New Okhla Industrial Development ... vs Anand Sonbhadra on 17 May, 2022

Author: K.M. Joseph

Bench: Hrishikesh Roy, K.M. Joseph

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2222 OF 2021

NEW OKHLA INDUSTRIAL DEVELOPMENT
AUTHORITY ..APPELLANT(S)

VERSUS

ANAND SONBHADRA ..RESPONDENT(S)

WITH

CIVIL APPEAL NO. 2367-2369 OF 2021

NEW OKHLA INDUSTRIAL DEVELOPMENT
AUTHORITY ..APPELLANT(S)

VERSUS

MANISH GUPTA & Anr. Etc. ..RESPONDENT(S)

JUDGMENT

K.M. JOSEPH, J.

1. Hardly six years old, the Insolvency and Bankruptcy Code (hereinafter referred to as the Date: 2022.05.17 16:07:56 IST Reason:

> 'IBC") continues to be a fertile ground to spawn litigation. Born in the year 2016, the IBC this time around has given rise to the question as to whether the appellant would be a financial creditor and entitled to be so treated in the Corporate Insolvency Resolution Process (CIRP, in short) commenced against the corporate debtor under the 'IBC'.

THE APPEALS

2. The appellant 'NOIDA' initially submitted Form 'B' and claimed as an operational creditor in regard to the dues outstanding under the lease. Subsequently the appellant filed a claim in Form 'C' and claimed as a financial creditor. There was some correspondence which reveals that the appellant insisted upon being treated as a financial creditor. Finally, the matter was considered by the adjudicating authority (NCLT) which held that there was no financial lease in terms of the Indian Accounting Standards and there was no financial debt. By the impugned order, NCLAT has affirmed the view taken by the NCLT. Hence the appeal.

CIVIL APPEAL NOS.2367-2369 OF 2021

3. The appellant in 2222 of 2021 is the appellant in this case also. The appeal is filed against an interim order passed by the NCLAT staying the order passed by the NCLT. By the order passed by the NCLT, the appellant herein was directed to be admitted as a financial creditor and adjudicating authority also directed to admit the whole of the claim of the appellant. In view of the order passed, which is the subject matter of C.A. No. 2222/2021, NCLAT found it fit to pass an order staying the order passed by the NCLT. Hence the appeals.

4. Since a common question arises namely whether the appellant is entitled to be treated as a financial creditor within the meaning of the IBC, we are rendering the common judgment.

5. We have heard Shri Tushar Mehta, Learned Solicitor General appearing for the appellant in C.A. No.2222/2021 and Smt. Madhavi Divan, learned Additional Solicitor General for the appellant in C.A. No.2367-2369/2021. We have also heard Shri Ritin Rai, learned Senior Counsel appearing on behalf of the respondent in CA 2222/2021. Besides we heard Dr. A.M. Singhvi, learned Senior Counsel who was allowed to intervene in the matter on the basis that there is a case involving the appellant NOIDA which is pending consideration. We also heard Shri Devashish Bharuka on behalf of the first respondent in C.A. Nos. 2367-2369/2021.

THE LEASE

6. The terms of the lease are as found in C.A. No. 2222/2021. The lease was entered into on the 30th day of July, 2010. The appellant is the lessor described as the Authority under Section 3 of the Uttar Pradesh Industrial Area Development Act, 1976 (hereinafter referred to as the 'UPIAD Act'). The lease deed recites that the leasehold property forms part of the land acquired under the Land Acquisition Act and developed by the lessor for the purposes of setting up of an 'Urban and Industrial Township'. The purpose of the lease is the construction of the residential flats according to the setback and building plan approved by the appellant. The lessee earned its right as lessee under the process of two bid tender system in favour of a consortium of which it is a member. The lease deed provides that the shareholding of the lessor shall remain unchanged till the temporary occupancy/completion certificate of at least the first phase of the project is obtained from the lessor and the lessee is permitted to transfer upto 49% of the shareholding subject to conditions. Thereafter, it is recited that of the consideration of Rs.46,14,69,996.50, 10% stood paid. The lease

deed further contemplated moratorium of 24 months from the date of allotment. Only the interest at 7% per annum compounded half yearly which accrued during the moratorium period shall be payable in equal half yearly instalments. The lease deed further contemplated payment of the balance 90% of the amount after expiry of the moratorium in 16 half yearly instalments along with interest as specifically set out. Relevant portions of the lease deed to be noticed read as follows:

> "And also, in consideration of the yearly lease rent hereby reserved and the covenants provisions· and agreement herein contained and on the part of the Lessee. to be respectively paid observed and performed, the Lessor doth hereby demise on lease to the lessee! that plot of land numbered as Group Housing Plot No.GH-5/B, Sector-137, In the NOIDA, Distt. Gautam Budh Nagar (U.P.) contained by measurement 22,565.77 Sq. mtrs. be the same a little more or less and bounded:
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> On the North by : As per Site On the South by : As per Site On the East by : As per Site On the West by : As per Site And the said plot is more clearly delineated and shown In the attached plan and therein marked red.
>
> TO HOLD the said plot (hereinafter referred to as the demised premises with their appurtenances up to the lessee for the term of 90 (ninety) years commencing from 30, JULY, 2010 except and always reserving to the Lessor.
>
> a) A right to lay water mains, drains, sewers or electrical wires under or above the demised premises, if deemed necessary by the Lessor in developing the area.
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> b) The Lessor reserves the right to all mine and minerals, claims, washing goods, earth oil, quarries, over & under the allotted plot and full right and power at the time to do all acts and things which may be necessary or expedient for the purpose of searching for working and obtaining removing and enjoy the same Without providing or leaving any vertical support for the surface of the residential plot or for any building for the lime being standing thereon provided always that the lessor shall make reasonable compensation to the Lessee for all damages directly occasioned by the exercise of such rights. To decide the amount of reasonable compensation the decision of the Lessor will be final and binding on the Lessee.
>
> (II) AND THE LESSEE DOTH HEREBY DECLARE AND CONVENANTS WITH THE LESSOR IN THE MANNER FOLLOWING: .
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> a) Yielding and paying therefore yearly in advance during the said term unto the lessor In the month of MARCH for each year the yearly lease rent indicated below: -
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> (i) Lessee has paid Rs. 46,14,699;96 say Rs.46,14,700,00 as lease rent being 1% of the plot premium for the first 1O years of lease period.

(ii) The lease rent may be enhanced by 50% after every 10 years i.e., 1.5 times of the prevailing lease rent.

(ii) The lease rent shall be payable In _advance every year. First such payment shall fall due on the date of execution of lease deed and thereafter, every year, on or before the last date of previous financial year.

(iv) Delay In payment of the advance lease rent will be subject to Interest @14% per annum compounded half yearly on the defaulted amount for the defaulted period.

(v) The lessee has the option to pay lease rent equivalent to 11 years @ 1 % of the premium of the plot per year as 'One Time Lease Rent unless the Lessor decides to withdraw this facility: On payment of One Time Lease Rent, no further annual lease rent would be required to be paid for the balance lease· period. This option may be exercised at any time during the lease period provided the lessee has paid the earlier lease right due and lease rent already paid will not be considered· in One Time Lease Rent option.

b) The Lessee shall be liable to pay all rates, taxes, charges and assessment leviable by whatever name called for every description in respect of the plot of land or building constructed thereon assessed or Imposed from time to time by the lessor or any Authority/ Government. In exceptional circumstances the time of deposit for the payment due may be extended by_the lessor. But in such case of extension of time an interest@ 14% p.a. compounded every half yearly shall be charged for the defaulted amount for such delayed period. In case lessee fails to pay the above charges it would be obligatory on the part or Its members/ sub lessee to pay proportional charges for the allotted areas.

c) The Lessee shall use the allotted plot for construction of Group Housing, however, the lessee shall be entitled to a lot the dwelling unit on sublease basis to its allottee and also provide space for facilities like Roads, Parks etc. as per their requirements, convenience with the allotted plot, fulfilling requirements or building bye-laws and prevailing and under mentioned terms and conditions to the lessor.

Further transfer/sub lease shall be governed by the transfer policy of Lessor:

(i) Such allottee/sub lessee should be citizen of India and competent to contract.

(ii) Husband/wife and their dependent children will not be separately eligible for the purpose of allotment and shall be treated as single entity.

(iii) The permission for part transfer of plot shall not be granted under any circumstances. The Lessee shall not be entitled to complete transaction for sale, transfer, assign or otherwise part with possession of the whole or any part of the

building constructed thereon before making payment according to the schedule specified in the lease deed of the plot to the Lessor.

However, after making payment of premium of the plot to the lessor as per schedule specified in the lease deed, permission for transfer of built up flats or to part with possession of the whole or any part of the building constructed on the group housing plot, shall be granted and subject to payment of transfer chargers as per policy prevailing at the time of granting such permission of transfer. However, the Lessor, reserves the right to reject any transfer application without assigning any reason. The lessee will also be required to pay transfer charges as per the policy prevailing at the time of such permission of transfer.

The permission to transfer the part Or the built up space will be granted subject to execution of tripartite sub- lease deed which shall be executed in a form and format as prescribed by the lessor." On the fulfillment of the following conditions: -

a) The Lease Deed of plot has been executed and the Lessee has made the payment according to the schedule specified in the lease deed of the plot, interest and one time lease rent. Permission of sub-lease deed shall be granted phasewise on payment of full premium (with interest upto the date of deposit) of the plot of that phase.

b) Every sale done by the lessee shall have to be registered before the physical possession of the property is handed over.

c) The Lessee has obtained building occupancy certificate from Planning Department, Greater Noida (Lessor).

d) The Lessee shall submit list of individual allottees of flats within 6 months form the date of obtaining occupancy certificate.

e) The Lessee shall have to execute tripartite sub lease in favour of the individual allottees for the developed flats/plots in the form and format as prescribed by the LESSOR.

f) The Sub-Lessee undertakes to put to use the premises for the residential use of residential area only.

g) The Lessee shall pay an amount of Rs.

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1000/-     towards     processing       fee     and
proportionate     (pro-rate    basis)     transfer
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charges and lease rent as applicable at the time of transfer and shall also execute sub lease deed between Lessor, Lessee and proposed transferee (sub-Lessee). The Lessee/ Sub Lessee shall also endure adherence to the building regulations and directions of the Lessor. The Lessee as well as sub Lessee shall have to follow rules and regulations

prescribed in respect of lease hold properties and shall have to pay the charges as per rules of the Lessor/Government of U.P. The transfer charges shall not be payable in case of transfer between son/daughter, husband/wife, mother/father and vice versa or between these six categories. A processing fee of Rs.1000/- will be payable in such case. The transfer of the flat in favour of 1st sub-Lessee shall be allowed without any transfer charges but sub lease deed will be executed between the Lessor & Lessee and allottee. However, a processing fee of the Rs. 1000/- will be payable at the time of transfer/execution of the sub-lease deed. The physical possession of dwelling units/ flats/plots will be permitted to be given after execution of sub-lease deed.

i) Every transfer done by the Lessee shall have to be registered before the physical possession of the flat/ plot is handed over. J) Except otherwise without obtaining the completion certificate, the Lessee shall have the option to divide the allotted plot and to sub lease the same with the prior approval of lessor on payment of transfer charges.

However, the area of each of such sub divided plot should not be less than 10,000 sq. metres.

k) Rs.1000/- shall be paid as processing fee in each case of transfer of flat in addition to transfer charges.

7. Norms of development are specifically set out as maximum permissible FAR, maximum ground coverage and maximum height. The construction is to be completed in maximum five phases within a period of seven years from the date of execution of the lease deed. Delay specifically entitled the appellant to cancel, as also gave rise to power to extend time in the manner provided therein with penalty. The period of extension is fixed at 3 years with penalty. It further provided that further extension will normally be not permitted. If the lease is cancelled, the Lessee is to lose all rights and the building appurtenant thereto. The lessee is at total liberty to design the size of the flat/plots. The FAR earmarked for commercial/institutional use would be admissible but the allottee/lessee may utilize the same for their residential use as per their convenience. The clause relating to mortgage reads as follows:

MORTGAGE “The lessee may with prior permission of the Lessor, mortgage the land to any Financial Institution(s)/ Bank(s) for raising loan for the purpose of financing his investment in the project on receipt of payment by allottee or on receipt of assurance of payment by bank or under any other suitable arrangement. In mutual settlement amongst the LESSOR, developer and the financial institution(s)/ Bank(s). As regards the case of mortgaging the land to any Financial Institution(s)/ Bank(s) to mortgage the said land to facilitate the housing loans of the final purchasers, N.O.C may be issued subject to such terms and conditions as may be decided by the LESSOR at the time of granting the permission.

Provided that in the event of sale or foreclosure of the mortgaged/ charged property the LESSOR shall be entitled to claim and recover such percentage, as decided by the

LESSOR of the unearned increase in values of properties in respect of the market value of the said land as first chare, having priority over the said mortgage charge, the decision of the LESSOR in respect of the market value of the said land shall be final and binding on all the parties concerned.

The LESSOR'S right to the recovery of the unearned increase and the pre-emptive right to purchase the property as mentioned herein before shall apply equality to involuntary sale or transfer, be it bid or through execution of decree of insolvency/court." Transfer of plot is the next provision to notice and it reads as follows:

"TRANSFER OF PLOT Without obtaining the completion certificate the lessee shall have the right to sub-divide the allotted plot into suitable smaller plots as per planning norms and to transfer the same to the interested parties upto 30.09.2010 with the prior approval of LESSOR on payment of transfer charges @ 2% of allotment rate. However, the area of each of such sub-divided plots should not be less than 20,000 sq. mtrs. However, individual flat/plot will be transferable with prior approval of the LESSOR as per the following conditions: -

(i) The dues of LESSOR towards cost of land shall be paid in accordance with the payment schedule specified in the Lease Deed before executing of sub-lease deed of the flat.

(ii) The lease deed has been executed.

(iii) Transfer of flat will be allowed only after obtaining completion certificate for respective phase by the Lessee.

(iv) The sub-lessee undertakes to put to use the premises for the residential use only.

(v) The lessee has obtained building occupancy certificate from Building Cell, NOIDA.

(vi) First sale/transfer of a flat/plot to an allottee shall be through a Sub-lease/ Lease Deed to be executed on the request of the Lessee to the LESSOR in writing.

(vii) No transfer charges will be payable in case of first sale, including the built-up premises on the sub-divided plot(S) as described above. However, on subsequent sale, transfer charges shall be applicable on the prevailing rats as fixed by the LESSOR.

(viii) Rs. 1000/- shall be paid as processing fee in in each case of transfer of flat in addition to transfer charges."

8. Under the heading "Misuse, addition, alteration etc.", it is provided that the lessee shall not use the flat for any purpose other than residential purpose. Violation would open the doors for cancellation. The lessee is liable to pay all rates, taxes, charges and assessment of every description imposed by any lessor empowered in this behalf, whether it be imposed on the plot or the building constructed thereon from time to time.

9. Under the heading "Overriding power over dormant property", it is provided as under:

> "OVERRIDING POWER OVER DORMANT PROPERTIES

The lessor reserves the right to all mines, minerals, coals, washing gold earth's olls, quarries on or under the plot and full right and power at any time to do all acts and things which may be necessary or expedient for the purpose of searching for, working and obtaining removing and enjoying the same without providing or leaving any vertical support for the surface of the plot(s)/ flats or for the structure time being standing thereon provided always that the Lessor shall make reasonable compensation to the Lessee for all damages directly occasioned by exercise of the rights hereby reserved. The decision of the Chief Executive Office/ Lessor on the amount of such compensation shall be final and binding on the lessee/ sub-lessee."

10. The lessee is to maintain the premises. Under the head 'Maintenance', it is, inter alia, stated as follows:

> "5. The lessee/sub lessee shall make such arrangements as are necessary for the maintenance of the building and common services and · If the building Is not maintained properly. The Chief Executive Officer or any officer authorized by· Chief. Executive Officer of the Lessor will have power to get the maintenance done through the Lessor and recover the amount so spent from the lessee/sub lessee. The lessee/sub lessee will be individually and severally liable for payment of the maintenance amount. The rules/regulation of UP Flat ownership act 1975 shall be applicable on the lessee/sub lessee. No objection on the amount spent for maintenance of the building the lessor shall be entertained and decision of the Chief Executive Officer of the Lessor In this regard shall be final."

11. Cancellation of lease deeds is separately provided as follows:

> "CANCELLATION OF LEASE DEED "In addition to the other specific clauses relating to cancellation, the Lessor, as the case may be, will be free to exercise its right of cancellation of lease in the case of:-
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> 1. Allotment being obtained through misrepresentation/suppression of material facts, misstatement and/or fraud.

2. Any violation of directions issued or rules and regulation framed by Lessor or by any other statutory body.

3. Default on the part of the lessee for breach/violation of terms and conditions of registration/allotment/lease and/or non-

deposit of allotment amount.

4. If at the same time of cancellation, the plot is occupied by the Lessee thereon the amount equivalent to 25% of the total premium of the plot shall be fortified and possession of the plot will be resumed by the Lessor with structure thereon, if any, and the lessee will have no right to claim compensation thereof. The balance, if any shall be refunded without any interest. The forfeited amount shall not exceed the deposited amount with the Lessor and no separate notice shall be given in this regard.

5. If the allotment is cancelled on the ground mentioned in sub clause 1 above, then the entire amount deposited by the lessee, till the date of cancellation shall be forfeited by the Lessor and no claim whatsoever shall be entertained in this regard."

12. We may also notice the provisions under other clauses:

"OTHER CLAUSES

1. The Lessor reserves the right to make such additions/ alternations or modifications in the terms and conditions of allotment/lease deed/sub lease deed from time to time, as may be considered just and expedient.

2. In case of any clarification or interpretation regarding these terms and conditions the decision of Chief Executive Officer or the lessor shall be final and binding.

3. If due to any "Force Majeure" or such circumstances beyond the lessor's control, the lessor is unable to make allotment or facilitate the Lessee to undertake the activities in pursuance of executed lease deed, the deposits depending on the stages of payments will be refunded along with simple interest @ 4% p.a., if the delay in refund is more than one year from such date.

4. If the Lessee commits any act of omission on the demised premised resulting in nuisance, it shall be lawful for the lessor to ask the Lessee to remove the nuisance within a reasonable period falling which the LESSOR shall itself get the nuisance removed at the Lessee's cost and charge damages from the Lessee during the period of submission of nuisance.

5. Any dispute between the lessor and Lessee/ Sub-Lessee shall be subject to the territorial jurisdiction of the Civil Courts having jurisdiction over District Gautam

Budh Nagar or the Courts designated by the Hon'ble High Court of Judicature at Allahabad.

6. The Lease Deed/ allotment will be governed by the provisions of the U.P. Industrial Area Development Act, 1978 (U.P. Act no. 6 of 1976) and by the rules and/ or regulations made or directions issued, under this act.

7. The lessor will monitor the implementation of the project. Applicants who do not have a firm commitment to implement the project within the time limits prescribed are advised not to avail the allotment.

8. The lessee/ sub-lessee of the Lessee shall be liable to pay all taxes/ charges livable from time-to-time lessor or any other authority duly empowered by them to levy the tax/charges.

9. Dwelling units flats shall be used for residential purpose only, in case of default, render the allotment/ lease liable for cancellation and the Allottee/Lessee/sub-

lessee will not be paid any compensation thereof.

10. Other buildings earmarked for community facilities cannot be used for purposes other than community requirements.

11. All arrears due to the Lessor would be recoverable as arrears of land revenue.

12. The Lessee shall not be allowed to assign or change his role, otherwise the lease shall be cancelled and entire money deposited shall be forfeited.

13. The lessor in larger public interest may take back the possession of the land/building/ by making payment at the prevailing rate.

14. In case the lessor is not able to give possession of the land in any circumstances deposited money will be refunded to the allottee with simple interest.

15. All terms and conditions of brochure and its corrigendum, allotment, building bye-laws and as amended from time to time shall be binding on the Lessee.

