

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**Company Appeal (AT) (Ins) No.1183 of 2019**

[Arising out of Order dated 30.09.2019 by National Company Law Tribunal, New Delhi in CA No.257/ND/2019 in Company Petition No.IB-1059/ND/2018]

**IN THE MATTER OF:**

**Before NCLT**

**Before NCLAT**

New Okhla Industrial  
Development Authority  
Through Mr. Tejveer Singh,  
Authorized Representative,  
Main Administrative Building,  
Sector 06, Noida,  
District Gautam Buddha  
Nagar – 201 301  
Uttar Pradesh

Applicant

Appellant

**Vs.**

Mr. Anand Sonbhadra  
(Resolution Professional)  
E-10A, Kailash Colony,  
New Delhi 110048

Respondent

Respondent

**For Appellant:**

**Mr. Raju Ramachandran, Sr. Advocate with Mr. Sourav Roy and Mr. Prabudh Singh, Advocates**

**For Respondent:**

**Mr. Prateek Kushwaha, RP  
Mr. Anand Sonbhadra (Party in person)**

**J U D G E M E N T****(16<sup>th</sup> April, 2021)****A.I.S. Cheema, J. :**

1. This Appeal has been filed by the Appellant – New Okhla Industrial Development Authority (NOIDA - in short) against Respondent – Resolution Professional of Corporate Debtor – M/s. Shubhkamna Buildtech Pvt. Ltd. In the Corporate Insolvency Resolution Process (CIRP – in short) started against the Corporate Debtor, the Appellant a Statutory Authority filed Form 'B' as Operational Creditor for dues outstanding against lease of plot granted in favour of the Corporate Debtor which amount was of Rs.99,32,55,183. The Representative of the Appellant even attended COC (Committee of Creditors) as Operational Creditor. Later, the Appellant filed claim in Form 'C' seeking status of NOIDA as Financial Creditor. As there was no response by the Resolution Professional (RP – in short), the Appellant entered into correspondence and even moved Adjudicating Authority (National Company Law Tribunal, New Delhi) which passed Orders on 26.07.2019 and sent matter to the Resolution Professional but still when the Appellant was not treated as Financial Creditor, Application CA 257/ND/2019 was filed claiming that RP had disobeyed earlier directions and that Appellant deserved to be treated as Financial Creditor and should be permitted to participate in COC with voting rights.

2. The matter was taken up before the Adjudicating Authority and the Adjudicating Authority after hearing both sides held that the lease deed

concerned was not a financial lease as per the terms laid down under the guidelines of “Indian Accounting Standards”. Thus, the present Appeal.

3. It is argued and the Appeal claims that the Adjudicating Authority did not record reasons for its findings and thus, the Order is bad in law. The Appeal claims that the Corporate Debtor had entered into a lease deed with the Appellant on 30<sup>th</sup> July, 2010 (Annexure A-2 – Page 57). According to the Appellant, it is a finance lease under the Indian Accounting Standards and thus, a financial debt under Section 5(8)(d) of Insolvency and Bankruptcy Code, 2016 (IBC – in short). It would be appropriate to reproduce the concerned portion of the definition. Section 5(8)(d) reads as under:-

“(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

.....

(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;”

4. The lease deed concerned is dated 30<sup>th</sup> July, 2010 (Annexure A-2 – Page 57). We will refer to the contents of the lease deed later. At present, it would be appropriate to reproduce relevant portions from “Indian Accounting Standards”, filed by the Appellant. The Appellant claimed that the copy of the Companies (Indian Accounting Standards) Amendment Rules, 2019 is enclosed as Annexure A-12. Annexure A-12 (Page – 136)

states that these Rules may be called the Companies (Indian Accounting Standards) Amendment Rules, 2019. With regard to leases (which starts at Page – 146 of the Appeal Paper Book), the portions referred to, and relied on for the claim and defence are paragraphs – 61 to 67 which read as under:-

- “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 equalling 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.”

