 23-3-2006, there had been no financial transaction between the appellant Company and the respondents.*
>
> ***12.** However, by a legal notice dated 19-11-2012, the respondents called upon the appellant Company to repay*

to the respondents a sum of Rs 1,49,60,000 alleged to be the outstanding debt of the appellant Company, repayable to the respondents as on 19-7-2004.

13. *By a letter dated 5-12-2012, the appellant Company refuted the claim of the respondents, whereupon the respondents filed petition being CP No. 335 of 2013 in the High Court of Madras under Sections 433(e) & (f) and 434 of the Companies Act, 1956, for winding up of the appellant Company. The said petition was transferred [K.P. Jayaram v. Radha Exports (India) (P) Ltd. Company Petition No. 335 of 2013, order dated 14-2-2017 (Mad)] to the Chennai Bench of NCLT and renumbered TCP/301/(IB)/2017."*

33. In the above background, the Hon'ble Supreme Court made observations in paragraph 42, which is relied by the learned Counsel of the Appellant, which is as follows:

*"**42.** The definition of "financial debt" in Section 5(8) makes it clear that "financial debt" means a debt along with interest, if any, disbursed against the consideration for time value of money and would include money raised or borrowed against the payment of interest; amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent; amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument; 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; receivables sold or discounted other than any receivables sold on non-recourse basis or any amount raised under any other*

> *transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing. Explanation to Section 5(8) which relates to real estate projects is of no relevance in the facts and circumstances of this case. The payment received for shares, duly issued to a third party at the request of the payee as evident from official records, cannot be a debt, not to speak of financial debt. Shares of a company are transferable subject to restrictions, if any, in its Articles of Association and attract dividend when the company makes profits."*

34. What was held by the Hon'ble Supreme Court is that payment received for shares duly issued to third party at the request of the payee cannot be a debt, not to speak of financial debt. There can be no quarrel to the above proposition laid by the Hon'ble Supreme Court in the above case. When shares are duly issued to a third party, on the basis of which amount, filing of an application under Section 7 by the Respondent was rightly rejected, which was affirmed by the Hon'ble Supreme Court. The Hon'ble Supreme Court has again reiterated that 'financial debt' means debt along with interest, if any disbursed against the consideration for time value of money. The present is not a case regarding allocation of shares by payment of money on the basis of which money, Section 7 Application is filed. The transactions, which have come up for consideration contains several clauses which makes it clear that it is not a case of simple allotment of shares against payment of money. Hence, we are of the view that judgment in Radha Exports cannot help the Appellant in the present case.

35. The learned Counsel for the Appellant relied on judgment of this Tribunal in ***Company Appeal (AT) (Insolvency) No.452 of 2020 – Sushil Ansal vs. Ashok Tripathi and Ors.***, which Appeal arose out of an order of admission passed by Adjudicating Authority on an Application filed by one Mr. Ashok Tripathi and Saurabh Tripathi claiming to be Financial Creditors. Ashok Tripathi and Saurabh Tripathi were allotted a dwelling unit under a Real Estate Project. In the above case, the Ashok Tripathi and Saurabh Tripathi has filed an Application before the Uttar Pradesh Real Estate Regulatory Authority, which Authority passed an order in favour of the Applicant and issued a Recovery Certificate. This Tribunal allowed the Appeal and set-aside the order of Adjudicating Authority admitting Section 7 Application and the Application was dismissed. It is relevant to notice paragraphs 19 and 20 of the judgment, which are to the following effect:

> *"**19.** Sub-clause (f) of sub-section (8) of Section 5 provides that any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing would fall within the ambit of 'financial debt' and the explanation added to sub-section by Act No. 26 of 2018 provides that 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. Thus, the relevant consideration for determination of 'financial debt' would be whether the debt was disbursed against the consideration for the time value of money which may include amount raised from an allottee under a Real Estate Project, the transaction deemed to be amount having the commercial effect of a borrowing. Since*