For and on behalf of LESSOR"
` (Emphasis supplied)

FINDINGS OF THE NCLAT

13. FINDINGS

I. The NCLAT finds that the lease deed does not have any clause of transfer of ownership of the underlying asset, which is land and not flat, as harped upon by the appellant. This is noted as one of the factors, which is an important factor. The appellant has not done any classification of the lease as a financial lease, however observing that it would not be a deciding factor. The NCLAT has proceeded to evaluate the contents of the lease. It proceeds to remind itself that to be classified as a financial lease, what is relevant is whether there is a substantial transfer of all the risks and rewards incidental to ownership of an underlying asset. It proceeds to further hold that the lease is heavily tilted in favour of the appellant, controlling almost all the aspects and while passing over the risks keeps the rewards with lessor, except the liberty to sell the flats which would be constructed. Thereafter, the NCLAT proceeded to consider whether rewards incidental to ownership of the underlying asset were transferred. It is found that appellant put a condition that the lessee will be allowed to transfer/sell upto 49% of its shareholding, subject to the condition that the original shareholders indicated on the date of submission of the tender, shall continue to hold at least fifty-one per cent of the shareholding, till the temporary occupancy completion certificate is obtained of at least one phase.

II. There is reference to a total premium of Rs.46 crores and the down payment of ten percent. So also, reference is made to half-yearly instalments to be paid between 2010 and 2020. The term of the lease is for ninety years. Reference is made to the clause reserving rights to all mine and minerals under the allotted plot, inter alia. Reliance is placed on ten percent of the amount paid towards premium being repeated, by referring to the same amount as lease rent. Lease rent and premium are used interchangeably. The option of paying the lease rent is referred to. The liability to pay taxes is adverted to. There is further reference to the following clause:

> "c) The Lessee shall use the allotted plot for construction of Group Housing. However, the lessee shall be entitled to allot the dwelling units on sublease basis to its allottee and also provide space for facilities like Roads, Parks etc. as per their requirements, convenience with the allotted plot, fulfilling requirements or building bye-laws and prevailing and under mentioned terms & conditions to the lessor. Further transfer/sub lease shall be governed by the transfer policy of the Lessor." Reference is made to the clause that the allottee/sub-lessee, should be a citizen of India and should be competent and that husband, wife, and dependent children would be considered single entity.
>
> Further reference is made to the following clause:
>
> "iii) The permission for part transfer of plot shall not be granted under any circumstances. The Lessee shall not be entitled to complete transaction for sale, transfer, assign or otherwise part with possession of the whole or any part of the building constructed thereon before making payment according to the schedule specified in the lease deed of the plot to the Lessor. However, after making payment of premium of the plot to the lessor as per schedule specified in the lease deed permission of transfer of built-up flats or to part with possession of the whole or any part of the building constructed on the Group Housing Plot, shall be granted and

subject to payment of transfer charges as per policy prevailing at the time of granting such permission of transfer. However, the Lessor, reserves the right to reject any transfer application without assigning any reason. The lessee will also be required to pay transfer charges as per the policy prevailing at the time of such permission of transfer." III. Reference is made to the following clause, which reads as follows:

The lessee shall have to execute sub-lease in favour of the individual allottees for the developed flats/plots in the form and format, as prescribed by the lessor. This is relied upon by the NCLAT to conclude that rewards incidental to ownership is not transferred.

IV. Next, it is found that the lease deed contemplates that the number of phases within which the work needs to be completed. The schedule of time had to be adhered to by the lessee. The power of cancellation loomed large in this context.

V. Next, reliance is placed on the clause relating to mortgage, which required permission of the appellant to mortgage the plot. The priority of charge of the appellant was maintained. The use of the flat was limited to residential purpose only.

Departure from the same would invite the wrath of cancellation. The appellant reserved the right to even remove the vertical support for the surface of the plots/flats with only liability to pay compensation and the right to determine which was lodged with the appellant and it was to be binding on the lessee/sub-lessee. The general power of cancellation is maintained.

VI. Thereafter, we may notice the following:

"21. Thus, the Appellant, even after creating the lease kept with itself all the rights to control and monitor the project which was to come up. The Appellant of course now has tried to say in the Appeal that it was "only exercising minor supervision over the land use" (see 9.12 of the Appeal), which we do not agree to. What we can see from the Lease Deed which we have just referred in brief, is that the acts which could be performed by the lessee, were fully controlled by the Appellant. The lessee, of course, had the liberty to construct and transfer the flats by way of sublease. The above discussion shows that while risks and liabilities were transferred to the lessee, the rewards incidental to ownership were not transferred. There is no Clause of transfer of ownership at the end of lease term. There is no option given to the lessor to purchase the asset at a price that is accepted to be sufficiently lower than the fair value. The lease is for a term of 90 years. For life of a land, 90 years cannot be said to be major part of economic life of the asset. There are no calculations available, and the Lease Deed does not state that the present value of the lease payments amounts to at least substantially all of the fair value of the asset i.e. the land. The right to cancel the lease by the lessor are specified at various places in the lease deed, however, there is no option to the lessee to step out. There is no option available in

the lease deed for the lessee to continue lease for secondary period. This is, leave apart, the indicator which requires that said secondary period should be at a rent that is substantially lower than market rent.

22. Thus, when we have gone through the Lease Deed keeping the classification of leases and the indicators mentioned above, we do not find that the lease deed in question can be said to be a finance lease.

23. Keeping in view the Indian Accounting Standards, what appears broadly is that when lease involves real estate (like land in present matter) with a fair value different from its carrying amount, the lease can be classified as a finance lease if the lease transfers ownership of the property to the lessee by the end of the lease term or there is bargain purchase option. The lease must transfer substantially all the risks and also rewards incidental to ownership of the asset.

24. The argument of the Appellant trying to mix up transfer of ownership of the asset which is land with right to transfer flats to be constructed has no substance. Merely, because the lessee was given right to fix the price of the dwelling units to be constructed, that by itself is not sufficient to say that the lease of the land is a finance lease. The argument of the Appellant that lessee has an option to pay onetime lease rent and that if such right was exercised lessee would not be required to pay further rent and that this shows that present value of the lease payment amounts to at least substantially all of the fair value of the asset, is also baseless. No material is brought to show as to what is and would be the fair value. With regard to right to cancel lease, it is reserved with the lessor but not the lessee. The Appellant argues that the question of cancellation of lease deed by lessee would not arise as lessee would build and transfer dwelling units. This is speculative and cannot be helpful in construing the document. Again, it is not that the right to land would get transferred to the flat purchasers (who are referred rather as sub-lessees). We do not find substance in the arguments being raised by the Appellant to bring the Lease Deed within the requirements of Indian Accounting Standards. We rather find substance in the submissions of the Respondent as recorded in the Chart reproduced supra." VII. Finally, we may further also notice paragraphs-29 and 30 at page 41 and 42 of impugned Order in C.A. No. 2222 of 2021.

"29. In the present matter, there is no sale of land. It is lease, for premium /rent with almost all rights controlled by the Lessor. We have gone through the provisions of Section 5(8)(f) and also when we keep the above observations of the Hon'ble Supreme Court of India, we are unable to persuade ourselves to accept the submission that when land is leased out, if premium is fixed and instalments are given, it should be treated as a financial lease. We do not find substance in this argument.

30. We may record that we are not finding fault with the various terms and conditions in the Lease Deed. It is a Lease Deed from a development authority which has the object of developing the

township and thus wants to control the manner in which the constructions of housing come up. That purpose is alright. However, such lease does not fit in with the requirements of Indian Accounting Standards which we have referred. Just to be part of COC, the lease of land between developing authority and the builders cannot be considered or treated as a financial lease." RELEVANT PROVISIONS OF THE IBC

14. Section 5(8), which is at the centre of the controversy, defines 'financial debt' as: -

> "5(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; 1 [Explanation. -For the purposes of this sub-clause, - (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]
>
> (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
>
> (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

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

(h) of this clause;"

15. Section 3(11) defines the word 'debt'. It reads as: -

"(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"

16. Section 3(6) defines the word 'claim'. It reads as: -

"(6) "claim" means—

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"

17. Section 5(21) defines the word 'operational debt'. It reads as: -

"(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"

18. Section 5(20) defines the word 'operational creditor'. It reads as: -

"(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;"

19. Section 3(33) defines the word 'transaction'. It reads as: -

"(33) "transaction" includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;" THE UTTAR PRADESH INDUSTRIAL AREA DEVELOPMENT ACT, 1976 UNDER WHICH APPELLANT WAS CREATED ('UPIAD', FOR SHORT)

20. The Act defines the word 'transferee' in Section 2(f) as follows: -

"2(f) 'Transferee' means a person (including a firm or other body of individuals whether incorporated or not to whom any land or building is transferred in any

manner whatsoever, under this act and includes his successors and assigns,"

21. Section 3 deals with the Constitution of the authority and reads as follows: -

"3. (1) The State Government may, by notification, constitute for the purposes of this Act, An authority to be called (Name of the area) Industrial Development Authority, for any industrial development area. (2) The Authority shall be a body corporate. (3) The Authority shall consist of the following: –

(a) The Secretary to the Government, Uttar Pradesh, Member Industries Department or his Nominee not below Chairman the rank of Joint Secretary-ex-official.

(b) The Secretary to the Government, Uttar Pradesh, Member Public works Department or his nominee not below the rank of Joint Secretary ex-official.

(c) The Secretary to the Government, Uttar Pradesh, Local Member Self-Government or his nominee not below the rank of joint Secretary-ex official.

(d) The Secretary to the Government, Uttar Pradesh, Finance Member Department or his nominee not below the rank of Joint Secretary-ex official.

(e) The Managing Director, U.P. State Industrial Development Member Corporation-ex official.

(f) Five members to be nominated by the State Government Member by notification.

(g) Chief Executive Officer. Member Secretary (4) The headquarters of the Authority shall be at such place as may be notified by the State Government.

(5) The procedure for the conduct of the meetings for the Authority shall be such as may be prescribed.

(6) No act or proceedings of the Authority shall be invalid by reason of the existence of any vacancy in or defect in the constitution of the Authority."

22. Section 6 of the UPIAD deals with the functions of the Authority, which in this case is the appellant. Section 6 reads as follows:

"FUNCTION OF THE AUTHORITY

6. (1) The object of the Authority shall be to secure the planned development of the industrial development area.

(2) Without prejudice to the generality of the objects of the Authority, the Authority shall perform the following functions :–

(b) to prepare a plan for the development of the industrial development area;

(c) to demarcate and develop sites for industrial, commercial and residential purpose according to the plan;

(d) to provide infrastructure for industrial, commercial and residential purposes;

(e) to provide amenities;

(f) to allocate and transfer either by way of sale or lease or otherwise plots of land for industrial, commercial or residential purposes;

(g) to regulate the erection of buildings and setting up of industries: and

(h) to lay down the purpose for which a particular site or plot of land shall be used, namely for industrial or commercial or residential purpose or any other specified purpose in such area."

23. Section 7 deals with the power to transfer. It reads as follows: -

> "7. The authority may sell, lease or otherwise transfer whether by auction, allotment or otherwise any land or building belonging to the Authority in the industrial development area on such terms and conditions as it may, subject to any rules that may be made under this Act think fit to impose." The proviso deals with consequences of not utilising it for the purpose for which it was allowed.

24. Section 8 provides that for the proper planning and development of the industrial development area, the authority may issue such direction as it considered necessary regarding various aspects. They include architectural features of the elevation or frontage of any building, the alignment of building on any site, the number of residential buildings that may be erected on any site, the restrictions in regard to open spaces and height to be maintained, maintenance of amenities, restrictions of use of any site for a purpose other than that for which it has been allocated.

25. Section 10 deals with power to require proper maintenance of site and buildings. Section 11 deals with power to levy taxes. It, inter alia, reads as follows: -

> "11. Levy such Taxes. — [(1) For the purposes of providing, maintaining or continuing any amenities in the industrial development area, the Authority may with the previous approval of the State Government, levy such taxes as it may consider necessary in respect of any site or building on the transferee or occupier thereof, provided that the total incidence of such tax shall not exceed one per cent of the market value of such site, including the site of the building.

Explanation—For the purpose of this sub- section, the expression "market value" means, the amount of—

(a) consideration, in the case of sale; or

(b) premium, in the case of lease; or

c) the minimum value determined in accordance with the rules made under the Indian Stamp Act, 1899, whichever is more]

2) If the State Government considers it necessary or expedient in the public interest, it may, by a general or special order, exempt wholly or partly-any such transferee or occupier or any class thereof from the taxes levied under sub-section (1)."

26. Section 11A inserted with effect from 21.03.2016 empowers collection of tolls. Section 11B inserted likewise provides for levy of additional stamp duty.

27. Section 12 reads as follows: -

"12. Applications of certain provisions of President's Act XI of 1973.—The provisions of Chapter VII and Sections 30, 32, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 53, and 58 of the Uttar Pradesh Urban Planning and Development Act, 1973, as re-enacted and modified by the Uttar Pradesh President's Act (Re-enactment with Modifications) Act, 1974, shall mutatis mutandis apply to the Authority with adaptation that— (a) any reference to the aforesaid Act shall be deemed to be a reference to this Act; (b) any reference to the Authority constituted under the aforesaid Act shall be deemed to be a reference to the Authority constituted under this Act; and (c) any reference to the Vice-Chairman of the Authority shall be deemed to be a reference to the Chief Executive Officer of the Authority."

28. Section 13 reads as follows: -

"(13) Where any transferee makes any default in the payment of any consideration and money or instalment thereof or any other amount due

--- account of the transfer of any site or building by the Authority or any rent due to the Authority in respect of any lease, or where any transferee or occupier makes any default in the payment of any fee or tax levied under this Act, the Chief Executive officer may direct that in addition to the amount of arrears, further sum not exceeding that amount shall be recovered from the transferee or occupier, as the case may be, by way of penalty."

29. It is necessary to notice Section 12A and 12B inserted with effect from 12.03.2016. They read as follows: -

> "12-A. No Panchayat for industrial township.— Notwithstanding anything contained to the contrary in any Uttar Pradesh Act, where an industrial development area or any part thereof is specified to be an industrial township under the proviso to clause (1) of Article 243-Q of the Constitution, such industrial development area or part thereof, if included in a Panchayat area, shall, with effect from the date of notification made under the said proviso, stand excluded from such Panchayat area and no Panchayat shall be constituted for such industrial development area or part thereof under the United Provinces Panchayat Raj Act, 1947 or the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961, as the case may be, and any Panchayat constituted for such industrial development area or part thereof before die date of such notification shall cease to exist, Explanation:—The expression "Panchayat and Panchayat area" shall have the meanings respectively assigned to them in part IX of the Constitution.] 12-B.—(1) The Governor may, by notification, specify under Article 243-Q of the Constitution of India, the whole of Special Investment Region or the Industrial Development Area or any part thereof to be an Industrial Township.
>
> (2) Notwithstanding anything to the contrary contained in any Uttar Pradesh Act, where an special investment region or industrial development area or any part thereof is specified to be an Industrial Township under the proviso to clause (1) of Article 243- Q of the Constitution of India, such industrial development area or part thereof, falling in a Municipality shall from the date of notification stand excluded from that Municipality area and all powers and functions performed with respect to such area shall be exercised or performed by the Authority.

Explanation: —The expression "Municipality" shall have the meaning assigned to it in Part IX or Part IX-A of the Constitution of India.]"

30. Section 14 reads as follows: -

> "14. For feature for breach of conditions of transfer. —(1) In the case of non-payment of consideration money or any installment thereof on account of the transfer by the Authority of any site or building or in case of breach of any condition of such transfer or breach of any rules or regulations made under this Act, the Chief Executive Officer may resume the site or building so transferred and may further forfeit the whole or any part of the money, if any, paid in respect thereof.
>
> (2) Where the Chief Executive Officer orders resumption of any site or building under sub-

section (1) the Collector may, on his requisition, cause possession thereof to be delivered to him and may for that purpose use or cause to be used such force as may be necessary."

31. We may further notice Section 17:

"(17) Upon any area being declared on industrial development area under the provision of this act, such area, if included in the master plan or the zonal development plan under the Uttar Pradesh Urban planning and Development Act, 1973, or any development plan under any other Uttar Pradesh Act, shall with effect from the date of such declaration be deemed to be excluded from any such plan."

THE PROVISIONS OF THE UTTAR PRADESH URBAN PLANNING AND DEVELOPMENT ACT, 1973 MADE APPLICABLE TO THE AUTHORITY VIDE SECTION 12 OF THE UPIAD ACT [For short, 'the 1973 Act']

32. Chapter VII dealing with Finance, Accounts and Audit begins with Section 20. Section 20 provides for fund of the authorities. It reads as follows:

"20. (1) The authority shall have and maintain its own fund to which shall be credited–

(a) all moneys received by the Authority from the State Government by way to grants, loans advances or otherwise;

(b) all moneys borrowed by the Authority from sources other than the State Government by way of loans or debentures;

(c) all fees, tolls and charges received by the Authority under this Act;

(d) all moneys received by the Authority from the disposal of lands, buildings and other properties movable and immovable; and

(e) all moneys received by the Authority by way of rents and profits or in any other manner or from any other sources. (2) The fund shall be applied towards meeting the expenses incurred by the Authority in the administration of this Act for no other purposes.

(3) Subject to any directions of the State Government, the Authority may keep in current account of any Scheduled Bank such sum of money out of its funds as it may think necessary for meeting its expected current requirements and invest any surplus money in such manner as it thinks fit.

(4) The state Government may, after due appropriation made by Legislature by law in that behalf, make such grants, advances and loans to the Authority as that Government may deem necessary for the performance of the functions of the authority under this Act, and all grants, loans and advances, made shall be on such terms and conditions as the State Government may determine. (5) The Authority shall maintain a sinking fund for the repayment of moneys borrowed under sub-section (5), and shall pay every year into the sinking fund such sum as may be sufficient for repayment within the period fixed of all moneys so borrowed.

> (7) The sinking fund or any part thereof shall be applied in, or towards, the discharge of the loan for which such fund was created, and until such loan is wholly discharged it shall not be applied for any other purpose."

33. Section 21 provides that the authority shall prepare a budget in the form and at such time as the State Government may specify.

34. Section 22 provides that the authority is to maintain proper accounts. The accounts of the authority shall be subject to audit annually by the Examiner Local Fund Accounts.

35. Section 23 mandates that the authority shall prepare a report and submit it to the State Government in such form and on or before such date as specified by the State Government and the report is to be laid before both Houses of the Legislature.

36. Section 24 deals with Pension and Provident Fund. It reads as follows: -

> "24. (1) The Authority may constitute for the benefit of its whole-time paid members and of its officers and other employers in such manner and subject to such conditions, as the State Government may specify, such pension or provident funds as it may deem fit. (2) Where any such pension or provident fund has been constituted, the State Government may declare that the provisions of the Provident Funds Act, 1925, shall apply to such fund as if it were a Government Provident Fund."

37. We must notice Section 40:

> "40. Recovery of moneys due to Authority—Any money due to an Authority on account of any fee; or charges, or from disposal of land, building or any other property, movable or immovable, by way of rent, premium, profit or hire purchase instalment, may, without prejudice to the right of recovery by any other mode of recovery provided by or under this Act or any other law for the time being in force, be realised—
>
> (a) either, as arrears of land revenue upon a certificate of the amount due sent by the Authority to the collector, or (b) by attachment and sale of property in the manner provided in Sections 504, 505, 506, 507, 508, 509, 510, 512, 513 and 514 of the [Uttar Pradesh Municipal Corporation, 1959) (2 of 1959)]; and such provisions of the said [Act] shall mutatis mutandis apply to recovery of dues of an Authority as they apply to recovery of a tax due to a [Municipal Corporation], so however, that references in the aforesaid section of the said Adhiniyam to 'Mukhya Nagar Adhikari', [Corporation] and Executive Committee shall be constructed as references to 'Vice Chairman, 'Development Authority' and 'Chairman respectively:
>
> Provided that no two or more modes of recovery shall be commenced or continued simultaneously.] the old Section 40, U.P. Urban Planning and Development Act, 1973

prior to Amendment Act 21 of 1985 is given below:

> "40, Mode of recovery of money due to Authority any money certified by the Authority as due to it on account of fees or charges, or from the disposal of lands, buildings or other properties, movable or immovable, or by way of rents and profits may, if the recovery thereof is not expressly provided for in any other provision of this Act, be recovered by the Authority as arrears of land revenue, and no suit shall lie in the Civil Court for recovery of such money."