5. In the above context, the Appeal claims and it is argued (Appeal para – 7.15) that the RP failed to consider that the lease is financial lease under Section 5(8)(d) of IBC. That, a financial lease under the Indian Accounting Standards is a lease which transfers substantially all the risks and rewards incidental to ownership. Appellant claims that under the lease deed dated 30.07.2010 (hereafter referred as lease deed), the risks and rewards pertaining to the use of allotted land are all incidental on Corporate Debtor because after payment of the lease deed according to the schedule provided, the permission to transfer ownership of flat (which were to be built) or to part with possession of whole or any part of the land would have been given to the Corporate Debtor. The Appellant claims that it is development authority and holds land in public trust and it is held in greater interest of the public at large. The transaction is clearly “money borrowed against payment of interest” or clearly has the “commercial effect of a borrowing” (Para – 7.17 of Appeal). The upfront premium has to be paid by 16 half yearly instalments starting from 11.09.2010 till 11<sup>th</sup> March, 2020. The Appeal gives breakup of the instalments. According to the Appellant, interest @ 11% per annum was to be paid on “outstanding balance of upfront lease premium” which was secured by creation of first charge in

favour of the Appellant over the leased land. On this basis, it is claimed (in Appeal Para – 7.18) as under:-

“Thus, even though no monies were directly disbursed by the Appellant to the Corporate Debtor, there was effectively, a deemed disbursement whereby the payment of upfront lease premium was financed by way of an inbuilt financial facility (availed from the Appellant itself), pursuant to which the Respondent was permitted to pay such upfront lease premium amount by way of instalments along with interest, representing time value of money for the Appellant. Therefore, the Lease Deed was a merger of a simpliciter lease transaction and a secured interest bearing financial ability. Thus, by virtue of the nature of the Lease Deed the debt payable by the Corporate Debtor to the Appellant, clearly constituted a ‘Financial Debt’ under Section 5(8)(a) of the Insolvency and Bankruptcy Code, 2016 (“Code”) being money borrowed against the payment of interest.”

6. It is claimed that under the Lease Deed, risks and rewards of ownership were transferred to the Corporate Debtor “if the dues are paid according to the schedule of payment in the Lease Deed”. For such reasons, the Appeal claims that the lease deed should have been treated as financial lease.

7. Referring to the definition of finance lease (para – 62 of Accounting Standards) (referred supra), Appellant claims that the lease deed put liability of maintenance and responsibility for misuse of the land allotted to the Corporate Debtor. The Corporate Debtor gained right to further transfer its interest “if the dues as per the lease deed are paid according to the schedule of payment” (Appeal Para – 9.3). The Appeal goes on to repeat that

risks and rewards were incidental on the Corporate Debtor. The liability to pay tax and maintenance of land was also lying with the Corporate Debtor. The only liability of the Appellant was to ensure that the land is being used for the purpose mentioned in the lease deed. Para – 9.4 of the Appeal referred to the finance lease which requires that additional factor which leads to the classification of lease as financial lease under the Companies (Indian Accounting Standards) Amendment Rules, 2019 includes “the transfer of ownership of the asset to the lessee by the end of the lease term”. (However, the Appeal without referring to this aspect any further, states that the substance of the transaction determines the nature of the lease rather than the form of contract.) According to the Appellant, referring to para – 63 of the Indian Accounting Standards, (the Appeal claims that) the lease deed is financial lease as the Corporate Debtor has right to choose sub-lessee and dispose of the property allotted “in terms” of the lease deed. On such basis, it is argued that the Corporate Debtor was granted right of ownership over the land. Referring to the contents of the lease deed, the Appeal claims (para – 9.8) that there was effectively “deemed disbursement” whereby the payment of upfront lease premium was financed by way of an inbuilt financial facility availed from the Appellant, pursuant to which “Corporate Debtor was permitted to pay such upfront lease premium amount by way of instalments along with interest”. Thus, it is claimed that this represented value of money for the Appellant. It is argued and the Appeal refers to the portion in lease deed regarding transfer of plot and misuse, addition,



subtraction, etc. to submit that the Appellant was “only exercising minor supervision over the land”.