the initial transaction was an allotment under a Real Estate Project, there can be no doubt that such transaction has the contours of a borrowing as contemplated under Section 5(8)(f) of the 'I&B Code'. However, the case set up by the Respondent Nos. 1 and 2 before the Adjudicating Authority is not on the strength of a transaction having the commercial effect of a borrowing, thereby clothing them with the status of 'Financial Creditors' but on the strength of being 'decree-holders'. It having been noticed that before the Adjudicating Authority Respondent Nos.1 and 2 staked claim in their capacity as 'decree-holders' and they having approached 'UP RERA' with complaints for refund of money culminating in issuance of a Recovery Certificate by the 'UP RERA' in terms of order dated 10th August, 2019, it cannot lie in their mouth that they are the allottees and the amounts raised from them as allottees under the Real Estate Project deemed to be having the commercial effect of a borrowing would clothe them with the capacity of being 'Financial Creditors'. Such argument being absurd and incompatible with their plea before the Adjudicating Authority and the events following filing of complaints before the 'UP RERA' and leading to passage of Recovery Certificate needs to be rejected outright. Respondent Nos. 1 and 2 neither asserted nor sought triggering of Corporate Insolvency Resolution Process in a purported capacity as allottees of Real Estate Project but sought initiation of Corporate Insolvency Resolution Process against the Corporate Debtor on the strength of being 'decree-holders' which owed its genesis to the Recovery Certificate issued by the 'UP RERA'. It is, therefore, required to be determined whether in their projected capacity as 'decree-holders'

Respondent Nos.1 and 2 could maintain an application under Section 7 as 'Financial Creditors'.

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 'decreeholder', 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'."

36. What was held by this Tribunal in the aforesaid case is that Application by a Decree Holder would not fall within the definition of Financial Creditor. We have noticed the judgment of Hon'ble Supreme Court in ***Kotak Mahindra Bank*** (supra), where the Hon'ble Supreme Court has clearly held that legislature could never have intended to keep a debt, which is crystallized in the form of a Decree, outside the ambit of Section 5, sub-section (8). Paragraphs 53 and 54 of the judgment we have already extracted above. In view of the clear pronouncement of the Hon'ble Supreme Court as noted above, we are of the view that Appellant cannot take any benefit from the above judgment of this Tribunal.

37. We may also notice one another recent judgment of the Hon'ble Supreme Court, which may have some bearing on the issue, i.e., judgment of the Hon'ble Supreme Court in ***Civil Appeal No.3806 – Vishal Chelani & Ors.***

vs. Debashis Nanda decided on 06.10.2023. The issue raised in the Hon'ble Supreme Court was that a beneficiary of Decree by the Uttar Pradesh Real Estate Regulatory Authority cannot be treated differently from allottees to real estate project. In the above case, the Resolution Professional has taken a view that once an allottee seeks remedies under RERA, and opts for return of money in terms of the order made in her favour, it is not open for her to be treated in the class of home buyer, as the said allottees, who had Decree from RERA were kept in a separate class, which classification was not upheld by the Hon'ble Supreme Court and the Hon'ble Supreme Court has held following in paragraph 8:

> *"**8.** The Resolution Professional's view appears to be that once an allottee seeks remedies under RERA, and opts for return of money in terms of the order made in her favour, it is not open for her to be treated in the class of home buyer. This Court is unpersuaded by the submission. It is only home buyers that can approach and seek remedies under RERA – no others. In such circumstances, to treat a particular segment of that class differently for the purposes of another enactment, on the ground that one or some of them had elected to take back the deposits together with such interest as ordered by the competent authority, would be highly inequitable. As held in Natwar Agarwal (HUF) (Supra) by the Mumbai Bench of National Company Law Tribunal the underlying claim of an aggrieved party is crystallized in the form of a Court order or decree. That does not alter or disturb the status of the concerned party - in the present case of allottees as financial creditors. Furthermore, Section 238 of the IBC contains a non obstante clause which gives overriding effect to its provisions. Consequently*

its provisions acquire primacy, and cannot be read as subordinate to the RERA Act. In any case, the distinction made by the R.P. is artificial; it amounts to "hyper classification" and falls afoul of Article 14. Such an interpretation cannot therefore, be countenanced."

38. One more judgment, which is relied by learned Counsel for the Appellant is ***Raj Singh Gehlot vs. Vistra (ITCL) India Ltd. – Company Appeal (AT) (Ins.) No.6 of 2021*** decided on 02.08.2021. In the above case also a Share Subscription cum Shareholders Agreement was entered, which also contained various conditions. The Financial Creditor invested through the above Agreement. The Agreement also contained clauses for distribution of revenue, cash flow etc. for which investment was made by the Financial Creditor in the SPV. Section 7 Application filed by the Financial Creditor was admitted by Adjudicating Authority, which was challenged by Raj Singh Gehlot. The Appeal was allowed by this Tribunal, on which heavy reliance has been placed by the learned Counsel for the Appellant. It is to be noticed that in the said case, there was Arbitral Award in favour of the Financial Creditor. This Tribunal in the above judgment placed reliance on judgment of the Hon'ble Supreme Court in ***Anuj Jain vs. Axis Bank – (2020) 8 SCC 401***, in which Hon'ble Supreme Court explained the meaning of concept of 'financial debt' under Section 5, sub-section (8). When we look into the judgment of this Tribunal in the above case, the basis of the judgment of this Tribunal is that Section 7 Application was filed on the basis of breach of Settlement Agreement,

which is not permissible under Section 7. Paragraph 25 (xi), (xii) and (xiii) are as follows:

> *"**(xi)** The Arbitral Award/Decree cannot be enforced by invoking Section 7 of the Code. A decree/Award holder is not a Financial Creditor and any obligation arising there under will not amount to a financial debt as held in the following cases:*
>
> ***a.*** *In **Shubankar Bhowmik v. Union of India W.P. (C) (PIL) No. 4/2022**, Division Bench, Hon'ble Tripura High Court has held that Decree Holder, although recognized as Creditor under S. 3(10), are a different class of creditor and cannot be treated as Financial Creditor or an Operational Creditor under I &B Code, 2016 as follows:*
>
> > *"[11]… The interest recognized is that in the decree and not in the dispute that leads to the passing of the decree. This is apparent from the fact that decree holders as a class of creditors are kept separate from "financial creditors" and "operational creditors". No divisions or classification is made by the statute within this class of decree holders. The inescapable conclusion from the aforesaid discussion is, that the IBC treats decree holders as a separate class, recognized by virtue of the decree held. The IBC does not provide for any malleability or overlap of classes of creditors to enable decree holders to be classified as financial or operational creditors…"*
>
> *This view was affirmed by the Hon'ble Supreme Court of India in SLP (C) 6104/2022 wherein the SLP to challenge the above Order was rejected.*

b. *In* ***Sushil Ansal v. Ashok Tripathy CA (AT) Ins. No. 452 of 2020*** *this Hon'ble Appellate Tribunal has held that an award/decree holder cannot be a Financial Creditor, as there is no disbursement and return under a decree. A decree is merely a settled/adjudicated amount culminating from the resolution of a dispute. This Tribunal held as follows:*

> ***"The answer to the question whether a decreeholder 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.") SCC Citation- 2020 SCC Online NCLAT 680*

c. *In* ***Digamber Bhondwe v. JM Financial Asset Reconstruction CA (AT) (Ins) No. 1379/2019*** *this Hon'ble Tribunal has held that decree holder cannot be termed as Financial Creditor for initiation of CIRP:*

> *"We further reject the submission that because in Section 3(10) of I & B Code in definition of "Creditor" the "decree holder" is included it shows that decree gives cause to initiate application under Section 7 of I & B Code. Section 3 is in Part I of I & B Code. Part II of I & B Code deals with "Insolvency Resolution and Liquidation for Corporate Person" & has its own set of definitions in Section 5. Section 3 (10) definition of "Creditor" includes "Financial Creditor", "Operational Creditor" "Decree-holder" etc. But Section 7 or Section 9 dealing with "Financial Creditor" and "Operational Creditor" do not include*

"decree-holder" to initiate CIRP in Part II. We accept the submissions made by the Learned Counsel for the Appellant…"

(xii) *It is very much clear that the Respondent no.1 cannot be said to be a financial creditor of the Corporate debtor. Simply, relying on the consent award CIRP cannot be invoked .The Code/Adjudicating Authority is not the executing authority for enforcing the Arbitral Award under the provisions of Arbitration & Conciliation Act, 1996.*

(xiii) *It is abundantly clear that the Respondent no.1 investment of debentures & unsecured loans to the Joint Venture Company are evidently not a disbursement made to the Corporate Debtor. This Appellate Tribunal has already prevented in the following Judgments the enforcement of a decree/Arbitral Award using the provisions of IBC.*

(i) G Eswara Rao v. SASF, Judgment dtd. 7.2.2020 – internal para. 26, pg. 22

(ii) Sushil Ansal v. Ashok Tripathy, Judgment dtd. 14.08.2020- internal para. 23, pg.29 (iii) HDFC Bank v. Bhagwan Das Auto Finance Ltd. Judgment dtd. 9.12.2019. (iv) C. Shivakumar Reddy v. Dena Bank, Judgment dated 18.12.2019 (v) IARCL v. Jayant Vitamins, Judgment dated 17.12.2019"

39. Paragraphs 26 and 27 of the above judgment, which are also relevant, are as follows:

*"**26.** We are making it clear that Investment made in SPV/Joint Venture through Share Subscription &*

Shareholders Agreement will not come within the purview of Section 7 R/w Section 5(8) of the 'Code'.

