

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1366 of 2023

(Arising out of Order dated 26.09.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, Court V in Company Petition (IB) No.995/PB/2020)

IN THE MATTER OF:

Anjani Kumar Prashar
(Suspended Director of
Grandstar Realty Pvt. Limited)

... Appellant

Versus

Manab Datta & Ors....

... Respondents

Present:

**For Appellant: Mr. Arun Kathpalia, Sr. Advocate, Ms. Shivani Kher,
 Mr. Rakesh Lakra, Ms. Bhavya Sharma, Advocates.**

**For Respondents: Ms. Pooja Mahajan, Ms. Arveena Sharma, Ms.
 Shreya Mahalwan, Advocates.**

**Mr. Abhishek Anand, Mr. Karan Kohli, Mr. Abhishek
Sinha, Ms. Jasleen Singh Sandha, Advocates for
IRP.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by Suspended Director of the Corporate Debtor has been filed challenging the order dated 26.09.2023 passed by National Company Law Tribunal, New Delhi Bench, Court-V admitting Section 7 Application filed by Respondents – allottees herein. The Appellant aggrieved by the order admitting Section 7 Application has come up in this Appeal.

2. Brief facts of the case, necessary for deciding this Appeal are:

- (i) On 31.10.2003, the land in question was purchased by one M/s Subros Ltd. from various land holders. On 27.08.2004, a Notification under Section 4 of Land Acquisition Act, 1894 was issued by the Govt. of Haryana, proposing to acquire certain land for setting up Industrial Township. The land in question was initially part of the above Notification, however, M/s Subros Ltd. applied to the Government of Haryana for release of property from land acquisition proceedings and filed a Writ Petition (CWP) No.2787 of 2006 before the Punjab and Haryana High Court, challenging the acquisition dated 27.08.2004. M/s Subros Ltd. received a letter from Govt. of Haryana on 22.08.2007 for release of the land owned by Subros from the land acquisition proceedings. On that basis, the Writ Petition filed by M/s Subros Ltd. was withdrawn on 20.09.2007. On 29.01.2010, a decision was taken by Govt. of Haryana to drop/close the acquisition proceedings.
- (ii) On 23.01.2012, M/s Subros Ltd. sold the land along with license to develop to M/s Akme Projects Ltd. vide registered Sale Deed.
- (iii) In 2015, **Rameshwar & Ors. Vs. State of Haryana**, a SLP was filed (which was converted into Civil Appeal No.8788 of 2015) by certain farmers challenging the action of Haryana Government in initiation and subsequent dropping of land acquisition proceedings. Before the Hon'ble Supreme Court, it

was contended that due to issuance of Notification on 27.08.2004, farmers were induced to sell their lands to developers/ builders at cheap prices and subsequently, the Haryana Government closed the land acquisition proceedings. On 24.04.2015, the Hon'ble Supreme Court passed an interim order, directing ban on the construction of the land that was covered under acquisition proceedings.

- (iv) On 12.03.2018, the Hon'ble Supreme Court passed the final order holding that the state machinery was used to further private ends and that the decision to withdraw from acquisition was a fraud on power under the Acquisition Act. The judgment invalidated all transfers effect from the date of publication under Section 4, to the date of publication of the State's decision to revoke the acquisition i.e. from 27.08.2004 to 29.01.2010.
- (v) The Akme Projects Ltd. ("**Akme**") has obtained loan from YES Bank. Default was committed by Akme, due to which YES Bank initiated proceedings under the SARFAESI Act, 2002 and in the SARFAESI proceedings, auction sale notice was issued on 02.04.2016. The Grandstar Realty Pvt. Ltd. ("**Grandstar**") – Corporate Debtor participated in the auction and submitted a bid of Rs.40.75 Crores. On 17.06.2016 and 19.07.2016, YES Bank issued Sale Confirmation Advice/ Sale Certificate respectively after receiving the full payment.

- (vi) Akme filed Writ Petition, challenging the auction sale proceedings, where on 05.10.2016, the Hon'ble High Court of Delhi directed to maintain the status quo with regard to sale in favour of the Corporate Debtor.
- (vii) A Corporate Insolvency Resolution Process ("**CIRP**") was commenced against Akme, in which Respondent – home allottees filed the claim on 09.05.2018. The Appellant also filed proceedings before the Debt Recovery Tribunal in the year 2019 seeking setting aside the Sale Confirmation, which was dismissed on 07.01.2020. In Writ Petition No.1271 of 2018, before the Hon'ble Punjab and Haryana High Court, the Director Town and Country Planning ("**DTCP**"), was personally present and made a statement and the said land is covered within the judgment dated 12.03.2018 passed by the Hon'ble Supreme Court in Civil Appeal No.8788 of 2015. The Appellant also challenged the order of DRT before the DRAT by filing Regular Appeal No.72 of 2020
- (viii) The Respondent herein, who are allottees of Project filed an Application under Section 7 on 25.09.2020 for initiation of CIRP against the Corporate Debtor for default of INR 78,09,94,385.56/-.
- (ix) An Application for clarification was filed by Homebuyers through their Association in Civil Appeal No.8788 of 2015