8. On such basis, the learned Counsel for the Appellant has argued to submit that it was a financial lease under Section 5(8)(d). For such reasoning, the Appellant is also further arguing that the claim of the Appellant that it is financial debt, is not merely on the basis of Section 5(8)(d) but also on the basis that the transaction has “commercial effect of borrowing”, and so is covered under Section 5(8)(f).

9. Against this, the Respondent – Resolution Professional relies on the Reply filed to the Appeal (Diary No.16867) and referring to the contents of the lease deed as well as the Indian Accounting Standards, the Respondent has argued that it is not a financial debt and the Appellant initially correctly claimed itself to be only an Operational Creditor but later on, has been trying to bring the lease deed within the definition of financial lease which is not correct in law.

10. The parties were heard. Both the sides referring to the lease deed and the Indian Accounting Standards, have tried to show how the lease deed fits into the requirement under the Indian Accounting Standards or does not fit in the same. The parties were asked to file charts in support of the submissions they were making. We will reproduce the charts one below each other which will give birds eye view of the rival claims.

11. The Appellant has filed the table with written submissions (Diary No.23977) as Annexure - 8 (Page - 14) which is as under:-

<b>ANNEXURE-8</b>		<b>14</b>
<b>ANALYSIS OF THE FACTORS UNDER THE INDIAN ACCOUNTING STANDARDS VIS-À-VIS THE PROVISIONS OF THE LEASE DEED:</b>		
<p>The following table shows the factors which have been enshrined under the AS 116 of the Indian Accounting Standards and their co-relation with the terms of the Lease Deed:</p>		
<b>PARAS OF THE INDIAN ACCOUNTING STANDARDS</b>	<b>PROVISIONS OF THE LEASE DEED</b>	
<b>Under Para 63:</b>		
<p>(a) The lease transfers ownership of the underlying asset to the lessee by the end of the lease term.</p>	<p>Under Clause (II) (c) of the Lease Deed <b>(p.68 of the Appeal)</b> the Lessee has the right to transfer the dwelling units/built up space/plots to third parties by way of a sub-lease deed. Therefore, the question of transfer of ownership to the Lessee does not arise in the facts of the present case because by the end of the lease term, third party rights would already have been created over the dwelling units/built up space/plots constructed by the Lessee.</p> <p>The Lessee alone brings such third parties on to the property and gets paid by such parties (purchase price of a unit).</p>	
<p>(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.</p>	<p>In the present case, firstly, the Lease Rent is being paid by the Lessee for leasing the land, and secondly, the premium amount is being paid by the lessee for acquiring rights to the develop and construct buildings on the leased land. Therefore, the underlying asset in question, in the present factual circumstances is not just the land which has been leased but the right to develop or construct a building on the leased land.</p> <p>For obtaining this right, the Lessee paid a bare minimum allocation amount and remained liable to pay the rest of the premium amount in 16 half-yearly instalments along with interest. Therefore, in effect, the Lessee, has already acquired the right to construct and develop the property at a far lesser amount as the entire payment was not made at the time of allocation.</p>	

  
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<p>(c) The lease term is for the major part of the economic life of the underlying asset even if title is not transferred.</p>	<p>In this regard, the Appellant submits that once the construction of the project is completed and third party rights are created over the dwelling units/built up space/Plots by way of a Sub-Lease Deed Under Clause (II) (c) of the Lease Deed, the leased land on which the project has been constructed, shall be of no value to the lessor. This is because, once the third-party rights have been created over the dwelling units/built up space/Plots, the economic life and value of the asset will have been exhausted.</p> <p>It should however be borne in mind that it is the Lessee who decides what is to be constructed, what is the price for the constructed dwelling units/built up space/Plots and to whom the dwelling units/built up space/Plots will be sold to.</p>
<p>(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</p>	<p>As on the inception date, under Clause (II) (a) (v) of the Lease Deed(p.67 of the appeal), the Lessee has the option to pay a One-time Lease Rent equivalent to Lease rent for 11 years at the rate of 1% of the premium of the plot per year. If the Lessee exercises this method of payment, then the Lessee does not have to pay the lease rent any further. Similarly, the premium amount which the lessee ought to pay under the Lease Deed signifies the minimum price payable by the Lessee to acquire rights for development and construction on the Leased Land.</p>
<p>(e) The underlying asset is of such a specialized nature that only the lessee can use it without major modifications.</p>	<p>By acquiring the right to construct and develop the leased land, the Lessee has agreed to construct residential flats as a part of group housing pockets/ flat/ plots (in case of plotted development) according to the setbacks and building plans approved by the Lessor. Only the Lessee can use and make gains from it after selling it to homebuyers. No party other than the Lessee, can use it therefore.</p>
<p><b>Under Para 64:</b></p>	