27. *It is also further stated that to get it covered under Section 7 R/w Section 5 (7) & (8) of the Code that there must be disbursal of fund by the Financial Creditor to the Corporate Debtor or in simple term, if there is no disbursal then even 'Financial Debt' will not attract Section 7 of the Code, as it looks from the bare reading of Section 5(8) of the Code in order to qualify under Section 7 of the Code, the following basic ingredients are a requirement to get covered under Section 7 of the Code:*

a. The Creditor must be a 'Financial Creditor' and be covered by Section 5(7) & (8) of the Code.

b. The Financial Debt must be owed by the Corporate Debtor. However, the default may be occurred in respect of that Financial Creditor or any other Financial Creditor.

c. Financial Debt to carry interest element and be disbursed against the consideration of time value of money.

d. Money borrowed against the payment of interest

e. Investment made with the object of profit sharing from revenue generated will also not be covered within the ambit of Section 7 of the Code. f. Award received under Arbitration and Conciliation Act, 1996 or amount emerged from the Settlement Agreement will not come within the purview of Section 7 of the Code."

40. When we look into the paragraph 27, it was held that there has to be disbursal of fund by the Financial Creditor. The Tribunal held that Award

received under Arbitration and Conciliation Act or amount emerged from the Settlement Agreement will not come within the purview of Section 7 Application, which was clearly held in paragraph 27 and 28. Paragraphs 28 and 29 are as follows:

> *"**28.** Even the Applicant has mentioned in the Form-1, Part-IV total amount of debt guaranteed as on 31st October, 2018 Rs. 234,69,62,791/- are in default as per Settlement Agreement dated 07.04.2017. This suggests that Section 7 of the Code is being invoked pursuant to Settlement Agreement which is not permissible under Section 7 of the Code.*
>
> ***29.** In view of aforesaid facts & Circumstances we are not in a position to sustain the order of Adjudicating Authority & accordingly we are allowing the Appeal."*

41. The ratio of the judgment of this Tribunal as noted above was that since Section 7 Application was filed alleging breach of Settlement Agreement, the Application was not maintainable. The basis of judgment is that Settlement Agreement, which resulted into Decree cannot be made basis for Section 7 Application. We have noticed the judgment of Hon'ble Supreme Court in ***Kotak Mahindra Bank***, which clearly says that mere fact that a Decree had been obtained by the Financial Creditor, shall not take him out of Section 7 proceedings and if ingredients of 'financial debt' are in existence, Section 7 Application is maintainable. This Tribunal in ***Raj Singh Gehlot*** has noticed the amendment made in the Shareholder Agreement. As per the judgment of this Tribunal, there was no consideration for time value of the debentures. Paragraph 12 of the judgment is as follows:

> *"**12.** The SHA was amended for the first time on 3 September 2011, wherein it was inter alia agreed between the parties that the Debentures issued by JV Company to Vistra ITCL and Ambience shall not carry any guaranteed coupon payment. It may be noted that the originally the Debentures issued by JV Company was to carry a coupon rate of 15% per annum. After the amendment, even the debentures issued by JV Company did not provide for any consideration for time value of the debentures."*

42. This Tribunal, thus, noticing certain clauses has held that since coupon rate of 15% per annum was deleted, there was no consideration for time value of debentures. We in the present case have noticed the various relevant clauses of the Agreement and Binding Term Sheet, which indicate that the investment made by the Financial Creditor was with an eye for consideration for time value and money and the said condition was fulfilled in the facts of the present case. We have also held that the transaction had commercial effect of borrowing. If the Settlement Agreement or Arbitration Award arises out of transactions, which are 'financial debt', the mere fact that 'financial debt' has crystallized in Decree, cannot result in disentitling the Financial Creditor, the remedy provided under Section 7, as has been held by Hon'ble Supreme Court in ***Kotak Mahindra Bank*** case (supra). We, thus, are of the view that judgment of this Tribunal in ***Raj Singh Gehlot*** is clearly distinguishable and not applicable in the facts of the present case and Appellant cannot take any help from the said judgment in the facts of the present case.

43. We have already noticed the facts and sequence of events of the present case, from which it is clear that Corporate Debtor has time and again acknowledged the debt. We having found that transactions between the parties including the Agreement, Supplementary Agreement and Binding Term Sheet, clearly indicate that there was a debt, due and payable, which debt was in the nature of 'financial debt'. We further noticed that in the present Appeal, the Appellant has taken several opportunities to make payment to the Corporate Debtor to liquidate his debt, which could not be done by the Appellant. The above is also clear acknowledgement of debt and default on the part of the Corporate Debtor. We, thus, are of the view that Adjudicating Authority has not committed any error in admitting Section 7 Application.

44. We do not find any good ground to interfere with the impugned order admitting Section 7 Application. The Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

24th November, 2023

Ashwini/Archana