before the Hon'ble Supreme Court. On 13.10.2020, the Hon'ble Supreme Court passed an order clarifying that M/s Subros Ltd. was not part of the land acquisition and is not covered within the said restraint, the clarification was issued on 21.07.2022.

(x) Regular Appeal No.72 of 2020 filed by the Corporate Debtor against the order dated 07.01.2020 before the DRAT, was also dismissed on 07.06.2021.

(xi) The Adjudicating Authority issued notice in Section 7 Application and after hearing the parties, by the impugned order dated 26.09.2023, admitted Section 7 Application. The Appellant aggrieved by the order has come up in this Appeal.

3. We have heard Shri Arun Kathpalia, learned Senior Counsel appearing for the Appellant; Ms. Pooja Mahajan, learned Counsel appearing for Respondents and Shri Abhishek Anand, learned Counsel appearing for IRP.

4. Shri Arun Kathpalia, learned Senior Counsel appearing for the Appellant submits that Adjudicating Authority committed error in admitting Section 7 Application. It is submitted that there was no financial debt owed by the Corporate Debtor. The Corporate Debtor was an auction purchaser in proceedings under the SARFAESI Act, 2002 and there was no disbursal in favour of the Corporate Debtor. The Respondents/ Applicants cannot be held to be Financial Creditors of the Corporate Debtor. The

Corporate Debtor is neither the assignee nor successor nor transferee of Akme Projects Ltd. The only obligation of Corporate Debtor as per the auction purchase sale certificate is that the Corporate Debtor is to carry out construction of the said apartments and honour the allotments of the allottees/ homebuyers on receipt of unpaid portion of consideration of the allotted flats. It is submitted that there being no transaction between the Appellant and the Respondents, which can be termed as financial debt, the Adjudicating Authority committed error in admitting Section 7 Application. It is further submitted that no default has been committed by the Appellant, which can be made basis of an Application under Section 7. It is submitted that Hon'ble Supreme Court in Civil Appeal No.8788 of 2015 passed an order of status quo on 24.04.2015, which continued till 12.03.2018, hence, during this period no construction could have been carried out by the Corporate Debtor. It is submitted that in Writ Petition No.9229 of 2016 titled as M/s Akme Projects Ltd. vs. Yes Bank and Anr., the Delhi High Court passed an interim order on 05.10.2016, which continued till 01.09.2017. It is further submitted that before the DRT-II, Delhi in SA No.148 of 2017 titled as Akme Projects Ltd. vs. Yes Bank Ltd., an interim order was passed on 15.09.2017, which continued till 07.01.2020. It is submitted that it was only on 21.07.2022, the Hon'ble Supreme Court in MA No.50 in Civil Appeal No.8788 of 2015 clarified that the said property is not covered by its covered dated 24.04.2015. The learned Senior Counsel for the Appellant also relied on the statement made on behalf of the DTCP recorded in the order dated 04.03.2020 before the

High Court, where the DTCP stated that the matter is covered by judgment of Rameshwar & Ors. Vs. State of Haryana and Ors. Hence, it was even the understanding of the DTCP also that land is covered in view of the order of the Hon'ble Supreme Court in Civil Appeal No.8788 of 2015. Hence, there was no question of carrying out any construction or committing any default by the Corporate Debtor. The land was subsequently released on 09.05.2023 by an administrative order. Hence, at no point of time any default is committed by the Corporate Debtor to initiate the CIRP proceedings. It is further submitted that the Corporate Debtor is only an auction purchaser and the Corporate Debtor is not party to Flat Buyers Agreement executed between Akme Projects Ltd. and allottees. The allottees have already filed their claim in the CIRP of Akme Project Ltd., which clearly indicate that allottees were treating the Akme Project Ltd. as a Company, who has committed the default. The Corporate Debtor has spent an amount of INR 40.75 Crores about eight years back with no returns. It is submitted that the Appellant, however, now deck being cleared, is willing to carry out construction and obtain necessary sanctions/ permission for completing the Project.