38. Section 41 provides for directions being issued by the State Government for the administration of the Act being binding on the Authority. Under Section 42 of the UP 1973 Act, the Authority is to furnish return and other information to the Government. Section 43 deals with manner of service of notices, orders, and other documents. Section 44 deals with how public notices are to be made known. Section 45 mandates fixing of reasonable time in any notice, order, or document, unless time is otherwise fixed by the Act or Regulation. Section 47 proclaims that every member and every officer and other employee of the Authority shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code. Without sanction of the Chief Executive Officer of the Authority or any other officer authorised by him, there cannot be prosecution for any offence under the Act. Section 51 deals with power of delegation, both of the State Government and of the Authority and the Chief Executive Officer. Section 53 empowers the State Government to exempt, by notification, any land or building from the provisions of the 1976 Act or Rules or Regulations made thereunder. Section 58 of the UP 1973 Act, as made applicable to the 1976 Act, provides for the dissolution of the Authority, on the State Government forming the opinion, that the purpose for which the Authority was established, has been substantively achieved, rendering the continued existence of the Authority unnecessary.

CONTENTIONS OF THE APPELLANTS

39. The learned Solicitor General would rely on Section 5(8)(d) and Section 5(8)(f) of the IBC in attempting to persuade the Court that the appellant is actually a financial creditor. He would point out with reference to Section 5(8)(d) that a careful analysis of the lease deed would show that the lease in question is a financial lease. In his endeavour, in this regard, he emphasised the part of the provision, which brings in the concept of a deeming provision. In other words, he contended that the Court is bidden to treat a certain position as deemed. The NCLAT has proceeded as if what is involved is classification of a financial lease he complained. He took us through the statutory rules, which have come to embody the Indian Accounting Standards (IAS) within the meaning of Section 5(8)(d), which have been enacted under the Companies Act, 2013.

40. He would first and foremost point out that the most prominent and indispensable element to make a lease a financial lease is that there should be a substantial transfer of the risks and rewards incidental to ownership from the lessor to the lessee. What is contained in later rules are essentially by way of examples or illustrations. The mere fact that with reference to each one of them, the appellant may not answer the description of a financial lessor, may not suffice to deprive the appellant of the status of a financial creditor, as the vital question to be posed and answered is

whether substantially there is a transfer of risks and rewards incidental to ownership. He does not dispute that in the case in question, appellant has not classified the lease as a financial lease in the balance sheet. He would however point out that the NCLAT has erred in finding that reward incidental to ownership has not been transferred to the lessee. In this regard, he would point out that the lessee is free to fix the amount of consideration it can charge from the buyers from the lessee. The appellant cannot demand any share in the consideration received by the lessee. In other words, the lessee is free to appropriate the entire profits. This is crucial in appreciating whether the rewards incidental to ownership has been transferred to the lessee. He highlights the fact the appellant is an Authority constituted under a statute, namely the UPIAD. He took us through the provisions of Section 6 and 7 of the Act. He would contend that as the Authority is charged with the statutory duty to carry out planned development of the area and group housing being residential in nature and since the construction had to be carried out in accordance with the laws in force and the appellant was also charged with the duty to regulate the activity, all that has happened is that the lease deed contains provisions for the regulatory regime. This cannot detract from the transfer of rewards substantially to the lessee. he contends.

41. As far as Section 5(8)(f) of the IBC is concerned it is pointed out that the said provision is a catch- all section and acts as a residuary reservoir, and what remains after what has been provided in the preceding provisions, are captured within its scope. He would contend that the Court must not overlook the object and scheme of the IBC. The financial creditors occupy a position of dominance whereby they call the shots when it comes to ruling on the destiny of the corporate debtor. Under the IBC, true power vests with the Committee of Creditors. It is the financial creditors, who are at the helm of affairs of the Committee. It is the Committee which will vote and finally decide, on the Resolution Plan, which binds all. A financial creditor would be in a position to sway the views of others on the Committee. He would, in the context of the facts point out that as things stand, the Committee is virtually filled with homebuyers. It would be unjust to deny the appellant its say in the proceedings of the Committee. Huge sums of public money are at stake. As the custodian of public interest, the appellant must be vouch-safed its legitimate position in the Committee of Creditors. It is this important perspective, which has been overlooked by the NCLAT, it is complained. The appellant cannot be treated as an operational creditor, whose interest is no more than the mere realisation of the money due to it. The appellant is more comparable with a bank. In other words, the lease in question provides the lessee with the mechanism, by which on payment of a mere ten percent of the total premium upfront, the lessee gets possession of the land. A moratorium follows. Thereafter, under the lease, the lessee is no doubt obliged to pay the balance ninety per cent of the premium and that too in 16 half-yearly instalments. If the lessee had wanted to purchase the property and required finance from any other source, including a bank, it would have had to receive financial accommodation in some form or the other, under which, the respondent would become obliged to pay back the loan to the bank in terms of the arrangement. In this case, on the other hand, under the lease, a lessee, instead of approaching a bank, must be treated as raising funds in the manner provided in the lease and that too on very easy and reasonable terms. The lessee pays ten percent only in the beginning. The lessee is, in fact, given the benefit of a reprieve and thereafter, he is enabled to pay the lessor directly the balance amount. Therefore, this is a transaction, as defined in Section 2(33) of the IBC. He would submit that the amounts are to be paid back with interest. Therefore, on the whole, it must be treated as a case

where, there is raising of funds by the lessee, which, has a commercial underpinning, as required under Section 5(8)(f) of the IBC. He would point out that the main provision, i.e., as contained in Section 5(8) contemplates a debt, which is disbursed. Various clauses, which are enumerated thereafter, need not contain the aspect of disbursement. Therefore, raising of funds, within the meaning of Section 5(8)(f), can be contemplated without actual disbursement. He would rely on the Judgement of this Court in Pioneer Urban Land and Infrastructure Limited and Another vs. Union of India (UOI) and Others1

42. Smt. Madhavi Divan, learned Additional Solicitor General, appears for NOIDA in the connected matter. She adopts the contentions of the learned Solicitor General appearing for the same party. However, the learned Additional Solicitor General, would make three-pronged submissions with regard to the appellant qualifying as a financial creditor. She would contend that the appellant would fall in the main provisions of Section 5(8). There is a debt. There is a time value of money. Interest is predicated on the strength of the same. As far as the requirement of disbursement is concerned, she draws our attention to Section 2(33) of the IBC, which defines the word 'transaction'. It is her contention that the disbursement need not be unidimensional. In the modern world, with the sophistication and development of the financial market, the disbursement can be from the creditor to the debtor or from the debtor to the creditor. Therefore, even without the (2019) 8 SCC 416 aid of the provisions, which appear by way of inclusion, the appellant fits the bill as a financial creditor. She also highlighted the true role of the appellant under the Statute of which it is an offspring. She would point out that there are long- term stakes, as far as the appellant is concerned. The appellant is charged with the sublime function of ensuring planned development. The lease operates as a tool of financing. Whatever be the form, of which the Court must not be a prisoner, the substance cries out for labelling the appellant as a financial creditor. Borrowing must not be viewed from the prism of convention. The lease contemplates an upfront payment, a moratorium and staggered payments of installments. She also draws considerable inspiration from Pioneer (supra). She would contend that in Pioneer (supra), which involved a challenge to including homebuyers as financial creditors on the strength of the Explanation, which was included in Section 5(8)(f) of the IBC, this Court recognised that a homebuyer is not a borrower in the traditional sense and yet the Court found that homebuyer was a financial creditor and builder was being financed by the payment of advances and staggered payment of installments and, at the end of which, the equivalent in terms of the flat, was promised. It would involve a manifest absurdity, if the appellant, who would be in a better position, in fact, than the homebuyers, is yet excluded from the Committee of Creditors on the score that it is to be treated as an operational creditor.

43. With reference to the expression 'raising of funds', contemplated in Section 5(8)(f), she would persuade the Court to hold that the lessee, by entering into the lease, comes to enjoy the property and also have other rights, including the right to entirely appropriate the profit from the transfer of the flats constructed thereon. By the staggered payments, after the initial payments of advance of ten percent and a moratorium freeing the funds of the corporate debtor clearly takes place. There is generation of funds by the mechanism provided in the lease and it plainly has the effect of borrowing and bringing into play the statutory mantra also, of commercial effect of borrowing. It works extremely well for the lessee, in fact, in comparison to how it would have fared, had it approached the bank or a financial institution. With regard to Section 5(8)(d), the learned

Additional Solicitor General also emphasised upon the word 'deemed' to be financial lease with reference to the Indian Accounting Standards. It is her case that, in fact, in the accounts of the appellant, the transaction is reflected as a sale. This assumes significance as, under the Indian Accounting Standards, the dominant test is, whether, substantially, the risks and rewards incidental to ownership has been transferred. There cannot be a more eloquent fulfilment of this requirement than the very action of the appellant in treating the transaction as a sale in the balance- sheet, and what is more, for the years, much prior to the enactment of the IBC. It is submitted that Court may not be oblivious that the premium under the lease, is, indeed, linked to the market value, indicating, unerringly, in the direction of a sale. She would make a thinly veiled threat that if the appellant is to be excluded in the manner from the Committee of Creditors, there can be possible cancellation of leases being resorted to by the appellant, which may not augur well for the real estate world. She relied upon Swiss Ribbons Private Limited and Another v. Union of India and Others2.
SUBMISSIONS OF SHRI RITIN RAI

44. The respondent in Civil Appeal No. 2222/2021 namely the resolution professional who appears through Shri Ritin Rai, learned Senior Counsel would make the following submission.

The case of the appellant that the disbursal can flow in either direction ignores that what is disbursed is a debt and not its repayment. The appellant has not parted with any money that is now with the corporate debtor. Section 5(8) does not use the word 'transaction' and any other interpretation other than a flow of funds from creditor to the debtor should not be accepted, and it will lead to absurdity. As far as the case under Section 5(8)(d) is concerned, it is submitted that (2019) 4 SCC 17 the appellant has not classified in its books of accounts classifying the lease as financial lease. The classification as operating lease or financial lease is to be made from the inception date. Neither at the time of entering into the lease deed nor subsequently has any classification been made. Under the Indian Accounting Standards, a Lessee under a capital lease transaction recognises the lease as an asset in his Balance Sheet and it is presented as Receivable at an amount equal to net investment. The objective of IAS 116 is that both the Lessor and Lessee provides relevant information. In the case of financial lease, a lessor is required to disclose in its financial statement selling profits or loss, finance income on the net investment in the lease, income relatable to variable lease, payment, not included in the measurement of the net investment of the lease. A pattern is expected. Lease payment under an operating lease are on the other hand on straight line basis or another systematic basis. There is difference of substance between the two cases. The absence of classification amounts to non-compliance with mandatory requirement as to standards required under Section 133 of the Companies Act for which a penalty is provided. The lease in question does not countenance substantially the transfer of all the rewards. The Lessee in terms of clause 12 of other clauses is not permitted to assign leasehold interest. Restrictions are put even on the lessee's shareholding. The clause relating to mortgage would inter alia indicate apart from restriction otherwise that any unearned increase in the value of the lease premises will be at the disposal of the appellant. Therefore, the gains would enure to the appellant. There is no renewal of the lease. Support is drawn otherwise from the order of NCLAT. Reliance is placed on the following judgment of this Court in Mohd. Noor and Others v. Mohd. Ibrahim and Others3 :

> "..The ownership concept does not accord with the status of a person who is paying the rent. A tenant under various legislations either urban or rural property, agricultural or otherwise, enjoys right of heritability and transferability. At the same time, he does not become owner of the property.
>
> (1994) 5 SCC 562 Transfer of ownership is distinct and different from transfer of interest in the property. A licensee or even a tenant may be entitled by law to transfer his interest in the property but that is not a transfer of ownership." A lessee's right to sub-lease comes with certain restrictions. The appellant continues to be the owner. The reward incidental to ownership is not to be read as profit from the commercial practice. The reward has to be considered as purely emanating from the rights of ownership. Towards the development, selling and promotion, the appellant has no role.

The word 'reward' bears the meaning that which is offered or given for some service or attainment. Therefore, the rewards cannot be said to mean the profit generated from the commercial activities of selling the units by the Lessee. Land has no economic life. As regards Section 5(8)(f) goes, it is contended that the claim of the appellant in view of the terms of the lease under which after the initial payment there is a moratorium and the Lessee is permitted to pay the balance premium in easy instalments overlooks the fact that a claim under any lease would then be termed as financial debt. Leases are already covered under Section 5(8)(d). There is no amount raised pursuant to any other transaction in the present case. The situation in Pioneer (supra) is distinguishable as no amount is raised from the appellant.

SUBMISSIONS OF DR. ABHISHEK MANU SINGHVI

45. There are concurrent findings of two courts against the appellants. Findings have been rendered which should dissuade this court from interfering in the matter. The appellants have understood itself to be an operational creditor. This is sought to be substantiated with reference to the submission of the claim initially in form B meant for operational creditors except workmen and employee. Subsequently that it was belatedly an amended claim in form C was found. The appellant has improved its case at each stage.

46. Before the NCLT it contended it must be treated as a financial creditor in view of Section 5(8)(d). Finding they will be unable to meet the requirements under the Indian Accounting Standards set out in Section 5(8)(d), for the first time in its written submission before the NCLAT the contention was raised under Section 5(8)(f). The appellant cannot concurrently claim that the lease deed is covered by a specific provision relating to financial leases contained in Section 5(8)(d) and also under Section 5(8)(f) which is a general provision. The dues to the appellant qualify as statutory dues. Reliance is placed on Section 12 of the UPIAD which makes Section 40 of the U.P. Act. 1973 applicable.

47. Appellant under UPIAD is not permitted to carry out any activity which is of a financial nature and consequently any dues arising from disposal of land which are in the discharge of statutory

duties, must be considered as statutory dues. In fact, NOIDA has been treated in a better manner than a financial creditor, having been given 41% share of its admitted claim.

48. It is contended that the risks and rewards incidental to ownership have not been transferred the leases not a finance lease. There has been no disbursement under the lease deed within the meaning of Section 5(8). The repercussions of NOIDA being declared as a financial creditor would be to frustrate the CIRP of the real estate corporate debtor. Having regard to its position as a public authority and the nature and transactions commercial wisdom of NOIDA would in fact compel the appellant to vote against all resolution plans proposed. The home buyers will be most adversely affected. Shri Devashish Bharuka, appearing for the flat owners contended that the flat owners have a heritable and transferable right under Section 5 and 7 of the U.P. Apartments Flat Owners Act, 2010.

THE IMPORTANCE OF BEING A FINANCIAL CREDITOR UNDER THE IBC

49. In this context, it is undoubtedly true that in the scheme of the IBC, Section 21 of the IBC contemplates the constitution of the Committee of Creditors. The Committee of Creditors is to consist of all financial creditors of the corporate debtor. It is the Committee of Creditors, which has power to appoint and replace the Interim Resolution Professional as the Resolution Professional. Under Section 27 of the IBC, the Committee of Creditors, which would consist of only the financial creditors, would have the right to replace a Resolution Professional. Under Section 28, the approval of the Committee of Creditors is mandatory in respect of various powers which need to be exercised by the Resolution Professional. Central to the IBC, and what would, in fact, constitute its very soul, is the idea of resurrecting an ailing corporate debtor. The means, contemplated, is the submission, consideration and approval of Resolution Plans to be given by Resolution Applicants. Here again, Section 30 contemplates that the Resolution Plan is to be initially scrutinised by the Resolution Professional, who is to present the Resolution Plan, which conforms to Section 30(2), to the Committee of Creditors. The Committee of Creditors may approve the Resolution Plan in the manner provided in Section 30(4). Regulation 38 of the Insolvency Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, no doubt, provides for the mandatory contents of the Resolution Plan, which may be approved. The Plan must include the submission as to how the interests of stakeholders, including financial creditors and operational creditors, are to be dealt with. Regulation 38(1), inter alia in fact, contemplates that the Resolution Plan must provide that the amount payable to the operational creditors shall be paid in priority over the financial creditors.

50. It is true that, in a given case, it may appear that the interests of operational creditors have been best looked after in the circumstances under a particular approved Resolution Plan. In fact, this is also one of the contentions of the respondents, who would point out that the appellants interests have been adequately and fairly addressed in the Resolution Plan. However, what is pointed out is that, as a matter of principle, it is vital, both from the point of view of the interest and rights of the appellant and also the object of the IBC itself, that the appellant must be treated as a financial creditor. By being a Member of the Committee of Creditors, the appellant would have the right to place its perspective. It would have the opportunity to persuade the other Members of the

Committee of Creditors to either accept or reject or modify a Resolution Plan. The corporate debtor slipping into liquidation, is a matter, which would, undoubtedly, impact the appellant in a considerable manner. None of these aspects have been borne in mind by the NCLAT, it is complained of.

CERTAIN MISCELLANEOUS OBJECTIONS

51. The argument of the respondent/intervenor that if the appellant is recognised as a financial creditor, since it claims itself to be a public authority and it holds the property as a trustee, it will not agree to any hair cut proposed by any resolution applicant does not appeal to us. The provisions in question cannot be construed on the basis of a prophecy of how a financial creditor will behave in its capacity as financial creditor. If the appellant falls within the ambit of the financial creditor as defined in Section 5(8), then as to how it will conduct itself being a public authority cannot be a relevant factor. Equally unimpressive is the argument that the appellant would have the largest claim in most real estate resolutions where it is a lessor and would therefore have the largest vote share in the committee of creditors and consequently have a domineering role in deciding on the fate of any resolution plan. If the appellant falls within the scope of the financial creditor, then none of these aspects can weigh with the court. Apparently, the respondent/intervenor represent the interests of flat owners. It is undoubtedly true that being financial creditor who perhaps fall under a particular class, they have their own interests to espouse. But if the appellant is actually a financial creditor, then the mere fact that the interest of the appellant clashes with that of the rest of the body of financial creditors cannot detract from the court holding the appellant a financial creditor if otherwise it establishes the case that it is a financial creditor. We cannot overlook the fact that large sums of money form the subject matter of the debt claimed by the appellant as due to it. There can be no objection to the appellant setting up the claim to be a financial debt and succeeding on the strength of the provisions entitling it to be so treated and therefore, the court should not hesitate to recognize the appellant as financial creditor if it is one. The contention also that the appellant would be more interested in realizing the greater value of its assets and would allow the corporate debtor to descend into liquidation and would not allow any resolution plan to pass muster are all arguments which we must only mention before it is rejected as it seeks to deflect us from proper understanding of the relevant provisions with the aid of the lease and other apposite inputs.

SECTION 5 (8) OF THE IBC: WHETHER SECTION 5(8) OF IBC ITSELF SUFFICES TO EMBRACE THE LEASE IN QUESTION?

52. Out of deference to submissions addressed by Smt. Madhavi Diwan, learned Additional Solicitor General, appearing on behalf of appellant-NOIDA, that appellant would be a financial creditor, even with reference to Section 5(8), though such a line was not taken by the learned Solicitor General, who purported to appear for NOIDA in the main matter, we shall deal with the said submission.