  
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(a) If the lessee can cancel the lease, the lessor's losses associated with the cancellation are borne by the lessee;	In the present case, the question of cancellation of the Lease Deed by the Lessee does not arise because ultimately, the Lessee will have built and transferred the dwelling units/built up space/Plots to third parties. For constructing the dwelling units/built up space/Plots, the Lessee reaps profits or bears the losses (risks and rewards) which arise out of the consideration paid for the construction of dwelling units/built up space/Plots by the prospective homebuyers.
(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 equalling most of the sales proceeds at the end of the lease) and;	After the construction of the project, the residual neither goes to the Lessee nor to the Lessor as third party rights are created on the property who will have an onward right to transfer such rights to other parties.
(c) The lessee has the ability to continue the lease for a secondary period at a rent that is substantially lower than market rent.	The lessee has the option to pay a one-time lease rent under Clause (II) (a) (v) (p.67 of the Appeal) equivalent to Lease rent for 11 years at the rate of 1% of the premium of the plot per year. If the Lessee exercises this method of payment, then the Lessee does not have to pay the lease rent any further.  Furthermore, third party rights are to be created on the property for which the Lessee will already have earned consideration of its own choosing, therefore, after transfer via Sub-Lease to such third parties (homebuyers), and the Lessee having reaped the rewards of it, the Lessee will have exited the project. So, the question of continuing the lease after Lessee transfers the rights under the Lease Deed, doesn't arise.



12. The Respondent has filed the chart with Diary No.24099 which is as under:-

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**BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL,  
AT NEW DELHI  
APPELLATE JURISDICTION  
APPEAL No. 1183 of 2019**

**IN THE MATTER OF:**  
NEW OKHLA INDUSTRIAL DEVELOPMENT AUTHORITY .... Appellant  
v.  
MR. ANAND SONBHADRA (RESOLUTION PROFESSIONAL) ....Respondent

**Comparative chart of the Indian Accounting Standards and the Lease Deed  
Dated 30.07.2010**

Srl No.	Indian Accounting Standards	Lease Deed dated 30.07.2010 "Lease Deed"
1.	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 financial lease are:  The lease transfers ownership of the underlying asset to the lessee by the end of the lease term [See Clause 63 (a) @Pg 157 of the Appeal paper book]	The Lease Deed <u>does NOT</u> have any clause therein, which provides for transfer of ownership of the underlying asset to the Lessee, pursuant to the conclusion of the Lease Deed.
2.	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 reasonable certain, at the inception date that the option will be exercised. [See Clause 63 (b) @Pg 157 of the Appeal paper book]	As aforementioned, a perusal of the Lease Deed indicates that the Lessee has <u>NO</u> option to purchase the underlying asset, let alone the option of purchasing it at a price that is sufficiently lower than the fair value on the date the option becomes exercisable.
3.	The lease term is for the major part of the economic life of the underlying asset even if title is not transferred. [See Clause 63 (c) @Pg 158 of the Appeal	(i) The Lease Deed specifically stipulates that the concerned plot of land can be held by the Lessee only for a term of 90 years. [See Pg 66 of the Appeal paper book]