5. Ms. Pooja Mahajan, learned Counsel appearing for the Respondent refuting the submissions of the Appellant, submits that the submission of the Appellant that there was no financial debt cannot be accepted as the Respondents were allottees of Akme Project Ltd., which project was mortgaged by the Akme to the YES Bank. In the proceedings under SARFAESI Act, it was clearly mentioned that all assets and liabilities of

Akme Project Ltd. are taken by auction purchaser. The sale of property was on 'as is where is', 'as is what is' and 'whatever there is' basis. The Sale Certificate dated 19.07.2016 issued by YES Bank in favour of the Corporate Debtor provides the list of allottees and notes the allotments made to the Respondents as an encumbrance over the property. The Corporate Debtor took over the assets (land, building, right to receive receivables) along with claims of the homebuyers on the units. The Corporate Debtor having taken all rights, obligation and liabilities has obligation to construct and deliver the units to the homebuyers. Once auction purchaser takes over both rights and liabilities of the original debtor qua a secured assets, the consequences of the same would flow under all relevant provisions of law, including the Code. It is submitted that the Sale Confirmation Advice records that Corporate Debtor will abide by existing Tripartite Agreements or enter into new Tripartite Agreements; rights of the allottees are not undergoing any change; and CD will honour the allotment. The Corporate Debtor, thus, clearly owed a debt to the Respondents, which debt stood transferred to auction purchaser, who is the successor of the Corporate Debtor. Disputing the submission of the Appellant that no default is committed by the Appellant, it is contended that land in question was never covered by the judgment of the Hon'ble Supreme Court in **Rameshwar** case, infact it only covered the transfers and purchase of the land between 27.08.2004 till 29.01.2010. The Subros acquired the land before 2003 and the land was sold to Akme in 2012, i.e. after the aforesaid period. The judgment of the Hon'ble Supreme Court in

Rameshwar case makes it clear that land is not covered by the proceedings before the Hon'ble Supreme Court. It is submitted that the Corporate Debtor took the property in auction in the year 2016 and never took any steps to start construction or obtain necessary license etc. and it was the homebuyers, who file an Application before the Hon'ble Supreme Court seeking a clarification that the land of the Project is not covered by the direction of the Hon'ble Supreme Court and Hon'ble Supreme Court issued such clarification on 21.07.2022. Thus, the default was committed by the Corporate Debtor in not carrying out the construction. The Corporate Debtor owed debt to the Respondents and there has been default. Hence, Section 7 Application was rightly filed by the allottees. Order of the High Court and the DRT, which are relied by the Appellant also did not prohibit the Corporate Debtor to obtain necessary license and complete the construction. It is submitted that the Corporate Debtor is enjoying the possession of the property along with the building, without undertaking any work. In the real estate Project, the builder is obliged to take steps with statutory Authorities for license and construction of the Project. It is submitted that the Appellant has no intention to carry out the delivery of the units to the allottees. Learned Counsel for the Respondents referring to the additional affidavit filed by the Appellant on 19.01.2024 submits that additional affidavit also does not indicate that the Corporate Debtor has any genuine intent towards the Project. It is submitted that the homebuyers are waiting for their units to be allotted for more than 10 years

and only solution is resolution of the Corporate Debtor to enable the Project to be completed.

6. We have considered the submission of learned Counsel for the parties and have perused the record.

7. From the submissions of learned Counsel for the parties and the materials on record, following questions arise for consideration in this Appeal:

- (I) Whether Grandstar Reality Pvt. Ltd., auction purchaser under SARFAESI Act, 2002, on 17.06.2016/ 19.07.2016 can be held to be Financial Creditor of the Respondent allottees, who were issued allotment letters/ Builder Buyers Agreement by Akme Projects Ltd. (the predecessor of the Corporate Debtor)?
- (II) Whether no default was committed by the Corporate Debtor in not carrying out the construction due to interim order passed by the Hon'ble Supreme Court in Civil Appeal No.8788 of 2015 in Rameshwar and Ors. vs. State of Haryana and Ors.; in Writ Petition No.9229 of 2016 – M/s Akme Projects Ltd. vs. YES Bank & Anr.; and in SA No.148 of 2017 in Akme Projects Ltd. vs. YES Bank Ltd. before the DRT-II, Delhi?