53. The essential requirements to attract Section 5(8) are that there must be a debt along with interest, if any, which is disbursed against consideration for the time value of money. There can be no dispute that there is a debt in this case. Even the respondents would contend that it is actually a debt but an operational debt under Section 5(21). That interest is payable in connection with the

debt, cannot be disputed, having regard to the terms of the lease deed. It is another matter that liability to pay interest is not an essential feature to attract Section 5(8), as held by this Court in Orator Marketing Private Limited v. Samtex Desinz Private Limited4. The next requirement is that there be disbursement. Disbursement is an indispensable requirement to constitute a debt, a financial debt, within the meaning of Section 5(8) and that disbursement must be from the creditor to debtor. Or 2021 SCC Online SC 513 is it that, our understanding is mistaken? Our understanding, in this regard, is sought to be shaken by the learned Additional Solicitor General by raising the following argument. It is her case that the requirement of disbursement is fulfilled by the payment of ten per cent down payment, which takes place upfront in the facts of the case before us. Further, it is her case that disbursal can flow both from the debtor to the creditor and the other way also. Myriad methods of availing financial facilities can render the flow of funds in either direction. It need not be unidirectional. It is, in this regard, that the meaning of the word 'transaction', as defined in Section 3(33), is invoked. Section 3(33) of the IBC reads as follows:

> "3(33) "transaction" includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;

54. What is contemplated in the principal provisions of Section 5(8) is a transaction, she contends. This is as Section 5(8)(f) refers to 'any other transaction', and therefrom, the provisions which precede Section 5(8)(f) would also involve transactions. The Legislature has not chosen to use a suffix 'from creditor to debtor' before the word 'disbursed'. So long as there is a disbursal against consideration for the time value of money, which is present in the case, and from which, the debt arises, viz., a liability or an obligation, Section 5(8) stands attracted. A default, by way of breach by the lessee, gives rise to a cause of action for breach of contract where the appellant can seek to recover damages for the lost opportunity in developing the land. The word 'claim' includes a right to remedy for breach of contract, it is pointed out.

55. The word 'transaction', as such, is not used in Section 5(8), as pointed out by the respondents. Unless there is disbursement of the debt, Section 5(8) will not apply. We do bear in mind the following exposition of law in regard to the interplay between the words 'debt' and 'claim' in Pioneer (supra):

> "69. It is precisely to do away with judgments such as Raman Iron Foundry [Union of India v. Raman Iron Foundry, (1974) 2 SCC 231] that "claim" is defined to mean a right to payment or a right to remedy for breach of contract whether or not such right is reduced to judgment. What is clear, therefore, is that a debt is a liability or obligation in respect of a right to payment, even if it arises out of breach of contract, which is due from any person, notwithstanding that there is no adjudication of the said breach, followed by a judgment or decree or order. The expression "payment" is again an expression which is elastic enough to include "recompense", and includes repayment. For this purpose, see H.P. Housing & Urban Development Authority v. Ranjit Singh Rana [H.P. Housing & Urban Development Authority v. Ranjit Singh Rana, (2012) 4 SCC 505 : (2012) 2 SCC (Civ) 639] (at paras 13 and 14 therein), where Webster's Comprehensive Dictionary (International Edn.), Vol. 2 and Law Lexicon by

P. Ramanatha Aiyar (2nd Edn., Reprint) are quoted."

56. Thus, a debt is a liability or an obligation in respect of a right to payment. Irrespective of whether there is adjudication of the breach, if there is a breach of contract, it may give rise to a debt. In the context of Section 5(8), in Pioneer (supra), disbursement has been understood as money, which has been paid. In the context of the transaction involved in the said case, the homebuyers advanced sums to the builder, who would then utilise the amount towards the construction in the real estate project. That there must be a disbursement, was clearly present in the mind of the Court, is clear from the fact that it has expressly proceeded on the basis that when the money was paid by the homebuyer to the builder, the amount disbursed was no longer with the homebuyer. The homebuyer was paying lesser sums by way of installments than he would have to pay for the ultimate price of the flat/apartment. The Court went on to hold that the expression 'borrow' was wide enough to include the advance by the homebuyer to the real estate developer for the temporary use. Both parties had commercial interests, which was further found. But what is relevant is to attract Section 5(8), on its plain terms, is disbursement. While, it may be true that the word 'transaction' includes transfer of assets, funds or goods and services from or to the corporate debtor, in the context of the principal provisions of Section 5(8) of the IBC, we are of the view that to import the definition of 'transaction' in Section 2(33), involving the need to expand the word 'disbursement', to include a promise to pay money by a debtor to the creditor, will be uncalled for straining of the provisions. 'Disbursement', within the meaning of Section 5(8), is the payment of money, which flows to the debtor. In the word 'claim', as defined in Section 3(6), right to payment is one of the components. The golden thread that runs through the word 'claim', is the right to payment. The right to payment may arise from a Judgement. It may or may not be fixed. It may be disputed or undisputed. It may be legal or equitable. It may be secured or unsecured, but what is indispensable is, there must be a right to payment. Similarly, in cases of breach of contract, under any law in force, if it gives rise to a right to payment, irrespective of whether it is reduced to a Judgment or fixed or matured or unmatured, disputed or undisputed, secured or unsecured, as long as there is a right to payment, a claim arises. When there is a claim and, in regard to such a claim, there is a liability or obligation, which is due from any person, it gives rise to a debt. A debt includes a financial debt and an operational debt. It is after defining the word 'debt' with reference to the existence of a right to payment in the broadest terms, as defined in the term 'claim' and including the word 'financial debt' within the expression 'debt', the word financial debt, in turn, is elaborately defined in Section 5(8). What is relevant for the purpose of Section 5(8), has been clearly articulated and can be understood with reference to what is expressly provided. It is unnecessary to bring in the concept of transaction, as defined in Section 2(33), for appreciating its scope. A perusal of definition of the word 'debt', no doubt, reveals that it is closely intertwined with the definition of the word 'claim' in Section 3(6). The word 'transaction' is conspicuous by its absence in the definition of both the word 'claim' and the word 'debt'. We do hold that 'debt' means a liability or obligation, which relates to a claim. The claim or right to payment or remedy for breach of contract occasioning a right to payment must be due from any person. Now, if it is due from any person, it must be due to someone who would then be the creditor. Section 5(7) defines 'financial creditor' as person to whom a financial debt is due besides an assignee or transferee from such person. While it may be true that there would be the brooding omnipresence of a transaction, as defined, underlying a debt and claim as defined, it would be unnecessary and unreasonable to import in the concept of transfer of funds,

from or to a corporate debtor, to glean the meaning of disbursement in Section 5(8), at least, in the facts of the instant case. In other words, while the word 'transaction' does contemplate a transfer of fund, inter alia, to a corporate debtor, it is unnecessary to explore the converse situation projected by the learned Additional Solicitor General, for understanding the scope of the word 'financial debt', as contained in Section 5(8), viz., the principal provision. As to the employment of the word 'transaction' in the various clauses of Section 5(8) and the true scope of Section 5(8)(f), it is a matter, which will be discussed separately. We are of the view that, in the lease in question, there has been no disbursement of any debt (loan) or any sums by the appellant to the lessee. The appellant would, therefore, not be a financial creditor within the ambit of Section 5(8).

SECTION 5(8)(D): WHETHER THE APPELLANT IS A FINANCIAL LESSOR

57. The IBC was enacted in the year 2016. It is interesting to note that the word 'financial lease' has been defined in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 by insertion of Section 2 (ha). This insertion was effected by Act 44 of 2016. It reads as follows:

> "2(ha) "financial lease" means a lease under a lease agreement of tangible asset, other than negotiable instrument or negotiable document, for transfer of lessor's right therein to the lessee for a certain time in consideration of payment of agreed amount periodically and where lessee becomes the owner of the such assets at the expiry of the term of lease or on payment of the agreed residual amount, as the case may be." Section 2 (ma) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which is also inserted by Act 44 of 2016 w.e.f. 1.9.2016 defines the word 'financial lease' identically to Section 2(ha) in the Recovery of Debts Due to Banks and financial Institutions Act, 1993. We notice this for the reason that the same law giver has enacted Section 5(8) defining financial debt in the IBC including a lease which is a financial lease in a manner which is different in scope from the words 'financial lease' as defined in the aforesaid two enactments. In the definition of 'financial lease' in the two Acts which we have adverted to, the conventional concept of a 'financial lease' inevitably and indispensably involving the transformation of a lessee into the owner of the assets when the lease ends, is essentially captured whereas for purpose of IBC, Parliament has set out the definition which we will recapitulate here Section 5(8)(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;"

58. The concept of a financial lease has engaged the attention of this court in a decision which has been applied by the NCLAT.

In Asea Brown Boveri Ltd. v. Industrial Finance Corporation of India and Others5 the appellant entered into a lease and finance agreement with the third respondent therein under which the subject matter of the lease was 57 cars. The third respondent became a notified party under a law under which the special court found that the transaction was only a lease and not a finance lease. In

this context this court went on to hold as follows:

> "13. What is a lease finance? According to Dictionary of Accounting & Finance by R. Brockington (Pitman Publishing, Universal Book Traders, 1996 at p. 136):
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> "A finance lease is one where the lessee uses the asset for substantially the whole of its useful life and the lease payments are calculated to cover the full cost together with interest charges. It is thus a disguised way of purchasing the asset with the help of a loan. SSAP 23 required that assets held under a finance lease be treated on the balance sheet in the same way, as if they had been purchased and a loan had been taken out to enable this." (emphasis supplied) (2004) 12 SCC 570
>
> 14. In Lease Financing & Hire Purchase by Dr. J.C. Verma (4th Edn., 1999 at p. 33), financial lease has been so defined:
>
> "Financial lease is a long-term lease on fixed assets, it may not be cancelled by either party. It is a source of long-term funds and serves as an alternative of long- term debt financing. In financial lease, the leasing company buys the equipment and leases it out to the use of a person known as the lessee. It is a full payout lease involving obligatory payment by the lessee to the lessor that exceeds the purchase price of the leased property and finance cost. Financial lease has been defined by International Accounting Standards Committee as 'a lease that transfers substantially all the risks and rewards incident to ownership of an asset. Title may or may not eventually be transferred'. Lessor is only a financier and is not interested in the assets. This is the reason that financial lease is known as full payout lease where contract is irrevocable for the primary lease period and the rentals payable during which period are supposed to be adequate to recover the total investment in the asset made by the lessor." (emphasis supplied)
>
> 16. In our opinion, financial lease is a transaction current in the commercial world, the primary purpose whereof is the financing of the purchase by the financier. The purchase of assets or equipments or machinery is by the borrower. For all practical purposes, the borrower becomes the owner of the property inasmuch as it is the borrower who chooses the property to be purchased, takes delivery, enjoys the use and occupation of the property, bears the wear and tear, maintains and operates the machinery/ equipment, undertakes indemnity and agrees to bear the risk of loss or damage, if any. He is the one who gets the property insured. He remains liable for payment of taxes and other charges and indemnity. He cannot recover from the lessor, any of the abovementioned expenses. The period of lease extends over and covers the entire life of the property for which it may remain useful divided either into one term or divided into two terms with clause for renewal. In either case, the lease is non-cancellable."

59. We shall take up Section 5(8)(d) of the IBC. The subject matter of Section 5(8)(d) is a lease or a hire-purchase contract. The matter does not end there. In other words, it is not any lease or a hire-purchase contract, which would entitle the lessor to be treated as the financial creditor. There must be a lease or hire-purchase contract, which is deemed as a finance or capital lease. The Law Giver has not left the courts free to place, its interpretation on the words 'finance or capital lease'. The Legislature has contemplated the finance or a capital lease, which is deemed as such a lease under the Indian Accounting Standards. It could also be deemed as a financial or a capital lease under any other accounting standards as may be prescribed. The word 'prescribed' has been defined in Section 3(26) as meaning prescribed under Rules made by the Central Government. There is no case for the appellant that Central Government has made any Rules providing for other accounting standards under Section 5(8)(d) of the IBC. In Section 5(8)(d), it is necessary to notice the opening words of the provision, viz., 'the amount of any liability in respect of'. The Law Giver, in other words, has contemplated that should there be any liability arising out of a lease or hire-purchase, which is deemed as a finance or a capital lease in terms of the Indian Accounting Standards, then, the person, who has incurred the liability, would become the debtor and the person, in respect of whom, the liability has been incurred, would become the financial creditor.

60. Much emphasis was laid by the appellant on the word 'deemed' in Section 5(8)(d). One would have expected that on turning to the Indian Accounting Standards, there would be a provision providing for a deemed finance or capital lease. The inquiry in this direction, however, did leave us with failure and even disillusionment. We found that there is no provision, which articulates a deeming provision, as such, providing for a lease or a hire-purchase contract, which is deemed as a finance or capital lease. The word 'deemed' is used as a verb. It is a legislative devise by way of a fiction. In other words, the provision requires the Court to imagine a state of affairs as true. The province of a deeming provision is the subject matter of a large body of case law. Suffice it to notice the following paragraphs from Aneeta Hada v. Godfather Travels and Tours Private Limited6:

> "34. Lord Asquith, in East End Dwellings Co. Ltd. v. Finsbury Borough Council [1952 AC 109 : (1951) 2 All ER 587 (HL)] , had expressed his opinion as follows : (AC pp. 132-33) "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact 2012 (5) SCC 661 existed, must inevitably have flowed from or accompanied it. ... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."
>
> 38. From the aforesaid pronouncements, the principle that can be culled out is that it is the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term "deemed" has to be read in its context and further, the fullest logical purpose and import are to be understood. It is because in modern legislation, the term "deemed" has been used for manifold purposes. The object of the legislature has

to be kept in mind."

61. It is apposite, at this juncture, to advert to the Indian Accounting Standards relevant to our inquiry.

62. The Rules, which are relevant in regard to the specification of a lease as a financial lease are set down as Rules 61 to 67 of Indian Accounting Standards [for short "IAS"]. They have been made under Section 133 of the Companies Act, 2018.

"Classification of leases (paragraphs B53– B58) 61 A lessor shall classify each of its leases as either an operating lease or a finance lease.

62 A lease is classified as a finance lease if it transfers substantially all the risks and rewards incidental to ownership of an underlying asset. A lease is classified as an operating lease if it does not transfer substantially all the risks and rewards incidental to ownership of an underlying asset.

63 Whether a lease is a finance lease or an operating lease depends on the substance of the transaction rather than the form of the contract. Examples of situations that individually or in combination would normally lead to a lease being classified as a finance lease are:

(a) the lease transfers ownership of the underlying asset to the lessee by the end of the lease term;

(b) the lessee has the option to purchase the underlying asset at a price that is expected to be sufficiently lower than the fair value at the date the option becomes exercisable for it to be reasonably certain, at the inception date, that the option will be exercised;

(c) the lease term is for the major part of the economic life of the underlying asset even if title is not transferred;

(d) at the inception date, the present value of the lease payments amounts to at least substantially all of the fair value of the underlying asset; and

(e) the underlying asset is of such a specialised nature that only the lessee can use it without major modifications.

64 Indicators of situations that individually or in combination could also lead to a lease being classified as a finance lease are:

(a) if the lessee can cancel the lease, the lessor's losses associated with the cancellation are borne by the lessee;

(b) gains or losses from the fluctuation in the fair value of the residual accrue to the lessee (for example, in the form of a rent rebate equaling most of the sales proceeds at the end of the lease); and

(c) the lessee has the ability to continue the lease for a secondary period at a rent that is substantially lower than market rent.

65 The examples and indicators in paragraphs 63–64 are not always conclusive. If it is clear from other features that the lease does not transfer substantially all the risks and rewards incidental to ownership of an underlying asset, the lease is classified as an operating lease. For example, this may be the case if ownership of the underlying asset transfers at the end of the lease for a variable payment equal to its then fair value, or if there are variable lease payments, as a result of which the lessor does not transfer substantially all such risks and rewards.

66 Lease classification is made at the inception date and is reassessed only if there is a lease modification. Changes in estimates (for example, changes in estimates of the economic life or of the residual value of the underlying asset), or changes in circumstances (for example, default by the lessee), do not give rise to a new classification of a lease for accounting purposes.

Finance leases Recognition and measurement 67 At the commencement date, a lessor shall recognise assets held under a finance lease in its balance sheet and present them as a receivable at an amount equal to the net investment in the lease."

63. The analysis of the said criteria in the context of the lease in question, would yield the following results. Under Rule 61, the lessor is obliged to classify each of its leases as an operating lease or a finance lease. In Civil Appeal No. 2222 of 2021, there is no case for the appellant-NOIDA, that it has been classified as finance lease. As far as the other Civil Appeal filed by the very same Authority, i.e., NOIDA is concerned, Smt. Madhavi Diwan, sought to contend that, while it is not shown as a finance lease as such, the transaction is characterised as a sale in the balance sheet.

64. Rule 62, the sheet anchor of the appellant, declares that a lease is classified as a financial lease if it transfers, substantially, all the risks and rewards incidental to ownership of an underlying asset. Moving on to Rule 63, it undoubtedly, declares that what matters is not the form but the substance. Thereafter, under the examples of situations, either individually or in combination, which would lead to a lease being classified as a finance lease, certain situations have been depicted. As far as the first situation is concerned, it would involve a lease, where, there is a transfer of ownership of an underlying asset to the lessee by the end of the lease term. There is no case for the appellants that the lease contemplates transfer of ownership of the underlying asset. The underlying asset is the land. In fact, the case of the appellant would appear to be also that there is no transfer of ownership because by the end of lease term third party rights would have been created over the dwelling unit/ built up space/ plot constructed by the Lessee. It is also the further case set up that the Lessee alone brings third parties on to the property and gets paid by such parties.

It will be relevant to notice that the so called third parties do not get ownership rights as such. The rights are transferred in favour of the allotees of dwelling units /built up space/ plot only by way of a sub-lease. Therefore, there is no transfer of the ownership of the underlying asset by the end of the lease term. Under the next situation considered relevant under the Indian Accounting Standards, is the granting of an option to the lessee to purchase the underlying asset at a price, which is expected to be sufficiently lower than the fair value at the date of option becoming exercisable for it to be reasonably certain at the inception date, that the option will be exercised. The underlying asset is the plot.

65. From the Table presented before the NCLAT by the appellant, we find that appellant appears to have taken the stand that the lease rent is paid for the leasing of the land and the premium is paid for the rights to develop and construct the buildings on the lease land. Therefore, the underlying asset is not just a land but the right to develop or construct a building.

66. A lease of immovable property is defined in Section 105 of the Transfer of Property Act, inter alia, as a transfer of a right to enjoy such property. The property, which is leased, under the lease is the plot of land. Section 105 speaks about the terms on which the lease takes place. The right to enjoy the leased property and the terms, on which it is to be enjoyed, must be distinguished from the property, which is the subject matter of lease. The subject matter of the lease is such property. It is such property, viz., immovable property, in the case of a lease of an immovable property, which can be treated as the underlying asset, for the purpose of the Rules made under Section 133 of the Companies Act, 2013. The contention of the appellant that the underlying asset is also the right to develop or construct a building on the leased land, does not appear to be tenable. The very contention contains an irreconcilable contradiction. On the one hand, the land is correctly described as the leased land. The right to develop or construct a building on the leased land, cannot be treated as the underlying asset. In fact, there is no case that the buildings that are put up on the leased land, would also constitute part of the underlying asset. We may firstly notice that there is no option to purchase 'the right to develop or construct the building'. This itself suffices to expose the fallacy that the right to develop or construct the building is also part of the underlying asset.

67. At any rate there is no right within the meaning of criteria with the Lessee to purchase the asset. This criterion is also not fulfilled as there is no option to purchase at all that is vested with the lessee.

68. The third criteria in Rule 63 is, where the lease term is for the major part of the economic life of the underlying asset, even if the title is not transferred. The definition of 'economic life', as provided in Indian Accounting Standards (hereinafter referred to as 'the IAS', for short) 17, reads as under:

> "Economic life is either:
>
> (a) the period over which an asset is expected to be economically usable by one or more users; or

> (b) the number of production or similar units expected to be obtained from the asset by one or more users." (Emphasis supplied) The lease in question is for a period of ninety years. In regard to land, the underlying asset, 'the principle of economic life of underlying asset', is inapposite. The economic life of land is not limited.

The principle in the said situation is predicated with reference to measuring the economic life of an asset. More importantly, it speaks of the major part of the economic life of the asset. Both these concepts are inapposite and even inapplicable with regard to land. Land does not depreciate with the passage of time. Ordinarily, the price of land would only increase, unlike other assets.