	<i>paper book]</i>	(ii) Moreover, it is pertinent to highlight herein, that a term of 90 years for an immovable property like the concerned plot is by no means a substantial part of the economic life. Infact, it is trite to state that the economic life of the bare land such as this, is infinite and cannot be said to be curtailed only to a period of 90 years.
4.	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 <i>[Clause 63 (d) @Pg 158 of the Appeal paper book]</i>	(i) The Respondent has made no argument or put forward any calculation which substantiates/ corroborates its claim that the net present value is equal to fair value of underlying asset. (ii) Furthermore, the yearly lease rental of Rs. 46,00,000/- (Forty Six Lakhs only) as has been specified in the Lease Deed cannot be equated to the fair value of the underlying asset.
5.	The underlying asset is of such a specialised nature that only the lessee can use it without major modifications. <i>[Clause 63 (e) @ Pg 157 of the Appeal paper book]</i>	The underlying asset is not of a special nature as the concerned plot is bare land which can be utilised by any Developer. Therefore, the development on the said land is not specific to only the needs of the Corporate Debtor.
6.	Indicators of situations that individually or in combination could also lead to a lease being classified as a finance lease are:  If the Lessee can cancel the lease, the lessors losses associated with the cancellation are borne by the lessee <i>[Clause 64 (a) @ Pg 158 of the Appeal paper book]</i>	The present Lease Deed has <u>NO</u> provision in the Lease Deed whereby the Lessee can cancel the Lease Deed. In fact it is apposite to note that, on the contrary, the rights to cancel the Lease Deed vest solely and exclusively with the Lessor. <i>[See Pg 76 of the Appeal paper book]</i>
7.	Gains or losses from all the fluctuations in the fair value of the residual accrue to the lessee; for example, in the form of a rent rebate equalling most	Gains or losses from all the fluctuations in the fair value of the residual <u>does not</u> accrue to the Lessee. It has specifically been provided in the Lease Deed that the unearned increase

	<p>of the sales proceeds at the end of the lease. <i>[Clause 64 (b) @ Pg 158 of the Appeal paper book]</i></p>	<p>in the value of the Leased Premise shall be at the disposal of the Lessor. The relevant clause is reproduced as follows:</p> <p>“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 charge, 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. <i>[See Pg 72 and 73 of the Appeal paper book]</i></p> <p>Thus, the unearned increase accrues to the Lessor and the Lessor will have 1<sup>st</sup> charge and decide a percentage of recovery and decision for market value will be binding.</p>
8.	<p>The lessee has the ability to continue the lease for a secondary period at a rent that is substantially lower than market rent. <i>[Clause 64 (c) @ Pg 158 of the Appeal paper book]</i></p>	<p>There is <u>NO such clause</u> allowing a secondary period of lease which has been included in the present Lease Deed [Let alone at a rent that is substantially lower than the market rate]. On the contrary the Lessee only has the option to hold the concerned plot with appurtenances until the lease term of 90 years subject to the rights of the Lessor. <i>[See Pg 66 of the Appeal paper book]</i></p>
9.	<p>It transfers substantially all the risks and rewards incidental to ownership of an underlying asset. <i>[See Clause 62 @ Pg 157 of the Appeal Paper Book]</i></p>	<p>(i) The Lease Deed provides for clauses that illustrate that it <u>does not</u> transfer risk and reward incidental to ownership of the underlying asset.</p> <p>(ii) Even during the lease period all rights with respect to the land, including right of way and right to valuable minerals in the land <u>are</u></p>