Question No.(I)

8. The Builder Buyers Agreement was entered between Akme Projects Ltd. and the allottees between year 2012 to 2015. Under Builder Buyers

Agreement, Home Buyers were to be delivered the flats within three years from the date of execution of BBA with six months grace period. SARFAESI proceedings were initiated by the YES Bank. Sale Notice was issued by the YES Bank, which provided:

“SALE NOTICE (TENDER)

For Immovable Property Under sub rule (6) of rule 8

Whereas the undersigned, being the Authorized Officer {AO} of YES BANK Limited ('the Bank') under the Securitization And Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('the Act') and in exercise of the conferred under Section 13(12) of the Act read with Rule 8 and of the Security Interest (Enforcement) Rules 2002 ('the Rules'), issued a demand notice under Section 13(2) of the Act ('Demand Notice') upon the below-mentioned borrower and guarantors, on the date mentioned hereunder, to repay the amount due. As the borrowed guarantors failed to repay the amount, the Bank took possession of the mortgaged property mentioned herein below on the date mentioned against the property. The borrower /mortgagors/ guarantors hereby requested to repay the outstanding amount as demanded in the said Demand Notice within 30 Days of publication of this notice, as per the provisions under the Rules 8 and 9 of the Rules. If the borrower/ guarantors fail to repay the debts, the property (including encumbrances, if any.) mentioned herein below will be sold on “AS IS WHERE IS”, "AS IS WHAT IS BASIS"; "WHATEVER THERE IS BASIS" and 'NO RECOURSE BASIS'. Interested Parties /Persons are requested to submit their sealed tenders FOR THE PROPERTY up to the below-mentioned dates during office hours on any business day, to Authorised Officer, YES BANK Limited, at, D-12, South Extension Part II, New Delhi - 110049 indicating the details of the property on the envelop for which tender has been submitted.”

9. It is also relevant to notice that in Sale Notice dated 02.04.2016 encumbrances were noticed where a total area 10.881 Acres situated in Village Lakhnaula, Tehsil Manesar, District Gurgaon Haryana was mentioned. The Sale Notice also noticed that approximately 220 Units/ Flats were allotted to prospective buyers. Sale Confirmation Advice was issued on 17.06.2016, which is as follows:

SALE CONFIRMATION ADVICE
(Rule 9(2))

Date: June, 17, 2016
M/s Grandstar Realty Pvt. Ltd.
H-65, Connaught Circus,
New Delhi-10001

Sub: Sale "As is Where is" and "As is What is" basis of Secured Assets in the case of M/s. Akme Projects Ltd., as per Sale Notice (Tender) dated April 02, 2016 under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAEST Act, 2002).

Sir,

In the auction sale conducted on June 14, 2016, you have been declared and confirmed as the successful bidder In respect of the property mortgaged by Akme Projects Ltd and more fully described in the Schedule hereunder, for a bid amount of Rs. 40.75 Crores (Rupees Forty Crores Seventy Five Lakhs only).

You have remitted Rs. 40,750,000,.00/- vide D.D. No. 882444, dated 03/05/2016 and Rs. 61,125,000.03/ vide D.D. No. 882444, dated 03/05/2016 aggregating Rs 101,875,000.00/- (Rupees One Hundred and One Million and Eight Hundred and Seventy Five Thousand only) and you are advised to remit to balance Rs. 305.625,000.00/- (Rupees Three Hundred Five Milion and Six Hundred and Twenty Five Thousand only) within 15 days from the date of this letter Le. on or before June 29, 2016: for issuance of sale certificate.

You may kindly note that on failure to remit the balance amount within the specified period i.e. on or before 29th Day of June, the amount already remitted would be forfeited.

That it is reiterated that 221 number of flats are allotted in the project as per the record of YES Bank Ltd. Further, out of the said 221 allotment, atleast 38 flats are financed by HDFC Ltd, and 42 flats are financed y different Banks/Financial Institution (FI). That you have to abide by the existing tripartite agreement executed between such Banks/FI/HDFC Ltd Akme Projects Ltd. and the lawful allottees of the said units or required shall enter into a fresh tripartite agreement with HDFC Ltd/Bank/FT, it is also clarified that the right of lawful allottees on respective Units flats is not undergoing any change in the auction process and the successful bidder will be required to honour and acknowledge all lawful allotment and such bidder will be entitled to receive the unpaid portion of the consideration of the allotted flats.

It was further informed that pursuant to the Order dated November 23, 2015 of Honble High Court of Punjab & Haryans in CWP NO. 24714 of 2015, YES Bank Ltd. has not taken the possession of Flat No.F-1702 allotted to Mr. Akhilesh Kumar and is not a part of auction proceedings.”

10. The above Sale Confirmation Advice makes it clear that the right of lawful allottees on respective Units flats is not undergoing any change in the auction process and the successful bidder will be required to honour and acknowledge all lawful allotment and such bidder will be entitled to receive the unpaid portion of the consideration of the allotted flats.