69. The argument of the appellant is that on the construction being completed the lease land shall be of no value to the lessor and the third party right being created, results in the economic life and the value of the asset being exhausted. We find no merit in this argument having regard to the fact that the underlying asset is the land. There is another important reason which we must set out here. A sub- lease has been produced before this Court in C.A.No.2369 of 2021. Originally it was referred to in the course of argument by Shri Devashish Bharuka. However, it has subsequently been filed under an affidavit on behalf of Respondent No..1 in C.A.No.2367-2369 of 2021. The sub-lease, no doubt, is entered into between the appellant as Lessor and one M/s. Cloud 9 Projects Pvt. Ltd., the Lessee in the said lease and the sub-lessee. The sub-lease dated 12.11.2018 would show that the land admeasuring 40087 sq.mtr. bearing Plot NO.GH-02 was the subject matter of the lease. The lease was, as in the facts of this case, for a period of 90 years. The lease was entered into with the lessee in the said case on 17.06.2009.

70. It is indicated in the sub-lease that the lessee has the right to allot to its applicants, the dwelling units including the undivided proportionate share in the land, inter-alia. It is further provided that the sub-lessee will observe the covenants, terms and conditions, laid down in the original lease. Thereafter, it is provided that in consideration of the amount paid, which included the cost of super structure and the undivided proportionate share in the land underneath the building paid by the sub- lessee to the lessee the lessee sells, transfers, and conveys to the sub-lessee the dwelling unit with proportionate right, inter-alia, in the land underneath the building. It is next provided that the lessee simultaneously sub-leases to the sub-lessee for the unexpired period of ninety years lease, the undivided unidentified title to the land proportionate to the area allotted to the sub-lessee in relation to the total area subject to various terms and conditions. In Condition 6, it is mentioned inter-alia that the sub-lessee shall get exclusive possession of the built-up covered area of the dwelling unit, and is being transferred the title of the same along with the right over the land, through the sub-lease. The lessee and the sub-lessee are to perform the covenants and conditions in the lease deed between the lessee and the lessor as applicable in relation to the land and the unit being leased under these present. The sub-lessee cannot mortgage the dwelling unit to secure 'any loan' at any stage except with the prior permission of the lessor. Sub lessee is to also obtain an appropriate NOC from the lessee/lessor, in this regard. The sub-lessee can use the dwelling unit only for residential purposes and for no other purpose. The right of the sub-lessee is made subject to the provisions of the UP Act of 2010. It is thereafter that condition 21 deals with what is to happen on the expiry of the lease of the land. It reads as follows:

> "21. That the Lessee /Sub-Lessee shall on the expiry of the lease of the land, peacefully hand over the said land unto the Lessor after removing the superstructure, within the stipulated period. The share in the undivided proportionate land hereby sub-leased, shall always remain un-divisible and unidentified. Similarly, the Sub-Lessee shall have the right of usage of common areas and will not have any independent right of possession of the same.
>
> It is further provided in condition 24 that the terms and conditions of the parent lease deed, inter-alia, shall be binding on the parties after execution of the sub-lease. Condition 27 provides that in case of any breach of the terms and conditions of the sub-
>
> lease by the lessee/sub-lessee, the lessor will have the right to re-enter the demised dwelling unit, after determining the sub lease. It is further provided that at the time of re-entry of demised dwelling unit, the lessor may re-allot the same to any other person. All the clauses of the parent lease deed are made applicable and they are to prevail in case of any repugnancy between them and the sub-
>
> lease.

71. A perusal of the same would reveal that in keeping with the lease deed and the provisions of Section 9 of the U.P. Apartment Owners Act, it is that the sub-lease deed is executed. The sub-lessee or the allottee pays the cost of the structure and the undivided proportionate interest in the land. The transfer to him is described as a sale and conveyance. There is simultaneous sub-lease also in regard to the unidentified title to the proportionate land. The sub-lease appears to effect a sale of the dwelling unit. However, certain conditions appear to militate against an absolute transfer. They include the condition that the sub-lessee cannot mortgage the dwelling unit for securing any loan at any stage except with prior written permission of the lessor. The use of the dwelling unit being limited to residential purpose is perhaps another feature which is unique. The power of the lessor to re-enter the dwelling unit, which is described in condition 27 as the 'demised' dwelling unit, after determining the sub-lease and also the power to re-allot the same to any person are clearly inconsistent with a completed sale. This is apart from condition 21 which we had extracted which obliges the sub-lessee on the expiry of the lease of the land to deliver to the lessor the land, after removing the super structure within the stipulated time. It will be noticed further, that the rent and the premium which is the amount claimed by the appellant has no relation with what the lessee would get from the sub-lessee. There is no such case that the amount which is claimed relates to any default by the sub-lessee.

72. The underlying asset in the lease is no doubt the plot of land. The terms contemplate construction of residential flats over the plot by the lessee. The lessee can subject to the lease transfer the built-up flats. The transfer is secured through a sub- lease. The transferor in the sub-lease of the dwelling unit is the lessee in regard to which the sub-lease appears to evidence the sale. We have noticed the features in terms of the conditions. If the built-up area/flats is to be treated as part of the underlying asset then the appellant would be the lessor of the flat. However,

going by the terms of the lease and the sub-lease, the flat is entirely constructed by the lessee and it is the lessee who transfers the same to the sub-lessee, and gets the entire consideration. The title flows from the lessee to the sub-lessee. The subject matter of the sub-lease is the dwelling unit as also the undivided right in the land. The question is whether on the basis of Section 5(8)(d), under the lease, what is the underlying asset as between the appellant and the corporate debtor? Though the flats to be constructed are contemplated in the lease, it is not the same as understanding them as the subject matter of the lease. The flats would be the subject matter of the sub-lease. No doubt, from the lease and the sub-lease the right of the lessee or rather its obligation under the lease is to put up the residential flats which he can transfer in terms of the lease. It may be true that the terms of the lease are made binding on the sub- lessee. However, as between the lessor and the lessee, the underlying asset would be the plot of land. From the terms of the sub lease which is as per the decision of the Lessor (appellant) goes to show the extent of the control by the Lessor and consequent intrusion into the power of the lessee namely, despite power to effect an apparent sale of the flat the term includes barring the purchaser from mortgaging the dwelling unit for any loan except with the prior consent of the lessor, the power of re- entry of the lessor and to re-allot the "sold dwelling unit" to any other person and the obligation of the lessee/sub lessee to surrender the land after demolishing the super structure on the expiry of the period of lease.

73. The lease before us is stated to be for a period of 90 years. The lease is intended and structured to attain the objective of putting up residential structures as part of the planned development of the area. The constructed area or the flats can be transferred to the allottees by the Lessee on the strength of tripartite sub-leases. This is borne out by the terms of the sub-lease produced before this court. This is also clear from the provisions of the clause before us which contemplate the execution of a sub-lease. There is no provision for renewal. The parties have clearly contemplated that the terms of the sub-lease will be in the form and format as provided by the Lessor (appellant). It is accordingly that the clause in the lease actually contemplates inter alia that the construction be completed within 7 years from the date of execution of the lease deed with a maximum extension of another 3 years with penalty. Ordinarily, there would be no further extension. Therefore, the construction can be used till the expiry of the 90 years period by the sub- lessee and the terms of the lease and sub-lease would clearly indicate that at the end of 90 years, far from any enlargement of the rights of the sub-lessee, the sub-lessee is to deliver back the land directly to the Lessor after removing the superstructure. It is another matter that with the passage of a long period of time, the superstructure itself may be in a state of disrepair. However, what is relevant is that the concept of economic life is ill-suited to the facts as the lease is in respect of land which is to be taken as the underlying asset. It may not be possible to hold that the lease is for the major part of the economic life of land. It cannot be said that at the expiry of 90 years the land will cease to be economically usable. Therefore, we cannot accept the argument of the appellant that after 90 years appellant would not get the empty parcel of land and the land would not be of any commercial use to the appellant after the expiry of the lease. The argument that the land will be of no value to the lessor, has no force, having regard to the nature of underlying asset, namely, land which indeed ordinarily would have perennial value. In clause 12 under other clauses, it is provided that lessee shall not be allowed to assign or change his role. Any breach would lead to cancellation and entire money deposited will be forfeited. Though the words used are the lessee cannot assign or change his 'role', it would in substance mean that it is a contract to the contrary within the meaning of Section 108 of

the Transfer of Property Act. The position would indeed be that the lessee cannot assign his right. We must at this juncture notice under the heading 'Transfer of Plot" that the lease does contemplate that upto 30.09.2010, the lessee has a right to sub-divide the allotted plot into suitable smaller plots as per the planning norms and to transfer the same to the interested parties with prior approval of the lessor on payment of transfer charges. However, the area of the sub-divided plot cannot be less than 20,000 sq. meters. We would notice that the leasehold plot in the case is only 22565.77 sq.meters. We would understand the scope of the said provision as right given to the lessee, no doubt, to transfer the allotted plot after sub-division into smaller plots and to transfer the plots so sub-divided. This is subject to two conditions. This is permitted only for a period of two months from the date of execution of the agreement namely till 30.09.2010. This can be only done if the lessor permits it by prior approval. More importantly, the sub-plots which can be so transferred, cannot be less than 20000 sq. meters. As we have noticed this will appear to be a standard clause and we have noticed that the lease in the case of M/s Cloud 9 which we have adverted to, consisted of about 40000 square meters. We do note that the lease deed in civil appeal no. 2367-69 of 2021 is for a plot of 69998.73 square metres. Also, therein the minimum size of the sub divided plot is not less than 10,000 square metres. But the other conditions including prior approval remains the same. Further provisions under the heading 'transfer of plot' deal with only cases of individual flat/plot being transferrable subject to the various conditions, the most pertinent being that it contemplates essentially a sub-lease. We do not think that we can permit the matter to be appreciated on the basis of the situation contemplated in a case where under the lease within 2 months on a sub-division of the plot assignment takes place of the plot without the construction and without obtaining the completion certificate. In fact, no argument was advanced based on the said provision. The claim relates to rental and premium on the basis that the lease continued and the lessee (corporate debtor) persevered in the lease.

74. The underlying principle appears to be that even if it is by way of a lease, the rights are vested with the lessee, for the lion's share of the economic life or the value of the underlying asset, then, substantially, the lessee is enjoying the rights as an owner it is in this context that the principle is laid down that the transfer of title is not necessary. In other words, sans transfer of title, the lessee enjoys the asset for the fruitful period of the life of the asset. At the end of the major part of the economic life of an underlying asset, the life of which is limited by time, the asset would be mostly depreciated, if not, without any value. Such a situation can never apply, in the case of land.

75. The fourth example of the situation, whereunder a lease is to be classified as a financial lease, is, if at the inception date, the present value of the lease payments, amounts to at least substantially all of the fair value of the underlying asset. 'Fair Value' is defined in the IAS, as follows:

> "Fair value is the amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in an arm's length transaction."

76. Inception date is different from the commencement of lease as ordinarily understood under the IAS. Inception date has been defined in the IAS, as follows:

> "The inception of the lease is the earlier of the date of the lease agreement and the date of commitment by the parties to the principal provisions of the lease. As at this date: (a) a lease is classified as either an operating or a finance lease; and (b) in the case of a finance lease, the amounts to be recognised at the commencement of the lease term are determined."

77. In fact, there is no such classification done by the appellant. Even as on the commencement day, what is paid by the lessee, is only ten percent of the total premium. There is neither a transfer of ownership, at the end of the lease term. There is also no option to purchase with the lessee. The payment of ten percent of the premium, in the first place, does not represent substantially all of the fair value of the underlying asset. The lease is for a period of ninety years. At the end of ninety years, there is, in fact, no provision for renewal of the lease. The amount of the premium paid cannot be linked with the fair value of the land. The relationship between the appellant and the lessee, was to remain throughout as lessor and lessee. It may not be possible to even find that the total premium and the rent would represent substantially all of fair value of the underlying asset.

78. The fifth example in Rule 63 is clearly inapplicable as it is not the appellant's case that the underlying asset is of such a specialised nature that the lessee could only use it without major modification. Therefore, as far as Rule 63 is concerned, to sum-up, none of the situations mentioned in Rule 63 are present in the instant lease.

79. Rule 64 continues with situations, which, individually or in combination, would also lead to a lease being classified as a finance lease. The first situation is power reserved with the lessee to cancel the lease and the lessor's losses associated with the cancellation being borne by the lessee. This example also does not apply for the simple reason that lease does not confer even the power to cancel the lease on the lessee. On the other hand, by stark contrast, the lessor is abundantly clothed in various contexts to cancel the lease.

80. The second situation in Rule 64 is, when the gains or losses from the fluctuation in the fair value of the residual accrue to the lessee. The specific example, which is given in the said situation is a case of a rent rebate, equalling most of the sale proceeds at the end of the lease. The example clearly has the underpinning of an ultimate sale at the end of the lease. In other words, a finance lease posits ordinarily a lease to begin with and a sale, when the curtains are finally wrung down. We have already noticed that no sale of the underlying asset is contemplated. The lease is for a period of ninety years. The expression 'residual value' is also defined. It reads as follows:

> "The residual value of an asset is the estimated amount that an entity would currently obtain from disposal of the asset, after deducting the estimated costs of disposal, if the asset were already of the age and in the condition expected at the end of its useful life." Residual value is predicated with reference to the end of the useful life of an asset. Useful life is, inter alia, the period over which an asset is expected to be available for use by an entity. The 'end' of useful life is hard to conceive in respect of land. Also, nothing is shown to establish how the ingredients are attracted.

81. The last example in Rule 64 is the ability of the lessee to continue for a secondary period at a rent that is substantially lower than the market rent. As far the lease in question is concerned, the period of the lease is ninety years. The lease, as such, does not contemplate a renewal of the lease. No secondary period is contemplated.

82. Rule 65 goes on to declare that the examples and indicators in Rules 63 and 64 are not always conclusive. Though the learned Solicitor General seized upon this enunciation, the very next sentence would belie the possibility of any expectation on the basis of the aforesaid declaration. What is stated is that even despite the presence of the examples and indicators in Rules 63 and 64, if other features of the lease do not persuade the Court to conclude that the lease transfers substantially all the risks and rewards incidental to ownership, it is to be classified as an operating lease. It would not be a financial lease. In this case, the position obtaining is the converse situation. None of the features in Rules 63 and 64, advance the case of the appellant that the lease in question is a financial lease. No doubt, a perusal of Rule 65 does give an impression that the most important criteria is that the lease must effect, substantially, the transfer of all the risks and the rewards incidental to ownership. The example, which is given in Rule 65, is based on transfer of ownership at the end of the lease for a payment, which is equal to the fair value at the time of transfer and which is variable. The other example furnished is variable lease payment, as a result of which, the lessor does not substantially transfer all the risks and the rewards.

83. Rule 66 provides that the classification of the lease must be made at the inception date, for which, there is no claim made by the appellants. Reclassification is permitted only, if there is a modification of the lease. Changes in estimates, which is again related to in the example to the changes in the estimates of the economic life or the residual value of the underlying asset, will not occasion a new classification of the lease for accounting purposes. So also, changes in circumstances, such as default by the lessee would not warrant a new classification being effected. The appellants have, admittedly, not classified the lease in question at the inception date as a finance lease. This, undoubtedly, is a circumstance, which would militate against the lease of the appellant being treated as a finance lease.

84. Rule 67 again provides that at the commencement date, which means the date of commencement of the lease, the lessor should recognise the assets under a finance lease in its balance sheet and the asset so recognised must be presented as a receivable. The matter does not end there. The asset must be presented as an amount equal to the net investment of the lease. There is nothing on record to establish that the underlying asset has been dealt with in the aforesaid manner by the appellants.

85. Having made a survey of the various situations and examples under the Statutory Rules, which would persuade the Court to 'deem' a lease as a finance lease and, having found that none of the situations or indicators suit the case of the appellant, the case should rest and the point must be answered against the appellant. However, the time is now ripe to examine the contents of Rule 62 and Rule 65. They declare as to when a lease is to be classified as a financial lease. It provides that a lease may be so classified as a financial lease, if it transfers substantially all the risks and rewards incidental to ownership of an underlying asset. The converse position applies to an operating lease

and a lease is to be classified as an operating lease, if the lease does not substantially transfer all the risks and the rewards incidental to the ownership of the underlying asset.

86. The concept revolves around the transfer substantially of risks and rewards incidental to the ownership of the leasehold property. Therefore, we must deal with what constitutes ownership of an asset. We may notice the following discussion regarding the 'idea of ownership' in Salmond on Jurisprudence, 12th Edition:

> "Ownership denotes the relation between a person and an object forming the subject matter of his ownership. It consists in a complex of rights, all of which are rights in rem, being good against all the world and not merely against specific person(a). Though in certain situations some of these rights may be absent, the normal case of ownership can be expected to exhibit the following incidents(b)."

87. Thereafter, the following are treated as the rights associated with ownership. An owner of a property will have the right to possess the thing which he owns, it is stated. Secondly, the second principle is described as follows: -

> "Secondly, the owner normally has the right to use and enjoy the thing owned: the right to manage it, i.e., the right to decide how it shall be used; and the right to the income from it. Whereas the right to possess is a right in the strict sense, these rights are in fact liberties: the owner has a liberty to use the thing, i.e., he is under no duty not to use it, in contrast with others who are under a duty not to use or interfere with it."

88. The third right is described as follows: -

> "Thirdly the owner has the right to consume, destroy or alienate the thing. The rights to consume and destroy are straight-forward liberties. The right to alienate, i.e., the right to transfer his rights over the object to another, involves the existence of a power. A non-owner even though he has possession, cannot normally transfer the rights of ownership over a thing to another; for the law acts on the principle nemo dat quod habet. To this principle there are certain exceptions: for example, the Factors Acts enable non-owners in possession to transfer ownership in certain circumstances."

89. Fourthly, the right is one associated with the indeterminate duration of the right. It is here that we find the following discussion in this regard: -

> "Fourthly, ownership has the characteristic of being indeterminate in duration. The position of an owner differs from that of a non-owner in possession in that the latter's interest is subject to be determined at some future set point, whereas the interest of the owner can endure theoretically for ever. The interest of a bailee or lessee comes to an end when the period of hire or of the lease determines; the owner's interest is

> perpetual, being determined neither by any set point nor by the owner's death, because the property owned can descend to the owner's heir or next-of-kin, and if he had sold the property prior to his death, then the new owner's interest would continue unaffected by the previous owner's death."

90. Fifthly, there is a residual nature, in regard to the concept of ownership, and it is described as follows: -

> "If, for example, a landowner gives a lease of his property to A, an easement to B and some other right such as a profit to C, his ownership now consists of the residual rights, i.e., the rights remaining when all these lesser rights have been given away. Moreover, in English law the general rule is that the extinction of such lesser rights will revive in the owner all his original rights."

91. A question may arise as to whether in approaching the subject, we are to be guided by an examination of the question as to whether the lessee in this case possesses the rights incidental to ownership or the expression 'rewards incidental to ownership' is different from rights incidental to ownership. Can there be rewards if the rights which we have indicated herein before are not transferred? Can there be rewards which must be interpreted in a different manner from the idea of rights? In this regard, we must also remind ourselves that to constitute a lease, a financial lease, it is not indispensable that the ownership is in all cases transferred from the lessor to the lessee. However, we have noticed the example hereinbefore wherein the said concept is declared. That is, it is relevant when the lease term is for the major part of the economic life. Undoubtedly, ordinarily a financial lease would be a lease which is born as a lease but ends as a sale. The lease does involve transfer of ownership from the previous owner, namely the lessor to the lessee. In this context, Parliament has defined financial lease in two enactments through Amendment Act no. 44/2016 as hereinbefore noticed.

92. We may at once bear in mind two concepts, in the overarching principle. The two concepts are "substantially" and "all". In other words, substantially all the risks and rewards incidental to ownership must be transferred under the lease. While we do agree with the appellants that an element of flexibility is allowed by the presence of the concept 'substantially', at the same time, it cannot be a case where predominantly all the risks and rewards incidental to ownership are not transferred. In other words, on a conspectus of all the terms of the lease and the reference to the situations and examples which have already been set out, if there is for the most part, a transfer of all the risks and rewards incidental to ownership, in effect, it can be treated as a finance lease.

93. In Black's Law Dictionary 11th Edition the word "substance" to begin with, is defined as follows:-

> "(i) The essence of something; the essential quality of something, as opposed to its mere form (ii) Any matter, esp. an addictive drug illegal."