11. YES Bank issued Sale Certificate on 19.07.2016 in favour of the Grandstar Reality Pvt. Ltd. Description of the immovable property was mentioned therein. Under ‘List of encumbrances’ following was mentioned:

“1. Nil except flats allotted to respective allottees as per list attached as Annexure-1.”

12. In the Annexure-1, ‘List of Allottees of flats’ contained 220 names along with unit details. Thus, in the Sale Certificate, flats allotted to the respective allottees were encumbrances to the immovable property in question.

13. The learned Counsel for the Respondent has also relied on a Clause in Builders Buyers Agreement entered with flat buyers and the Akme Projects Ltd., which Agreement include its transferee, assignee, successor. The Appellant has brought on record in the Appeal one of the sample Flat Buyer’s Agreement dated 28.08.2012 between M/s Akme Projects Ltd. and one Mahesh Dutt Kala. Akme Ragga Flat Buyer’s Agreement begins as follows:

**“Akme Raaga
Flat Buyer’s Agreement**

This Agreement is made at New Delhi this 28th day of Aug 2012

BETWEEN

M/s Akme Projects Ltd., a company duly Incorporated under the Companies Act 1956, presently having its Registered Office at B-1/E-3, Mohan Co-operative Industrial Area Ph-I. Delhi-110044. (hereinafter referred to as the ‘company’, which expression, unless excluded by or repugnant to the context or meaning thereof, shall mean and include its successors, executors, administrators and assigns) of the FIRST PART.

AND

(FOR INDIVIDUALS)

Shri/Smt./Ms. Mahesh Dutt kala

Son/Daughter/Wife of Mr. Shanker Dutt

Resident of D-40/2, Jangh Vihar,

New Delhi – 110062.”

14. There is definition Clause in the Agreement and the Company has been defined as follows:

“Company” shall have the meaning as ascribed it in the preamble.

15. The preamble, which refers to the description of the Company, which provides “*(hereinafter referred to as the ‘Company’, which expression, unless excluded by or repugnant to the context or meaning thereof, shall mean and include its successors, executors, administrators and assigns)*”. Thus, as per the Flat Buyer’s Agreement successors, executors, administrators and assignee has also to be treated for the Company for the purposes of Flat Buyer’s Agreement. Learned Senior Counsel for the Appellant submits that Grandstar Reality Pvt. Ltd. is not party to the Flat Buyer’s Agreement, which was between Akme and Flat Buyers, hence, the above description of Company is not binding on the Appellant. The Appellant has taken the assets as per auction sale conducted under the SARFAESI Act, 2002. The Sale Certificate and Sale Confirmation Advice have already been noticed by us. Sale Confirmation Advice dated 17.06.2016 contained following stipulation “*it is also clarified that the right of lawful allottees on respective Units flats is not undergoing any change in the auction process and the successful bidder will be required to honour and acknowledge all lawful*

allotment and such bidder will be entitled to receive the unpaid portion of the consideration of the allotted flats". The above stipulation clearly indicates that Grandstar Reality Pvt. Ltd., i.e., successful auction purchaser is obliged to honour and acknowledge all lawful acknowledgment. Thus, the obligation of Akme towards the allottees has been continued and attached with the purchase of assets by the Appellant. The obligation under Flat Buyer's Agreement is an obligation to be discharged by the Appellant. The submission of the Appellant that the Appellant's only obligation is to carry out construction is not the only obligation, which has been undertaken by the Grandstar Reality Pvt. Ltd. All obligation under the Flat Buyer's Agreement has to be treated to have been taken over and acknowledged by the Grandstar Reality Pvt. Ltd. Thus, the definition of 'Company' as noticed in the Flat Buyer's Agreement fully encompasses the Appellant and Grandstar Reality Pvt. Ltd. has to discharge all obligation, which were the obligation of Akme with whom flat buyers entered into Agreement.

16. The learned Senior Counsel for the Appellant in support of his submission that there is no financial debt has relied on the judgment of the Hon'ble Supreme Court in **(2019) 8 SCC 416 – Pioneer Urban Land and Infrastructure Limited and Anr. vs. Union of India and Ors.** Paragraphs 70 to 75, which have been relied, are 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 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.”

74. What is clear from what Shri Venugopal has read to us is that a wide range of transactions are subsumed by para (f) and that the precise scope of para (f) is uncertain. Equally, para (f) seems to be a “catch all” provision which is really residuary in nature, and which

would subsume within it transactions which do not, in fact, fall under any of the other sub-clauses of Section 5(8).

75. And now to the precise language of Section 5(8)(f). First and foremost, the sub-clause does appear to be a residuary provision which is “catch all” in nature. This is clear from the words “any amount” and “any other transaction” which means that amounts that are “raised” under “transactions” not covered by any of the other clauses, would amount to a financial debt if they had the commercial effect of a borrowing. The expression “transaction” is defined by Section 3(33) of the Code as follows:

3. (33) “transaction” includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;

As correctly argued by the learned Additional Solicitor General, the expression “any other transaction” would include an arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay instalments at various stages of construction, so that they themselves then fund the project either partially or completely.”

17. Another judgment relied by learned Senior Counsel for the Appellant is judgment of the Hon’ble Supreme Court in **Anuj Jain, IRP for Jaypee Infratech Ltd. vs. Axis Bank Ltd. & Ors. – (2020) 8 SCC 401**. Reliance has been placed on paragraphs 46 to 48, which are 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 disbursement 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.

47. As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.

48. It is also evident that what is being dealt with and described in Section 5(7) and in Section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the

corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code.”

18. The above judgments notices the essentials for financial debt and Financial Creditor. Financial Creditor is defined in Section 5, sub-section (7), which is as follows:

“**5(7)** “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;”

19. The definition of Financial Creditor means that any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. The crucial word in the definition is “*any person to whom a financial debt is owed*” becomes a Financial Creditor. Further, the expression “*includes a person to whom such debt is legally assigned or transferred to*” is only incidence of further elaboration of person to whom the financial debt is owed. In the facts of the present case, there can be no denying that financial debt, which was owed by Akme to the allottees is now the debt owed by Grandstar Reality Pvt. Ltd. The Grandstar Reality Pvt. Ltd. is fully covered by the definition of Section 5, sub-section (7), who owed the debt towards the allottees. The judgment of the Hon’ble Supreme Court in **Pioneer Urban Land and Infrastructure Limited** and **Anuj Jain, IRP** (supra) lays down the essentials to be proved for a financial debt. There is

no issue that the allottees were Financial Creditor to the Akme and when the Grandstar Reality Pvt. Ltd. has taken obligation of Akme, the financial debt is also owed by Grandstar Reality Pvt. Ltd. towards the allottees. The judgments relied by the Appellant, thus, in no manner support the submission of the Appellant that Grandstar Reality Pvt. Ltd. is not the Financial Creditor of the allottees. The financial debt can be owed in more than one manner. Assignment or transfers are two modes, which has been expressly included in the definition. In cases of amalgamation and demerger under the Companies Act, 2013 of a Corporate Debtor with another entity is obviously considered as Corporate Debtor on account of transfer/ vesting of assets and liabilities to the amalgamated/ transferee Company. Transferee Company cannot be permitted to escape the rigours of the Code by claiming that disbursement was not done to it directly. In the present case, where Grandstar Reality Pvt. Ltd. has taken over the Project under the SARFAESI Act, cannot escape the rigours of the Code and defeat the rights of the homebuyers under the Code. We, thus, are satisfied that there is a financial debt and the filing of the Application by the allottees under Section 7 cannot be faulted on this ground.

Question No.(II)

20. The learned Senior Counsel for the Appellant submits that there is no default committed by the Appellant due to various orders passed by the Hon'ble Supreme Court, Hon'ble High Courts and DRTs, due to which the Grandstar Reality Pvt. Ltd. had no opportunity to carry out the

construction. It is submitted that when there was a restraint by the judicial order, no default can be found with the Grandstar Reality Pvt. Ltd. in not carrying out the construction.

21. We have noticed above the judgment of the Hon'ble Supreme Court in **Rameshwar and Ors. vs. State of Haryana and Ors. – (2018) 6 SCC 215** has been relied by learned Senior Counsel for the Appellant. The judgement of the Hon'ble Supreme Court in **Rameshwar's** case, which was decided by the Hon'ble Supreme Court on 12.03.2018 needs to be noticed to find out, which were the lands, which were covered under the judgment. The final directions issued by the Hon'ble Supreme Court are contained in paragraph 42, which is relevant to notice, is as follows:

“**42.** Having bestowed our attention to various competing elements and issues we deem it appropriate to direct:

42.1. The decisions dated 24-8-2007 and 29-1-2010 referred to hereinabove are set aside as being brought about by mala fide exercise of power. In our considered view, those decisions were clear case of fraud on power and as such are annulled.

42.2. The decision dated 24-8-2007 was taken when the matters were already posted for pronouncement of the award on 26-8-2007. Since all the antecedent stages and steps prior thereto were properly and validly undertaken, and since the decision dated 24-8-2007 has been held by us to be an exercise of fraud on power, it is directed that an award is deemed to have been passed on 26-8-2007 in respect of lands:

- (i) which were covered by declaration under Section 6 in the present case, and
- (ii) which were transferred by the landholders during the period 27-8-2004 till 29-1-2010.