94. The word "substantial" is defined as follows:-

> "(i) Of, relating to, or involving substance; material. (ii) Real and not imaginary; having actual, not fictitious, existence. (iii) Important, essential, and material; of real worth and importance (iv) Strong, solid, and firm; large and strongly constructed (v) At least moderately wealthy; possessed of sufficient financial means (vi) Considerable in extent, amount, or value; large in volume or number (vii) Having permanence or near- permanence; long-lasting (viii) Containing the essence of a thing; conveying the right idea even if not the exact details (ix) Nourishing; affording sufficient nutriment."

95. We would find the word 'substantially' occurring in the provision in question would mean that what matters is not the form but the substance. In other words, largely and in substance all the risks and rewards incidental to ownership is to be transferred in a lease to constitute it as a finance lease.

96. In the context of the word 'incidental', the contention that with reference to the definition of the word incidental in Black's Law Dictionary which is referred by the appellant, namely that it is subordinate to something of greater importance or having a minor role, and therefore the interpretation must be that it can be less than the absolute, does not appear to us to be correct. No doubt, the word incidental has been defined as follows: -

> "Subordinate to something of greater importance; having a minor role"

97. In this case we may notice the definition of the word "incident to employment" in Black's Law Dictionary wherein it has been defined as follows: -

> "A risk that is related to or connected with a worker's job duties."

98. The words "incident of ownership" itself has been defined as follows: -

> "Any right of control that may be exercised over a transferred life-insurance policy so that the policy's proceeds will be included in a decedent's gross estate for estate-tax purposes. The incidents of ownership include the rights to change the policy's beneficiaries and to borrow against, assign, and cancel the policy." (Emphasis supplied)

99. In State of Orissa and Another V. M/S. Chakobhai Ghelabhai and Company,7 one of the questions which arose was whether under Section 29 of the Orissa Sales Tax Act, 1947, the State had power to provide for fee on the memorandum of appeals and applications in revision. Section 29 of the said Act inter alia provided for the power to make rules providing for AIR 1961 SC 284 the procedure and other matters including fees incidental to the disposal of appeals and applications for revision and for review under Section 23. While dealing with the scope of the word "incidental", this Court held as follows: -

> "The fees imposed are not taxes at all; they come within the expression "other matters (including fees) incidental to the disposal of appeals and applications for

> revision etc. We are unable to agree with the High Court that the word 'incidental' has reference to a matter of casual nature only. The procedure for disposal of an appeal includes as a necessary incidental matter the filing of an appeal on a proper fee." (Emphasis supplied)

100. In State of Tamil Nadu V. Binny Ltd., Madras,8 the question arose whether the sales of provisions effected by the assessee in a workman store, was assessable to tax under a State law. Section 2(d)(ii) defined business as including any transaction in connection with or incidental or ancillary to the trade, commerce, manufacture, adventure or concern which formed the subject matter of section 2(d)(i). 1980 Supp SCC 686 The contention taken by the assessee was that it was necessary that the connection between the sales of the provisions in the store and manufacture of the goods in question must be direct and that direct connection was missing. In other words, the assessee was carrying on manufacture and sale of textiles. It was also running a store in question. The word "business" was defined as including trade and manufacture inter alia in the first limb of Section(2)(d) and also any transaction incidental to such trade and manufacture. This Court took the view that there is no justification in the contention of the assessee. We notice the following exposition: -

> "It is indeed difficult to see how it can at all be said that the activity of selling provisions to the workmen in the Store was not incidental to the business of manufacture of textiles in the factory. The sales which were effected in the Store were to the workmen employed in the factory where textiles were being manufactured and the provision of this facility to the workmen was certainly incidental to the carrying on the business of manufacture of textiles. This view finds support from the decision of this Court in Royal Talkies, Hyderabad v. Employees State Insurance Corporation where the question was as to whether a canteen maintained by a cinema owner in the premises of the cinema could be said to be incidental to the business of running the cinema. Krishna Iyer, J., speaking on behalf of the court, pointed out that (SCC p.212 : SCC (L&S) p. 505) "a thing is incidental to another if it merely appertains to something else as primary. Surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either." (Emphasis supplied)

101. The proper interpretation in the context of the word "incidental" is not that it is subordinate to an absolute, as it is sought to be made out. In M/s. Shroff and Co. v. Municipal Corpn. of Greater Bombay and Another,9 this Court reiterated the view that the expression incidental means 'necessary' in certain contexts which does not mean a matter of causal nature only.

102. In the context of the provision in question, the expression "incidental to" would mean arising out of or otherwise connected with. In other words, the risks and rewards must flow out of ownership. The rewards must be those arising out of ownership. This 1989 Supp 1 SCC 347 in fact is central to understanding the concept of a finance lease.

103. An argument is raised that paragraphs 15A to 17 of the Indian Accounting Standards (in IND AS) 17, it becomes evident that finance leases are contemplated in respect of lands. We may notice paragraphs 15A to 17, which read as follows: -

> "15A. When a lease includes both land and buildings elements, an entity assesses the classification of each element as a finance or an operating lease separately in accordance with paragraphs 7-13. In determining whether the land element is an operating or a finance lease, an important consideration is that land normally has an indefinite economic life.
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> 16. Whenever necessary in order to classify and account for a lease of land and buildings, the minimum lease payments (including any lump-sum upfront payments) are allocated between the land and the buildings elements in proportion to the relative fair values of the leasehold interests in the land element and buildings element of the lease at the inception of the lease. If the lease payments cannot be allocated reliably between these two elements, the entire lease is classified as a finance lease, unless it is clear that both elements are operating leases, in which case the entire lease is classified as an operating lease.
>
> 17. For a lease of land and buildings in which the amount that would initially be recognised for the land element, in accordance with paragraph20, is immaterial, the land and buildings may be treated as a single unit for the purpose of lease classification and classified as a finance of operating lease in accordance with paragraphs 7-13. In such a case, the economic life of the buildings is regarded as the economic life of the entire leased asset."

104. It is clear that the subject matter of the lease mentioned in paragraphs 15A to 17 is not merely land alone. It contemplates a situation where the lease relates to land and buildings. It is no doubt true that in paragraph 15A it is stated that in determining whether the land element is an operating or finance lease, an important consideration is that the land normally has an indefinite economic life. What is significant is that what the provision contemplates is finding out whether the land element in a composite lease can be treated as a finance lease or as an operating lease. In a lease which has only a land element, the concept of a limited economic life, which is apposite in the context of assets which have a life limited by time and which ordinarily depreciate over time, would not be relevant. We need not deal with the case of the lease of land at the end of which there is a sale. There may be instances of such leases entered into by developmental authorities. It would then turn upon the terms of the lease.

105. The lease in question, is a lease of the plot of land, as already found by us. The underlying asset is the plot of land. Therefore, we cannot treat the subject matter of the lease, as containing both land and building elements. We have already noticed, while dealing with Rule 63(b) that the case of the appellant before the NCLAT, was only that, apart from the land, the right to develop or construct the building, is the underlying asset. It is not the case of the appellant that the buildings, which are to be put up by the lessee, are also the subject matter of the lease. In fact, it is, no doubt, true that the

lease actually contemplates that, as regards the build-up area/plot or land, the transfer to the allottee is to be made only by way of a sub-lease. The sub-lease of the land in favour of the apartment owners, is also contemplated under Section 9 of the Uttar Pradesh Apartment Owners Act, 2010. The lease, indeed, does contemplate the execution of a tripartite sub-lease. The form and the format are to be dictated to by the lessor. The sub-lease can be executed subject to the fulfilment of certain conditions, which we have already adverted to. This is, indeed, a case where the lease is of the plot and the interest or the right to enjoy the lease is by way of construction of residential buildings only and the use, both by the lessor and lessee and even the sub-lessee is regulated and circumscribed by the terms of the lease and the sub-lease. Even, according to the appellant, it is the lessee, who is to find out the allottees and to transfer the rights in the building, also the land, only by way of a sub-lease. The consideration for the transfer of apartments is subject to the transfer fee being paid, to be appropriated by the lessee. The lease, therefore, contemplates a sub-lease, whereunder, the rights over the apartments, are regulated. Not unnaturally, therefore, the appellant cannot project the case that the flats/apartments, would constitute part of the underlying asset. We notice this, as though it was not argued, we did toy with the idea that if the lease is a composite lease of land and building, the Rules made under the IAS, may have to be appreciated differently. However, we need not explore that line of thought any further.

106. The NCLAT has found that while all risks are transferred, the rewards are not transferred, therefore, we need consider only whether this is correct. While we are on the concept of the rewards incidental to ownership, we must record the assistance which was provided by the fairness of Shri Ritin Rai, learned Senior Counsel, who drew our attention to the Clause B53 of IAS 116 which is as follows: -

> "B53: "The classification of leases for lessors in this Standard is based on the extent to which the lease transfers the risks and rewards incidental to ownership of an underlying asset. Risks include the possibilities of losses from idle capacity or technological obsolescence and of variations in return because of changing economic conditions. Rewards may be represented by the expectation of profitable operation over the underlying asset's economic life and of gain from appreciation in value or realisation of a residual value."

107. There is reference to 'idle capacity or technological obsolescence'. In the context of risk, it appears to be irrelevant, in the context of land. Rewards are again predicated with reference to the expectation of profitable operation over the underlying asset's economic life and the gain from appreciation in value or the realisation of a residual value. The concept of 'economic life' in the first place is inapposite in the case of lease of land alone. The residual value is predicated again with the expiry of the term of the lease which is predicated with reference to the end of the lease. In other words, it would be the value of an asset predicated with reference to the end of the useful life of the asset [see in this regard definition of residual value in para 77] at the expiry of the term of the lease. The lease in question contemplates a period of 90 years. The lease is only of the land.

108. We may now turn to the provisions of the lease and the contentions in the context of Section(5)(8)(d). Undoubtedly, the lessee is put in possession of the land. Call it a right or a reward

incidental to ownership, possession, or the right to possession has been transferred to the lessee. The lessee is entitled to hold the plot. The lease further proclaims that the lessee shall use the allotted plot for the purpose indicated. Possession being in the context of a lease does not partake of a liberty to not use as would be the case of an owner. In fact, the manner of the use is stipulated. Non-use even entails penalty and even cancellation. In fact, things could not be clearer when Clause 13 under 'other clauses' is borne in mind. The said clause unequivocablly declares that the lessor in larger public interest may take back the possession of the land/ building and making payment at the prevailing rate. This, no doubt, is subject to what we will pronounce on its impact on the fate of this case.

109. Next, we may notice whether there is right with the lessee to transfer the leasehold property. In this regard, it is relevant to notice that under the law which is as contained in the Transfer of Property Act, 1882, Section 108, thereof, provides for rights and liabilities of a lessor and lessee. It declares that in the absence of the contract or local usage to the contrary, the lessor and lessee of immovable property would possess rights and be subject to liabilities as provided therein. Section 108(j) reads as follows: -

> "(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease:
>
> nothing in this clause shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee:"

110. Therefore, in the case of a lease where there is no contract placing restrictions on the right of the lessee, the lessee can transfer absolutely or by way of mortgage or sub lease, the whole or any part of his interest in the property and any transferee of such interest or part may again transfer. This is no doubt subject to the clause which deals with the category of untransferable right of occupancy and the other categories mentioned therein. In this context the lease in question must be probed in order to find out whether there is a contract placing restrictions on the right of the lessee to transfer. As far as an absolute assignment by the lessee, Clause 12 under 'other clauses', clearly prohibits any assignment by the lessee. It declares that the lessee shall not be allowed to assign or change his role. The lessee would be liable to be visited with the penalty of cancellation of the lease itself for breach. It further provides that the entire money which the lessee would have deposited would stand forfeited. Therefore, while it may be that this clause is to enable the proper and successful implementation of the objective of the appellant which is tasked with the planned development of the area and the use of the property for the laudable purpose of construction of group housing, it cannot detract from our finding that there is a prohibition on assignment of the right within the meaning of a contract which is contrary under Section 108. Jurisprudentially, a right which is the soul of ownership and which is clearly incidental or arising out of ownership is denied to the lessee, that is, the right to transfer the leasehold right.

111. Undoubtedly, in law, generally the lessee can assign his rights as a lessee which amounts to assignment of his right. A lessee may create a sub- lease. A lessee can also create a mortgage. All of these rights vest with a lessee, subject to a contract to the contrary. In the lease in question what is prohibited in Clause 12 under other clauses is the right to assign his rights as lessee. Any reward which the lessee could have obtained if it wished to absolutely assign its right, is clearly denied by virtue of the provision in the lease which acts as a contract to the contrary.

112. No doubt, the lease deed would show that the subject matter of the lease is Plot No.GH-05/B Sector-137, Noida. It is further shown as measuring 22565.77 Sq. mts. The purpose of the lease is constructing the residential flats. It is no doubt true that under the head 'transfer of plot' it is indicated that without obtaining the completion certificate the Lessee will have the right to sub-divide the allotted plot into suitable smaller plots as per the planning norms and to transfer the same to interested parties. This can be done upto 30.09.2010 with prior approval of the appellant-Lessor on payment of transfer charges at the rate of 2% of the allotment rate. However we notice that there is a stipulation that the area of each of the sub-divided plot should not be less than 20,000 sq.mtrs. We have already noticed that the total extent of the lease property is only 22565.77 square mtrs. Thereafter, it is no doubt mentioned that individual flat /plot will be transferrable with prior approval of the Lessor, subject to various conditions which include execution of the lease deed and the sub-lessee undertaking to put the premises for residential use only. Even though there is reference to transfer of plot which is to consist of not less than 20,000 sq.meters with the prior approval of the Lessor, it was to be done before 30.09.2010. It is difficult to conceive how when the total extent is little over 20,000 sq. meter i.e., 22565.77 sq. metres and when the condition for transfer of the plot is that the area of the sub divided plot should not be less than 20,000 sq. meter and the construction has to be completed in the manner provided and yet the transfer in the aforesaid manner is permitted only upto 30.09.2010. The parties contemplated transfer only if there is prior approval of the plot of not less than 20,000 sq. metres before 30.09.2010. At least it is not a case before us that this clause has been invoked or worked. The transfer of the first sale/transfer of a flat/ plot to an allottee is to be done through sub-lease/ lease deed. No doubt, we have already noticed the difference in area in the lease in the connected appeal and the lease which is the subject matter of the sub-lease provided before us.

113. As far as the right to mortgage is concerned the lessee is indeed permitted to mortgage the land. However, the mortgage can be effected only with prior permission of the lessor. The right to mortgage which flows as an incident of ownership is one of the bundle of rights which vests with an owner. It is undoubtedly a lesser right and the owner would be possessed of the residual right. However, it is one of the many rights which is incidental to ownership but there is no absolute right to create a mortgage.

114. The requirement of prior permission to create a mortgage would mean that the permission may be forthcoming or it can be denied. If there is a denial of the right to create a mortgage, then it would impliedly mean that to the said extent the right to raise funds for the purpose of financing the investment is impaired. Depending on whether or not the right is permitted actually the rewards incidental to ownership is transferred. In other words, if we were to imagine that the lessee stood in the shoes of an owner of the property, he would be in a position to create a mortgage, raise funds as

he chose and deal with the property in the manner, he felt advised to. The clause relating to mortgage, in fact, indicates that the purpose contemplated, is that the mortgage can only be for the purpose of raising loan or for the purpose of financing the lessee's investment in the project. This in turn is to be on receipt of the payment by the allottee or on receipt of assurance of payment by the bank or under any other suitable arrangement. In this regard, the lease contemplated a mutual settlement amongst the lessor, the developer and the financial institution/bank. It clearly constitutes a foray into the right of a person 'if an owner' to deal with the property including the right to create a mortgage. The suitable arrangement in mutual settlement contemplates the lessor giving its consent to the terms of the mortgage. It includes the right of the lessor to prevail upon, in regard to the terms of the mortgage. Its object may be lofty and in keeping with its role as a statutory authority but its impact on the true interpretation of the lease and as to whether it involves transfer of rewards incidental to ownership is another matter. The terms and conditions of the NOC which is contemplated as necessary for mortgaging the land to facilitate housing loans of final purchaser will be as decided by the lessor. Still further we may notice that under the proviso if there is a sale or a foreclosure of the mortgaged property, the lessor is given the right to such percentage of the unearned increase in value as will be decided by the lessor.

115. Moving on to the transfer of the plot having regard to the purpose of the lease it is as follows:-

> The lease contemplates the lessee is to put up construction of group housing. The lessee is entitled to allot the dwelling units on sub-lease basis to its allottee and shall provide space for facilities which are indicated which include roads, parks, etc. It is further indicated that however transfer/ sub lease shall be governed by the transfer policy of the lessor. No doubt, restrictions are put in regard to how allotment can be made. Allotments can be made only to citizens of India competent to contract. This means that if the law permits (Barring citizens of certain countries, the law does permit citizens of other countries to acquire property in India) the allotment of what is constructed by the lessee by way of group housing to persons who are not citizens and make profits on such transfer, this clause indeed impacts such right and also takes away the profits which it could make thereunder. The lease further indicates that there will be no permission to part transfer of plot. In this regard, it must be noticed that what is permitted under the lease is the creation of a sub-lease of the dwelling units to the allottee. No doubt there would be a sub-lease over the plot as well. The lease goes on to state that the lessee shall not be entitled to complete transaction for sale, transfer, assign or otherwise part with the possession of whole or part of any of the buildings constructed thereon, before making payment in terms of the schedule under the lease.
>
> Though it is described as sale, transfer, assignment or otherwise as all of it relates to the building which is constructed on the underlying leased property. We must not lose sight of the fact that the subject matter of the lease is the plot described as plot no. GH-05/B Sec.137, Noida consisting of 22565.77 square metres. What is essentially and in reality permitted apparently is the creation of only the sub-lease. Undoubtedly by the lessee the transfer of the built-up area is permitted subject to

payment of transfer charges in terms of the policy. The lessor is given an absolute right to reject any application for transfer. The lessee is to pay the transfer charges in terms of the policy which is determined. The transfer of the built-up flats is to be premised on a tripartite sub lease. The terms of such a sub-lease will be dictated to by the lessor.

The sub-lease interchangeably is described as sale by the lease. The sale in turn is to be captured in the terms of a sub-lease for it is clear that the lessee is obliged to execute a sub-lease. We have referred to the lease and the terms of a sample sub lease.

The sub lessee also can use the premises only for residential purposes. In this case it must be noticed that being a part of the fulfilment of its goal under the act to transfer plots for residential purposes inter alia and the lease in question being one for developing group housing, the lessee can transfer the built-up flats only for residential purposes. The argument of the appellant is that being a necessary corollary of the lease being one to effectuate the appellants duty and being a reasonable restriction, it is undoubtedly the duty of the appellant in the context of the purpose that a regulatory and the restrictive mechanism in question is put in place. As to whether there is a substantial transfer of all the rewards incidental to ownership as an owner or whether the lessee would stand in the shoes of a person resembling an owner is another matter. Were the lessee to enjoy the right as owner, there would be liberty to transfer the premises subject to the law of the land for any purpose. Being limited to only residential purpose indeed robs the lessee of one of the cardinal rights of a person who can be described as an owner. The lease, read as a whole, contemplates the transfer to enjoy/use the leasehold property for the period of 90 years for the purpose limited to the construction of the residential complex only. This is apart from all the concomitant constraints and restrictions which have been put in place to achieve the goal of the appellant in its statutory role.

116. It is no doubt true that the appellants correctly point out that the lessor does not purport to seek any sharing of the consideration which may be received by the lessee from the allottees. In that sense ‘rewards’ are transferred. We have in this regard noticed the qualifications and conditions such as forbidding transfer to non-citizens and the purpose for which the said property can be used. The other aspects, which even limit the rights and therefore, dampen the prospect of profit, have been adverted to.