The lands which were not transferred by the landholders during the period from 27-8-2004 till 29-1-2010 are not governed by these directions.

42.3. Subject to the directions issued hereafter, the lands covered under aforementioned Direction 42.2 shall vest in HUDA/Hsiidc, as may be directed by the State of Haryana, free from all encumbrances. HUDA/Hsiidc may forthwith take possession thereof. Consequently, all licences granted in respect of lands covered by the deemed award dated 26-8-2007 will stand transferred to HUDA/HSIDC.”

22. We have noticed above that Subros Ltd. has purchased the land in the year 2003 and Akme Projects Ltd. has purchased the land from Subros Ltd. in 2012. The above transaction, thus, was not clearly covered by judgment of the Hon’ble Supreme Court. The Hon’ble Supreme Court has annulled the transactions/ transfers made by land holders during the period 27.08.2004 to 29.01.2010. The Appellant’s submission that the land in question was covered by the judgment of the Hon’ble Supreme Court does not appeal to reasons. The learned Senior Counsel has placed reliance on the statement made by Counsel on behalf of DTCP before the Punjab and Haryana High Court, where the Counsel stated that land is covered under the **Rameshwar’s** case. There was no direction or declaration by Punjab and Haryana High Court that the land was covered under the **Rameshwar’s** case. Any statement of the Counsel cannot be accepted as against the express content of the judgment of the Hon’ble Supreme Court. It is further relevant to notice that no steps at all were taken by Grandstar Reality Pvt. Ltd. to carry on the construction or to take the Project forward. The judgment of the Hon’ble Supreme Court was

delivered on 12.03.2018, hence, after the said date any doubt or dispute regarding the content of the order passed in **Rameshwar's** case, came to an end and there was no reason for the Appellant not to proceed any further towards the construction of the Project, which was the obligation undertaken by the Grandstar Reality Pvt. Ltd. in auction purchase. It is further relevant to notice that it was the flat buyers themselves, who approached the Hon'ble Supreme Court by filing an Application before the Hon'ble Supreme Court for clarification and Hon'ble Supreme Court issued the clarification in MA No.50 of 2019 filed by Akme Flat Buyer's Association. The said order was passed on 21.07.2022. Paragraphs 46 to 50 of the judgment are relevant, which are as follows:

“46. M/s. R.P. Estates Pvt. Ltd. (hereinafter, “R.P. Estates”) owned 2.9875 acres of land, and M/s. Subros Ltd. (hereinafter, “Subros”) owned 10.881 acres. The lands of both these concerns were included in the notification under Section 4 as well as the declaration under Section 6. The State decided to release these lands, as indicated by its letter to Subros dated 22.08.2007. This stand was reiterated by the State in these proceedings, where it was submitted that as there were no sale transactions with respect to these lands, it was decided not to include them in the deemed award. It was also stated that no developmental rights were parted by them.

47. Learned counsel appearing for both the entities reiterated the State's submissions, that the lands were vested in these two concerns and continued to be so vested. In the circumstances, R.P. Estates and Subros had to be treated as bona fide land owners, since they did not enter into any transactions during the suspect period.

48. In three applications (i.e., I.A. Nos. 111557 of 2020, 111562 of 2020 and 111563 of 2020) in M.A. No. 2067 of 2020, R.P. Estates further submitted that it applied for license from the DTCP much

after the date of the deemed award and was granted License No. 82 of 2009 on 08.12.2009. It also disclosed that developmental rights were thereafter transferred to another enterprise called M/s. Elan Ltd. in 2013-14. The application and pleadings show that the project was completed on 14.01.2020 and the application for grant of occupation certificate was thereafter made, with 305 units allotted to third parties out of a total of 362.

49. Subros had initially challenged the acquisition by filing a writ petition before the Punjab & Haryana High Court.¹¹ However, after it received a letter from the DTCP, communicating recommendation for withdrawal from acquisition, Subros withdrew its petition. Thereafter, it applied for license, and was granted the same on 13.06.2008. Subros did not enter into any collaboration agreement or sell its rights during the suspect period - it sold the lands to one Akme Projects Ltd. much later on 23.01.2012.

50. Having regard to the overall circumstances, this Court is of the opinion that the lands owned by both R.P. Estates and Subros should be excluded from the deemed award. The judgment of the Court dated 12.03.2018 is therefore clarified to the above extent. I.A. No. 111557/ 2020; I.A. No. 111562/2020; and I.A. No. 111563/ 2020 of M.A. No. 2067/2020; I.A. No. 116120/2021; I.A. No. 116128/2021 and I.A. No. 123690/2021 of M.A. No. 50/2019 are disposed off accordingly.”

23. No steps were taken by the Grandstar Reality Pvt. Ltd. to start the construction or to seek any clarification or direction, clearly indicate inaction of the Grandstar Reality Pvt. Ltd., which is nothing but default committed by Grandstar Reality Pvt. Ltd. in proceeding to carry out its obligation under the auction purchase.

24. The learned Senior Counsel for the Appellant has also relied on order passed by Delhi High Court and orders passed by DRT. The Appellant has

referred to order of the status quo passed by Delhi High Court in ***M/s Akme Projects Limited vs. Yes Bank & Anr. in Writ Petition (C) No.9229/2016*** from 05.10.2016 to 01.09.2017. According to own showing of the Appellant, the said order came to an end on 01.09.2017. The DRT by its interim order on 15.09.2017 on an Application filed by Akme Projects Ltd. has directed “*respondent no.2/ Auction Purchaser is hereby restrained to create any 3rd parte interest qua the property in question*”. The above order passed by DRT in no manner precluded the Grandstar Reality Pvt. Ltd. to take steps towards the completion of the Project. In any view of the matter after 07.01.2020 there was no dispute nor any interim order was passed by the DRT, which continued thereafter. Thus, the submission of the Appellant that due to order passed by Hon’ble Supreme Court, Delhi High Court and the DRT, it could not have carried out the construction, cannot be accepted. The assets were handed over to the Grandstar Reality Pvt. Ltd. in July 2016, who was in possession of the assets without undertaking any work. In the real estate Project, which was taken over by the Grandstar Reality Pvt. Ltd., it was the obligation of the Grandstar Reality Pvt. Ltd. to take steps with the statutory Authorities. The learned Counsel for the Respondent is right in her submission that even in additional affidavit filed on 19.01.2024 by the Appellant, no such facts have been stated, which may indicate that Grandstar Reality Pvt. Ltd. has been taking steps for completion of the Project. In the additional affidavit, the Appellant has placed reliance on letter dated 09.05.2023 issued by Tehsildar in terms of the order No.17/LAC dated 12.04.2023 passed by District Revenue Officer

cum Land Acquisition Collector Gurugram. When we look into the said letters/ orders, it is clear that said orders were issued on a request made by one Om Prakash Yadav in the **Rameshwar's** case. Hence, order of the District Revenue Officer dated 12.04.2023 and letter dated 09.05.2023 by Tehsildar are not relevant for the present case. The judgment of the Hon'ble Supreme Court in the **Rameshwar's** case has already clarified the position. More so, there is nothing on record that at any point of time the Grandstar Reality Pvt. Ltd. has taken steps to initiate construction and taken steps for seeking necessary permissions for carrying out construction or shown any order stopping the Grandstar Reality Pvt. Ltd. for carrying out construction, further was passed. We, thus, are satisfied that in the facts of the present case default was clearly proved on the part of the Grandstar Reality Pvt. Ltd. and the findings recorded by the Adjudicating Authority that Section 7 Application is complete and deserved to be admitted, does not warrant any interference.

25. The learned Senior Counsel for the Appellant has also submitted that in the CIRP of Akme Project, allottees have also filed their claim. The said arguments was rejected by the Adjudicating Authority in paragraph-19 of the order, which is as follows:

“**19.** As regards to the Corporate Debtor's contention that CIRP has already been initiated against the Original Borrower and the Applicants had submitted their claims in the CIRP of the Original Borrower, this Adjudicating Authority is of the view that the admissibility of the Applicants claim in the CIRP of the Original Borrower shall not preclude the claim of the Applicants against the Corporate Debtor, as the Corporate Debtor herein is now in the

ownership as well as in the physical possession of the Project land and also undertaken the liability to complete construction and deliver possession by receiving the unpaid portion of the consideration from the Allottees.”

26. We find substance in the submission of learned Counsel for the Respondent that since the Project has been taken over by the Grandstar Reality Pvt. Ltd. in 2016 and it is now the obligation of Grandstar Reality Pvt. Ltd. to continue the Project, the filing of the claim by the allottees against the CIRP of Akme Project, cannot preclude the allottees from agitating their claim by filing Application under Section 7 against the Grandstar Reality Pvt. Ltd., who has taken over the Project.

27. In view of the foregoing discussions and conclusions, we are satisfied that there is no error in the order of the Adjudicating Authority admitting Section 7 Application. The Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

14th March, 2024

Ashwani