117. Though the rules under the Uttar Pradesh Ownership of Flat Act, 1975 is referred to in the lease as noticed by us earlier, the Uttar Pradesh Apartments (Promotion of Construction, Ownership and Maintenance) Act, 2010 (hereinafter referred to as ‘the UP 2010 Act’, for short) repealed the 1975 Act. The UP Act 2010 came into force on 21.07.2010. The lease deed, in this case, came to be executed on 30.07.2010. We notice that in the UP 2010 Act, Section 2 provides that the Act applies to all buildings having four or more apartments in any building constructed or converted into apartment and land attached to the apartment whether freehold or held on lease excluding shopping

malls and multiplexes. Section 3 defines common areas and facilities as including the land on which the building is located and all easements, rights and appurtenances belonging to the land and building. Section 5(1) declares that every person to whom any apartment is sold or otherwise transferred by the promotor, shall, subject to the provisions of the Act, be entitled to the exclusive ownership and possession of the apartment so sold or otherwise transferred to him. The person, who is entitled to the exclusive ownership and possession of the apartment, is also declared entitled to such percentage of the undivided interest in the common areas and facilities as may be specified in the deed of apartment. The percentage is to have a permanent character and cannot be altered except with a written consent of all the apartment owners. Section 7 reads as follows:

> "Section 7 - Apartment to be heritable and transferable Each apartment, together with the undivided interest in the common areas and facilities appurtenant to such apartment, shall, for all purposes constitute a heritable and transferable immovable property within the meaning of any law for the time being in force, and accordingly, an apartment owner may transfer his apartment and the percentage of undivided interest in the common areas and facilities appurtenant to such apartment by way of sale, mortgage, lease, gift, exchange or in any other manner whatsoever in the same manner, to the same extent and subject to the same rights, privileges, obligations, liabilities investigations, legal proceedings, remedies and to penalty, forfeiture or punishment as any other immovable property or make a bequest of the same under the law applicable to the transfer and succession of immovable property. Provided that where the allotment, sale or other transfer of any apartment has been made by any group housing cooperative society or association in favour of any member thereof, the transferability of such apartment and all other matters shall be regulated by the law, which may provide a transfer fee at a maximum rate of 2 percent but not less than 1 percent in any case of the sale value, applicable to such group housing cooperative society or association whosoever maintains the common areas and facilities. The transfer fee shall no be leviable in case of heritability."

118. The most crucial provision is Section 9. It reads as follows:

> "Section 9 - Right of re-entry (1) Where any land is given on lease by a person (hereafter in this section referred to as the lessor) to another person (hereafter in this section referred to as the lessee, which term shall include a person in whose favour a sublease of such land has been granted), and any building has been constructed on such land by the lessee or by any other person authorised by him or claiming through him, such lessee shall grant in respect of the land as many subleases as there are apartments in such building and shall execute separate deeds of sub lease in respect of such land in favour of each apartment owner before handing over the possession of apartment in such building to him. The lessor shall be duty bound to supply the plans and other legal documents to the lessee. Provided that no sublease in respect of any land shall be granted except on the same terms and conditions on which the lease in respect of the land has been granted by the lessor and no additional terms and conditions shall be imposed by the lessee except with the previous approval of the

lessor.

(2) Where the lessee has any reason to suspect that there had been any breach of the terms and conditions of the sublease referred to in subsection (1), he may himself inspect the land on which the building containing the concerned apartment has been constructed, or may authorise one or more persons to inspect such land and make a report as to whether there had been any breach of the terms and conditions of any sublease in respect of such land and, if so, the nature and extent of such breach, and for this purpose, it shall be lawful for the lessee or any person authorised by him to enter into, and to be in, the land in relation to which such breach has been or is suspected to have been committed.

(3) Where the lessee or any person authorised by him makes an inspection of the land referred to in subsection (1), he shall record in writing his findings on such inspection [a true copy of which shall be furnished to the apartment owner by whom such breach of the terms and conditions of sublease in respect of the land appurtenant to the apartment owned by him has been committed (hereinafter referred to as the defaulting apartment owner)] and where such findings indicate that there had been any breach of the terms and conditions of the sublease in respect of such land, the lessee may, by a notice in writing, require the defaulting apartment owner to refrain from committing any breach of the terms and conditions of the sublease in respect of such land, or to pay in lieu thereof such composition fees as may be specified in the notice in accordance with such scales of composition fees as may be prescribed. (4) The defaulting apartment owner who is aggrieved by any notice served on him by the lessee under subsection (3) may, within thirty days from the date of service of such notice, prefer an appeal to the Court of the District Judge having jurisdiction (hereinafter referred to as the District Court), either challenging the finding of the lessee or any person authorised by him or disputing the amount of composition fees as specified in the notice, and the District Court may, after giving the parties a reasonable opportunity of being heard, confirm, alter or reverse those finding or may confirm, reduce or increase the amount of composition fees or set aside the notice.

(5) Where, on the breach of any terms and conditions of any sublease in respect of any land, any composition fees become payable, the defaulting apartment owner shall be deemed to have been guilty of such breach and in default of payment thereof it shall be lawful for the lessee to recover the amount of the composition fees from the defaulting apartment owner as arrears of land revenue. (6) Where any composition fees are paid whether in pursuance of the notice served under subsection (3) or in accordance with the decision of the District Court or a higher court on appeal, no further action shall be taken by the lessee for the breach of the terms and conditions of the sublease in respect of the land in relation to which payment of such composition fees has been realised.

(7) If the defaulting apartment owner omits or fails to refrain from committing any breach of the terms and conditions of the sublease in respect of the land or, as the case may be, omits or fails to pay the composition fees in lieu thereof-

(i) in accordance with the notice issued by the lessee under subsection (3); or

(ii) where the finding of the lessee or the person authorised to inspect the land about any breach of the terms and conditions of any sublease in respect of the land or the amount of composition fees specified in the notice issued by the lessee are altered by the District Court on appeal or by any higher court on further appeal, in accordance with the decision of the District Court or such higher court, as the case may be; the lessee shall be entitled,-

(a) where no appeal has been preferred under subsection (4), within sixty days from the date of service of the notice under subsection (3), or

(b) where an appeal has been preferred under subsection (4), within sixty days from the date on which the appeal is finally disposed of by the District Court or, where any further appeal is preferred to a higher court, by such higher court, to exercise the right of reentry in respect of the undivided interest of the lessee in the land appurtenant to the apartment owned by the defaulting apartment owner, and where such right of reentry cannot be exercised except by the ejectment of the defaulting apartment owner from his apartment, such right of reentry shall include a right to eject the defaulting apartment owner from the concerned apartment: Provided that no such ejectment shall be made unless the defaulting apartment owner has been paid by the lessee such amount as compensation for such ejectment as may be determined in accordance with the prescribed scales of compensation.

(8) No appeal preferred under subsection (4) shall be admitted, unless twentyfive per cent of the composition fees specified in the notice served on the defaulting apartment owner has been deposited to the credit of the District Court in savings bank account to be opened by the District Court in any branch of an approved bank:

Provided that the District Court may, on sufficient cause being shown, either remit or reduce the amount of such deposit, and the interest accruing on such deposit, shall ensure to the credit of defaulting apartment owner by whom such deposit has been made:

Provided further that the amount of such deposit together with the interest due thereon shall be distributed by the District Court in accordance with the decision in such appeal, or where any further appeal has been preferred against such decision, in accordance with the decision in such further appeal.

(9) The defaulting apartment owner, who is aggrieved by the amount offered to be paid to him under the proviso to subsection (7) as compensation for ejectment from his apartment may, within thirty days from the date of such offer, prefer an appeal to the District Court and the District Court may, after giving the parties a reasonable opportunity of being heard, maintain, increase or reduce the amount of compensation.

(10) On the ejectment of the defaulting apartment owner from the apartment under subsection (7), the lessee by whom such ejectment has been made may make a fresh allotment of the concerned apartment to any other person on such terms and conditions as he may think fit.

(11) Where any lessee omits or fails to take any action either in accordance with the provisions of subsection (2) or subsection (3) or subsection (7) the lessor may, in the first instance, require the lessee by a notice in writing to take action against the defaulting apartment owner under subsection (2) or subsection (3) or, as the case may be, under subsection (7), within a period of ninety days from the date of service of such notice, and in the event of the omission or failure of the lessee to do so within such period, the lessor may himself take action as contained in subsection (2) or subsection (3) or subsection (7), and the provisions of subsection (4) to subsection (6) and subsection (8) to subsection (10), shall, as far as may apply to any action taken by him as if such action had been taken by the lessee.

(12) For the removal of doubts, it is hereby declared that no work in any apartment by the owner thereof shall be deemed to be a breach of the terms of the sublease in respect of the land on which the building containing such apartment has been constructed unless the work is prohibited by subsection (2) of section 6." (Emphasis supplied)

119. Section 5 contemplates a sale or transfer otherwise of an apartment by the promoter. Then subject to the other provisions of the Act, the buyer or transferee becomes entitled to exclusive ownership and possession. He becomes entitled to a percentage of the undivided interest in the common areas.

Section 8 is a provision which conditions ownership based on amounts remaining to be paid. Still further Section 9 is another provision which conditions Section 5.

120. The mere fact that Section 7 declares that each apartment, together with the undivided interest in common areas, is to be heritable and transferable, would not amount to creating a freehold right over the land, which is the subject matter of the sub- lease, in favour of the apartment owner, under Section 9 of the UP Act of 2010. In other words, no enlargement of the rights of the sub-lessee into that of a freehold owner of the land is contemplated. The mere fact that an undivided interest in the common area, is created including the land (the definition of 'common area' includes land) and is made heritable and transferable, would only mean that the specific right, which the sub-lessee

(apartment owner) has under the sub-lease executed within meaning of Section 9, both over the land and the apartment, will be heritable and transferable. In fact, Section 10 of the UP Act of 2010 provides for a declaration to be given by a promotor containing, inter alia, the statement as to whether, land is freehold or leasehold. No doubt, the effect of Section 7 of the UP Act is that the proviso in Section 7 does contemplate that in the case of any allotment, sale or other transfer made by any group housing cooperative society or association, the transferability of the apartment and all other matters, will be as regulated by the law and it may include the transfer fee at the maximum rate of two per cent. Section 7, no doubt, permits the apartment owner the right to transfer the apartment with the common area including the right in the land by way of sale, mortgage, lease, gift, in the same manner and to the same extent and subject to the same rights, privileges, obligations and liabilities, inter alia, under the law applicable to the transfer and succession of an immovable property. Also since Section 9 contemplates sub-lease over the land, there cannot be claims of enlargement over the same vide either Section 5 or Section 7. The case of sale if it relates to land in the balance sheet projected by the appellant represented by Ms. Madhavi Divan cannot but be rejected.

121. We have noticed that the lessee has no power to cancel the lease. However, cancellation of lease deed under various contingencies is permitted to the lessor. They include allotment obtained through misrepresentation/ suppression of material facts inter alia violation of directions issued or rules and the regulations framed by the lessee or any other statutory authority, default on the part of the lessee on the terms and conditions of registration/ allotment lease. The provisions provide for the extent to which the premium can be forfeited in the event of cancellation among the other clauses. This is apart from the earlier reference to the power to cancel in specified contingencies. It is relevant to notice that the lessor is clothed with an absolute power to make additions/ alterations or modifications in the terms of the lease deed inter alia apart from the sub lease. One clause which we have already noticed is Clause 13 falling in other clauses. It empowers the lessor to take back possession of the land/ building. The only limitation is that larger public interest must justify such taking back of the possession. It also must be attended/ accompanied by the lessor becoming liable to only make the payment at what is described as the 'prevailing rate.' It is clear that it is incompatible with the lessee enjoying rights/rewards incidental to ownership. The only requirement then being what the lessor perceives as larger public interest, the overriding power constitutes a shadow over the rights of the lessee which is clearly incompatible with the rights and therefore even rewards which would follow the normal exercise of rights as an owner. The right to possession and the rewards associated with it can be extinguished upon the lessor invoking the said power. Therefore, we would find on the whole that the appellant is not the financial lessor under section 5(8)(d) of the IBC. No doubt we would observe that we have arrived at the findings based on the prevailing statutory regime. Needless to say there is always power to amend the provisions which essentially consist of the Indian Accounting Standards in the absence of any rules prescribed under Section 5(8)(d) of the IBC by the Central Government.

THE CASE UNDER SECTION 5(8)(f)

122. Section 5(8) defines 'financial debt' as meaning 'a debt along with interest, if any, which is disbursed against the consideration of time value of money'. Thereafter, Clauses (a) to (i) deal with

transactions which are included as financial debt. It is, thereafter, that Clause (f) provides that a financial debt includes any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing. To further simplify the concept, in Section 5(8)(f), we may eclipse the words 'includes any forward sale or purchase agreement', and then, the provision would read as 'any amount raised any other transaction having commercial effect of a borrowing'. The word 'transaction' has been defined in Section 2(33) to include 'an agreement or arrangement in writing for the transfer of an asset, or funds, goods or services from or to the corporate debtor. At this very juncture, we may notice that 'operational debt' has been defined in Section 5(21), which means 'a claim in respect of provision of goods or services including employment'. Operational debt also means a debt in respect of payment of dues arising under any law for the time being in force and payable to any Local Authority, inter alia. 'Operational creditor' is defined in Section 2(20) as meaning 'a person to whom operational debt is owed and includes any person to whom such debt has been legally assigned or transferred'.

123. 'Transaction', as defined in Section 3(33), would, undoubtedly, include an agreement or arrangement in writing or the transfer of funds. The transfer of funds may take place from a corporate debtor. A transfer can also take place when there is transfer of funds to the debtor. A transfer may include a transfer of assets in writing again from or to the corporate debtor. The definition of the word 'debt' in Section 3(11) is intertwined with the definition of the word 'claim' in Section 3(6). The impact of these provisions has been considered by this Court in Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others10. It may be profitable to advert to the same.

"68. Thus, in order to be a "debt", there ought to be a liability or obligation in respect of a "claim" which is due from any person. "Claim" then means either a right to payment or a right to payment arising out of breach of contract, and this claim can be made whether or not such right to payment is reduced to judgment. Then comes "default", which in turn refers to non-payment of debt when whole or any part of the debt has become due and payable and is not paid by the corporate debtor. The learned counsel for the petitioners relied upon the judgment in Union of India v. Raman Iron Foundry [Union of India v. Raman Iron Foundry, (1974) 2 SCC (2019) 8 SCC 416 231], and, in particular relied strongly upon the sentence reading: (SCC p. 243, para 11) "11. ... Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority."

69. It is precisely to do away with judgments such as Raman Iron Foundry [Union of India v. Raman Iron Foundry, (1974) 2 SCC 231] that "claim" is defined to mean a right to payment or a right to remedy for breach of contract whether or not such right is reduced to judgment. What is clear, therefore, is that a debt is a liability or obligation in respect of a right to payment, even if it arises out of breach of contract, which is due from any person, notwithstanding that there is no adjudication of the said breach, followed by a judgment or decree or order. The expression "payment" is again an expression which is elastic enough to include "recompense", and includes repayment. For this purpose, see H.P. Housing & Urban Development Authority v. Ranjit Singh Rana [H.P. Housing & Urban Development Authority v. Ranjit Singh Rana, (2012) 4 SCC 505 : (2012) 2 SCC (Civ) 639] (at paras 13 and 14 therein), where Webster's Comprehensive Dictionary (International Edn.), Vol. 2

and Law Lexicon by P. Ramanatha Aiyar (2nd Edn., Reprint) are quoted."

124. The question, which fell for consideration in Pioneer (supra) was whether a homebuyer, who made advances to the real estate developer, utilising which, the real estate developer puts up the project and what the homebuyer got in return or was expected to get in return was a developed flat or an apartment, would be covered as a financial creditor. It would be apposite to refer to the following observations:

> "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.""
>
> 125. In the said example, therefore, the homebuyer, by providing amounts to the real estate developer, was found to be entitled to be treated as a financial creditor on the basis that the real estate developer must be treated as having raised money under the transaction in question. In other words, it was a case of a transaction by reason of the

fact that there was transfer of funds to the corporate debtor.

The transfer of funds was in the form of the advance payments and the installments payable by the homebuyer under the agreement to the developer. Thus, this Court concluded that it must be treated as a case falling under Section 5(8)(f), even without the aid of the Explanation added by an amendment, which was challenged in the said case. The real estate developer, in other words, raised amounts within the meaning of Section 5(8)(f) under the transfer of funds by the homebuyer to the developer and it was found to possess a commercial effect. In this regard, the discussion is as follows:

> "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."
>
> 126. It is, therefore, the appellants case that if the home buyer could be treated as covered under Section 5(8)(f), and therefore, a financial creditor, the appellant also should be treated as a financial creditor under the lease. Instead of approaching a bank or a financial institution, the lessee is facilitated to pay the consideration for the lease in the following manner:
>
> The lessee would pay ten percent of the total premium upfront. The balance of the premium is to be paid in sixteen half-yearly installments with interest falling due after the expiry of the period of moratorium, which consisted of two years from the date of the commencement of the lease. During the moratorium, the lessee, would, no doubt, have to pay the lease amount and the interest which is not to be confused with the premium. In other words, the lease contemplated payment of the named sum of premium and also lease rent. The rent could be paid on an annual basis or it could be

paid at one go as provided in the agreement. There was, thus, amount raised by the lessee in the manner in that, while no amount was paid or disbursed in the conventional sense by the appellant-lessor to the lessee, by permitting the lessee under the lease to effect the payments due from it under the lease after the moratorium was over in a staggered manner, viz., by payment of sixteen half-yearly installments with interest, it had the effect of raising of funds in the sense that it operated as a tool for raising finance. The expression 'raising funds' employed in Section 5(8)(f), it is the case of the appellant, must receive an expansive interpretation. In the modern world myriad manifestations not to be pigeonholed to any set or finite number of transactions, may be contemplated. The legislative intention is to provide a catch-all or residuary provision. It is emphasised, in this context, before us that the Court must adopt a purposive interpretation. The concept of a financial creditor is that of a person who is not merely interested in recovery of the money, which perhaps characterises an operational creditor. The appellant, being an Authority under the UPIAD Act, charged with the duty of developing the land for various purposes, including residential purposes, has a long-term perspective and interest in the lease property like a conventional financial creditor who would do deep and due diligence and undertake careful and elaborate study before entering into a transaction. The appellant also has a binding stake or interest in the transaction. What is involved is public money. The land, which is subject matter of the lease, came to vest with the appellant on the strength of acquisition of land after payment of huge amounts as compensation. The said amount would represent the cost of the land. It is such land, which is the subject matter of the lease. When the appellants have such an interest, as described earlier, excluding the appellant from the decision-making process itself by not including it in the Committee of Creditors, is described as illegal and a manifest absurdity.

127. Per contra, apart from pointing out that this Court is being asked to overturn the concurrent findings rendered by the NCLT and NCLAT, the prevarication in the stand of the appellant is emphasised. Apart from the fact that originally appellant claimed as operational creditor in Form B and filed the Form-C later, declaring it as a financial creditor, it is pointed out that the appellant has attempted to shift its stand at different stages. Initially, the stand was that appellant fell under Section 5(8)(d) on the basis that what was involved was a finance lease. Finding itself unable to fulfil the requirement of being a financial lessor before the NCLAT, the focus shifted to Section 5(8)(f). Since, the case was initially set up under Section 5(8)(d), the case of the appellant involved reliance being placed on a specific provision, and simultaneously, on a general provision. In other words, resort to Section 5(8)(d) would preclude invoking of Section 5(8)(f). It is pointed out that there is no disbursement under the lease deed. With reference to the Judgment of this Court in Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited and Others11, it is contended that there is no disbursement by the appellant, an indispensable element under the main provisions of Section 5(8) without which the appellant could not rely upon Section 5(8)(f). On facts, it is pointed out that the

treatment given to the appellant under the Resolution Plan dated 30.10.2019, is better than that of a financial creditor, i.e., forty-one percent of the amount claimed.

128. In the context of the Explanation to Section 5(8)(f), inter alia, by which, homebuyers were expressly brought within the scope of Section 5(8)(f), this Court in Pioneer (supra), inter alia, laid down as follows:

"70. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in Black's Law Dictionary (10th Edn.) to mean:

"1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an (2020) 8 SCC 401 amount of money given for a particular purpose."

71. In the present context, it is clear that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression "disbursed" refers to money which has been paid against consideration for the "time value of money".

In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money. Thus far, it is clear that an allottee "disburses" money in the form of advance payments made towards construction of the real estate project. We were shown the Dictionary of Banking Terms (2nd Edn.) by Thomas P. Fitch in which "time value for money" was defined thus:

"present value: today's value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the time value of money. Today's value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis." (Emphasis supplied) That this is against consideration for the time value of money is also clear as the money that is "disbursed" is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).

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." We have already referred to paragraphs 75 and 76 above and hence do not refer to it.

129. It is thereafter, while dealing with the impact of the employment of the word 'means' followed by certain words and finally followed by the word 'includes', be found in Section 5(8), this Court in Pioneer (supra), inter alia, held as follows:

"82. This statement of the law, as can be seen from the quotation hereinabove, is without citation of any authority. In fact, in Jagir Singh v. State of Bihar [Jagir Singh v. State of Bihar, (1976) 2 SCC 942 : 1976 SCC (Tax) 204] , SCC paras 11 and 19 to 21 and Mahalakshmi Oil Mills v. State of A.P. [Mahalakshmi Oil Mills v. State of A.P., (1989) 1 SCC 164 : 1989 SCC (Tax) 56] , SCC paras 8 and 11 (which has been cited in P. Kasilingam [P. Kasilingam v. PSG College of Technology, 1995 Supp (2) SCC 348]), this Court set out definition sections where the expression "means" was followed by some words, after which came the expression "and includes" followed by other words, just as in Krishi Utpadan Mandi Samiti case [Krishi Utpadan Mandi Samiti v. Shankar Industries, 1993 Supp (3) SCC 361 (2)] . In two other recent judgments, Bharat Coop. Bank (Mumbai) Ltd. v. Employees Union [Bharat Coop. Bank (Mumbai) Ltd. v. Employees Union, (2007) 4 SCC 685 : (2007) 2 SCC (L&S) 82] , SCC paras 12 and 23 and State of W.B. v. Associated Contractors [State of W.B. v. Associated Contractors, (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1] , SCC para 14, this Court has held that wherever the expression "means" is followed by the expression "and includes" whether with or without additional words separating "means" from "includes", these expressions indicate that the definition provision is exhaustive as a matter of statutory interpretation. It has also been held that the expression "and includes" is an expression which extends the definition contained in words which follow the expression "means". From this discussion, two things follow. Krishi Utpadan Mandi Samiti [Krishi Utpadan Mandi Samiti v. Shankar Industries, 1993 Supp (3) SCC 361 (2)] cannot be said to be good law insofar as its exposition on "means" and "includes" is concerned, as it ignores earlier precedents of larger and coordinate Benches and is out of sync with later decisions on the same point. Equally, Dr Singhvi's argument that clauses (a) to (i) of Section 5(8) of the Code must all necessarily reflect the fact that a financial debt can only be a debt which is disbursed

against the consideration for the time value of money, and which permeates clauses (a) to (i), cannot be accepted as a matter of statutory interpretation, as the expression "and includes" speaks of subject-matters which may not necessarily be reflected in the main part of the definition."

130. It is, therefore, the case of the appellant that it is not the law that in order that a creditor is found entitled to be treated as a financial creditor under any of the inclusionary clauses, he must also satisfy the requirements in the main provision. In other words, the concept of disbursement of the debt to be found in Section 5(8), is not to be rigorously insisted upon in appreciating the scope of Section 5(8)(f).

131. The stand of the respondents, on the other hand, is the decision of this Court in Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited and Others12, wherein a Bench of (2020) 8 SCC 401 two learned Judges of this Court, inter alia, held as follows:

"46. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become "financial debt" for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in clauses

(a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per clauses

(g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in clauses (a) to (h).

The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in clauses

(a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of "disbursement" against "the consideration for the time value of money" could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said clauses (a) to (i) of Section 5(8) would be falling within the ambit of "financial debt" only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as "financial debt" within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal

against consideration for the time value of money."

132. Under Section 5(8)(f), the words used, inter alia, are 'any amount raised under any other transaction'. In our quest for similar words, namely, any amount raised, we discover that similar words are used namely 'any amount raised' specifically in clauses 5(8)(b) and 5(8)(c). We may notice that, in fact, Section 5(8)(a) specifically deals with money borrowed against the payment of interest. We have already found that under the main provision an interest free loan has been held by this Court to entitle the unpaid creditor to describe himself as a financial creditor. The words 'any amount raised pursuing to any note purchase facility or issue of bonds, notes, debentures, loans stocks' are followed by the words or by any similar instrument. Since, Part II of the IBC deals with resolution and liquidation for corporate persons and the definition of financial debt is found in Section 5(8) falling under Part II, we may bear in mind that Section 3(8) defines corporate debtor as a corporate person who owes a debt to any person. The word corporate person has in turn been defined under Section 3(7) as a company under the Companies Act as defined in Section 2(20) of the Companies Act, 2013, a limited liability partnership as defined in the Limited Liability Partnership Act, 2008 or any other person incorporated with limited liability but under any law for the time being in force but will not include any financial service provider. In fact, a perusal of Part III of IBC which deals with Insolvency Resolution for individuals and partnership firms will show that it does not contain the concept of financial debt as indicated in Section 5(8). Section 5(8)(c) comprehensively refers to raising of any amount based on note purchase facility, issue of bonds, notes, debentures, loan stock or any similar instrument. Thus, what is contemplated is ordinarily the corporate debtor raises funds by issuing bonds, notes, debentures or loan stock which are well known instruments usually used by corporate bodies to generate funds for its needs. These instruments are ordinarily transferable. It is after enumeration of such instruments specifically that the words 'similar instrument' are employed. The expression 'similar instrument' came to be considered by this Court in the decision reported in State of Orissa v. State of A.P.13. Therein the question related to the jurisdiction of the Supreme Court under Article 131 of the Constitution. The proviso to Article 131 operates to oust the jurisdiction of this Court. It reads as follows:

> "Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute." (Emphasis supplied) In the context of the said provision, we notice the following discussion.
>
> (2006) 9 SCC 591 "15. The word "or" indicates that the succeeding phrase "other similar instrument" is to be read disjunctively. At the same time the word "similar" means that the instrument must be of the same nature as those preceding. An instrument, to fall within this phrase would, in the context, have to be a formal writing by which a right or liability, is or purports to be, created, transferred, limited, extended, extinguished, or recorded.

Thus a document acknowledging title in a third person has been held to be an instrument in Biswambhar Singh v. State of Orissa [1954 SCR 842 : AIR 1954 SC 139] ." (Emphasis supplied)

133. We need not further explore the scope of the said clause 5(8)(c) except to notice that the word similar instrument would indicate instruments similar to the instruments which are specifically enumerated. It is unnecessary for us to expound the different types of instruments which answer the description of similar instruments and we need only notice that the golden thread that runs through the specific instruments is that they all contain an acknowledgement of debt. They are debt instruments ordinarily issued by corporate bodies. They also are transferable in the market and the holder can indeed bring an action on the same even if he is not the person who has made the initial disbursement of funds to the corporate debtor. A glance at another immediate neighbour which is the immediate predecessor of Section 5(8)(f), throws some light on the mind of the Law-Giver. Section 5(8)(e) deals with receivables sold or discounted other than any receivable sold on non-recourse basis. It will be noted that the receivables are treated as current assets. Ordinarily, they represent the value of goods or services for which the creditor can expect payment within a short time, ordinarily, during the balance period of the financial year. If it were mere receivables, then it would rightly belong to the fold of an operational debt as such debt includes a claim in respect of the provision of goods or services including employment. However, what legitimises its presence as a financial debt is the sale or assignment of the receivables or its discounting. In other words, when amounts are due to the seller of goods or services which represent receivables in his accounts, should he need payment immediately, it is open to such a creditor to assign the right to recover the amount to a third party. The third party can recover it from the debtor. He can also have recourse from the assignor of the receivables. When there is a non-recourse clause, it is taken outside the category of financial debt. It is also after providing explicitly for raising of funds under clause (b) which deals with acceptance of or under any acceptance credit facility and through the issuance of various instruments and further providing for a residuary clause through the medium of similar instruments in Section 5(8)(c), seemingly exhaustive transactions, and further including the category of financial debt in section 5(8)(e) that the legislature has thought it fit to provide for the catch-all or residuary provision in section 5(8)(f). In section 5(8)(g), the legislature has included any derivative transaction entered into or in connection with protection against or benefit from fluctuation in any rate or price as also a financial debt. Derivative transactions are essentially instruments which involve the deriving of the value of the instrument with respect to and in relation to an underlying asset. It could be a commodity or a share or any other asset having a value. Ordinarily derivatives comprehend within its scope forward contracts, futures, options and swaps and an instance of a swap would be an interest rate swap (IRS). The derivative market is a gigantic financial market. They also share the quality of marketability not unlike instruments which are specifically dealt with in Section 5(8)(c). While on any derivative transaction, a derivative transaction is ordinarily intended to hedge risk. This means it is intended to potentially protect the person from the ill-effects of the fluctuation in the price or the rate of an underlying asset. A resort is also made to derivatives as a matter of speculation in which case it partakes of a benefit. The words used in Section 5(8)(g) appear to suggest that the law giver has contemplated any derivative transaction, in connection with the protection of the benefit from fluctuation in the rate or price. There appears to be an intricate and complex web of transactions which can take place under a derivative transaction. The important aspect is, however, a debt in the context of its mention as a

financial debt.

134. While there may be again a brooding omnipresence of a disbursement at some level as between the parties very often in such transactions referred to as counter parties, there may not be a disbursement. It is clear that the law-giver has provided for calculation purposes, the market value of the transaction for determining the value of the derivative transaction. We are making these observations only to indicate that the device of the definition of the clause which employs the word 'means', followed by certain elements, and thereafter, ending with an inclusionary clause, providing for various distinct categories would indicate that for invoking the specified categories, there may not be a need for the presence of all the elements included in the main provision.

135. However, this is different from holding that the conditions in section 5(8)(f) would stand fulfilled even without a person falling within its four walls by satisfying even the requirements indicated therein. In other words, as we have indicated the raising of any amount under any other transaction having the commercial effect of a borrowing is indispensable to apply Section 5(8)(f).

136. The contention of the appellant on the one hand is that the terms of the lease under which as far as it provides for a moratorium for two years after the initial upfront payment and facility of payment of the balance amount of the premium with interest and spread over 16 half-yearly instalments, amounts to raising funds by the lessee from the appellant and it has the commercial effect of a borrowing from the perspective of the lessee. This is to counter the case of the respondents that having regard to its position as a statutory authority and a public authority under the UPIAD, the transaction does not have the commercial effect of borrowing. In other words, the case of the respondent is being indispensable requirement under Section 5(8)(f) that the amount raised under any other transaction referred to must have a commercial effect of a borrowing, it would bring in its train a profit motive which is incompatible with the position of the appellant as a public authority charged with the sublime duty it claims of planned development of the area. Shri Madhavi diwan would apparently point out along with the learned solicitor general that from the point of view of the lessee, there is a commercial effect. She also submits that the appellant has also charged interest.

137. We have already noticed the view expressed by this Court in Pioneer (supra). The view propounded is that the presence of profit as the main aim is essential for the commercial effect of a borrowing. This Court found that both the real estate developer and the home buyer are actuated by profit motive as underlying the transaction.

138. We are of the view that in the facts of the appeals before us, we are unable to hold that the lessee has raised any amounts from the appellant. The question, therefore, of considering the last limb of Section 5(8)(f), namely, whether it has commercial effect of a borrowing could not arise. But we can safely say that the obligation incurred by the lessee to pay the rental and the premium cannot be treated as an amount raised by the lessee from the appellant. It may be noticed that it is reasonably possible to find that the lessee has raised this amount which it had to pay to the appellant from some other sources. The reliance on the concept of 'a tool of raising finance' canvassed by the appellants would be carrying things too far and to allow them to invoke it carries

with-it far-reaching implications and bears dangerous portent for the purpose of Section 5(8)(f). We would think that the concept of disbursement as present in the main provision appears to be mandatory in Section 5(8)(f). The purport of Section 5(8)(f) is to provide for an exhaustive catch-all provision.

139. One of the contentions raised on behalf of the respondent that, since the Law Giver has referred to lease in Section 5(8)(d) of the IBC and defined 'financial lease', as limited only to finance lease and capital lease, deemed, as such, under the Indian Accounting Standards, no recourse can be made by the appellants to Section 5(8)(f), which is a residuary provision. On the other hand, the appellant, while agreeing that all cases of financial or capital lease, covered by Section 5(8)(d), cannot be considered under Section 5(8)(f) contends that there can be no embargo on the Court, considering whether, in the lease in question, any amount is raised, having the commercial effect of a borrowing. The case of the respondent can be understood differently by applying the principle that, when there is a special provision, no light must be allowed to emanate from the general provision. Another allied issue, which, at this juncture, we must address is, whether the words, 'any amount raised under any other transaction, in Section 5(8)(f), would involve attributing the presence of a transaction on the preceding provisions of Section 5(8). To put it differently, the use of the word, 'any other', before the word, 'transaction', would involve the presumption that the preceding sub-clauses of Section 5(8), embodied specific transactions. Going by the wide definition of the word 'transaction' in Section 2(33), we find that there is merit in the argument of the appellant. Section 5(8)(a) to Section 5(8)(e) proceed on the basis that there is a transaction, as conceived by the Law Giver. As far as the contention that, since the words, 'lease or hire-purchase contract', is specifically confined to, what is deemed as finance or capital lease, falling under the Indian Accounting Standards, and, therefore, any liability under such a lease, is not falling under Section 5(8)(f).

140. It is, no doubt, true that in Section 2(33), a transaction can be an arrangement in writing, under which, there is transfer of assets, funds, goods and services, from or to the corporate debtor. A perusal of the terms of lease contemplate that the appellant must not make available financial facility to the lessee. The appellant has, admittedly, not made available any loan to the lessee. No advance payment is made by the appellant. It is for the lessee to fund the project and make the payment from its own sources. It is entirely for the lessee to finance the payment of the rent, premium and interest due to the appellant under the lease. The claim of the appellant, it must be noticed, is for the amount due by way of premium and interest, besides the lease amount due as on the date of the claim. As far as these amounts are concerned, they are not amounts, which have been raised by the lessee from the appellant. They would have been either from its own sources or by availing financial facilities from others. It is vital to notice that as far as the amount saved by the corporate debtor, to pay the amounts to the appellant, there would be a financial debt incurred by the lessor to its lender. The acceptance of the appellants argument would involve that for the said amount the possibility of two financial creditors being present. This is unacceptable. In fact, the provision relating to limited power of mortgaging, available to the lessee, is for the purpose of financing the construction of the flats over the leasehold property. While, under the lease, the lessee may have incurred debt towards third party, which may be a financial debt. We are of the view that we would be placing a wholly strained and unreasonable interpretation on Section 5(8)(f), if we were

to hold that lessee has raised funds from the lessor (appellant) under the lease in question. Merely granting a moratorium, followed by the staggered payment in sixteen half-yearly installments of the balance of premium, cannot possibly lead to the conclusion that the respondent has raised the funds, under the lease, from the appellant.

141. We may notice that what Section 5(8)(d) of the IBC provides for is, any liability in respect of any lease, inter alia, which is, however, confined to a finance or capital lease. We are not ruling out the possibility that, in a lease, not a finance or a capital lease, falling under Section 5(8)(d), if it otherwise fulfils the requirements of Section 5(8)(f), it would not fall under the definition of the word 'financial debt'. In other words, Section 5(8)(d) includes only a finance or a capital lease, which is deemed, as such, under the Indian Accounting Standards. Section 5(8)(f) is a residuary and catch all provision. A lease, which is not a finance or a capital lease under Section 5(8)(d), may create a financial debt within the meaning of Section 5(8)(f), if, on its terms, the Court concludes that it is a transaction, under which, any amount is raised, having the commercial effect of the borrowing. All that we are finding, in the facts of this case, is that the lease in question does not fall within the ambit of Section 5(8)(f). This is for the reason that the lessee has not raised any amount from the appellant under the lease, which is a transaction. The raising of the amount, which, according to the appellant, constitutes the financial debt, has not taken place in the form of any flow of funds from the appellant/lessor, in any manner, to the lessee. The mere permission or facility of moratorium, followed by staggered payment in easy installments, cannot lead us to the conclusion that any amount has been raised, under the lease, from the appellant, which is the most important consideration.

WHETHER THE APPELLANT IS AN OPERATIONAL CREDITOR?

142. As far as the case of the respondents that the appellant is a Local Authority goes, the case of the respondent was largely premised on the Judgment of this Court in Union of India and Others v. R.C. Jain and Others14. In short, the case of the respondent was that the appellant is a Local Authority and the rental and premium in question, claimed by the appellant, constitutes amount due to the appellant under a law, viz., the UPIAD, read with Section 40 of the UP Act of 1973, made applicable to the UPIAD. Upon this Court pointing out the decision of this Court reported in New Okhla Industrial Development Authority v. Chief Commissioner of Income Tax and others15, wherein this Court has taken the view in the case of the appellant itself, that it is not a Local Authority. The parties would point out that the said Judgment, may not apply, as it was rendered in the context of the Income Tax Act. It is also pointed out that Judgments, which have been rendered after R.C. Jain (supra), which includes Housing Board of Haryana v. Haryana Housing Board Employees' Union and Others16 and Commissioner of Income Tax, Lucknow v. U.P. (1981) 2 SCC 308 (2018) 9 SCC 351 (1996) 1 SC 95 Forest Corporation17, are also distinguishable. It is contended that of the five tests propounded in R.C. Jain (supra), there is substantial fulfilment of the same qua the appellant.

143. It was pointed out that under Section 3(r) of the UP Act of 2010, a cognate law, the appellant is treated as a Local Authority. It is also pointed out that the appellant does provide civic amenities to the local inhabitants and, for the purpose of the IBC, it is, indeed, a Local Authority. It is also pointed out that the appellant is treated as a Local Authority under the Goods and Services Act.

Prima facie the decision in Noida (supra) may not detract from the appellant being found to be a local authority for the purpose at hand. No doubt, we do notice that in the context of the proviso to Article 131 of the Constitution of India, this Court did notice the distinction between the words 'arising out of' and the words 'arising under' and held that the words 'arising under' bears a narrower meaning (See also the discussion of the meaning of the word (1998) 3 SCC 530 'arises' as meaning 'coming into existence', in a Judgment of this Court by Justice Mukherji in Re:

> Rogers Pyatt Shellac Co. v. The Secretary of State for India in Council18, which stands approved in The Commissioner of Income Tax, Bombay v. Ahmedbhai Umarbhai and Co., Bombay19.
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> 144. The appellant would, in fact, point out that it is not necessary to probe the matter further, in view of the concurrent findings that the appellant is an operational creditor. No doubt, Smt. Madhavi Divan does point out that the words 'arising under any law', may not be the same as amounts being made recoverable under a law. Of course, she would point out that as far as the rental part of the claim, it may be relatable to the first limb of an operational debt. When questioned further, as to what her position is, if this Court found that the appellant is not a financial creditor, the appellant may be entitled, at least, to be treated as an operational creditor. We would think that, having regard to the AIR 1925 Calcutta 34 AIR 1950 SC 134 fact that both the NCLT and NCLAT have proceeded on the basis that the appellant is an operational creditor, we need not stretch the exploration further and pronounce on the questions, which may otherwise arise. We must not be oblivious to the following prospect, should we find that the appellant is not an operational creditor, even under the IBC Regulations apart from claims by financial creditors and operational creditors, claims can be made by other creditors. However, there are, undoubtedly, certain advantages, which an operational creditor enjoys over the other creditors. We would proceed on the basis that, while the appellant is not a financial creditor, it would constitute an operational creditor.
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> 145. The upshot of the above discussion is that the appeals must fail. The appeals are, accordingly, dismissed. Parties to bear their own costs.

.....,J (K.M. JOSEPH) .....,J.

NEW DELHI; (HRISHIKESH ROY)
MAY 17, 2022.