		<p>reserved with the Lessor. The Clauses in the Lease Deed which illustrate the aforesaid are as follows:</p> <p><b>Rights reserved with the Lessor:</b></p> <p>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. <i>[See Pg 66 of the Appeal Paper Book]</i></p> <p>The Lessor reserves the right to all mine and minerals, claims, washing goods, earth oil, quarries in over and 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 foe any building for the time 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 lessees. <i>[See Pg 67 of the Appeal Paper Book]</i></p> <p>The Lessor reserves the right to all mines, minerals, coals, washing gold, earths oils, 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 and obtaining removing and enjoying</p>
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		<p>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 Officer/Lessor on the amount of such compensation shall be final and binding on the Lessee/sub-lessee. <i>[See Pg 75 of the Appeal Paper book]</i></p> <p>(iii) Furthermore, any right to sub lease by the Lessee during the subsistence period of the lease is highly circumscribed by the restriction imposed by Lessor, i.e. Sub Leases are to be governed by the transfer policy of the Lessor and are subject to an execution of a tripartite sub-lease deed as prescribed by the lessor. The relevant clauses which illustrate the aforesaid is as follows:</p> <p>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 or building by-laws and prevailing and under mentioned terms and conditions to the lessor. <u>Further transfer/sub lease shall be governed by the transfer policy of the Lessor: [See Pg 68 of the Appeal Paper Book]</u></p> <p>(iii) the permission of part transfer of plot shall not be granted under any circumstances. The lessee shall not be entitled to complete transaction for sale, transfer, assign</p>
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		<p>or otherwise part with possession of the whole or any part of the building constructed thereon before making payment according to the schedule in the lease deed of the plot to the lessor. However, after making the payment of the premium of the plot to the lessor as per schedule in the lease deed, permission for transfer for 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. <u>However, the Lessor reserves the right to reject any transfer application without assigning any reason.</u> The lessee will also be required to pay transfer charges as per the policy prevailing at the time of such permission of transfer. <i>[See Pg 68-69 of the Appeal Paper book]</i></p> <p>The permission to transfer the part or <u>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.</u> On the fulfilment of the following conditions:</p> <ol style="list-style-type: none"> <li>a) The Lease Deed of plot has been executed and the Lessee has made the payment according to the schedule in the lease deed of the plot, interest and one time lease rent.</li> <li>b) Every sale done by the lessee shall have to be registered before the physical possession of the property is handed over.</li> <li>c) The Lessee has obtained building occupancy certificate from building cell, NOIDA.</li> </ol>
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		<p>d) The lessee shall submit list of individual allottee of flats within 6 months from the date of obtaining occupancy certificate.</p> <p>c) <u>The Lessee shall have to execute sub lease in favour of the individual allottee for the developed flats/plots in the form and format as prescribed by the Lessor.</u></p> <p>f) The sub lease undertakes to put to use the premises for the residential use only.</p> <p>g) The Lessee shall pay an amount of Rs. 1000/- towards processing fee and proportionate (pro-rate basis) transfer charges and lease rent as applicable at the time of transfer and <u>shall also execute sub lease deed between lessor, lessee and proposed transferee (sub-lessee).</u> The Lessee/sub lease shall also ensure 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 leasehold properties and shall have to pay the charges as per rules of the lessor/Government of UP. <i>[See Pg 69-70 of the Appeal Paper Book]</i></p> <p>(iv) Apart from the aforementioned illustrations, the Lease Deed also prescribes for rights to mortgage by the Lessee being subject to prior permission of the Lessor and subject to the Terms and conditions which may be decided by the Lessor. The relevant clause is reproduced as follows:</p> <p><b>Mortgage</b></p> <p>The lessee may with <u>prior permission</u> of the Lessor, mortgage</p>
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		<p>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 on 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, <u>N.O.C maybe issue subject to such terms and conditions as may be decided by the Lessor at the time of granting the permission.</u> Provided that in the event of sale or foreclosure of the mortgaged/charged property <u>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 charge 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.</u></p> <p>The Lessors right to recovery of the unearned increase and the pre-emptive right to purchase the property as mentioned herein before shall apply equally to involuntary sale or transfer, be it bid or through execution of decree of insolvency/count. <b><i>[See Pg 72 and 73 of the Appeal paper book]</i></b></p> <p>(v) Moreover, even during term of tenancy the Lessor can terminate the lease. Various clauses provide for such termination as illustrated below:</p>
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		<p><b>Misuse, Additions, Alterations Etc:</b> The Lessee shall not use flat for any purpose other than for residential purpose.</p> <p><u>Incase of violation of conditions specified in the lease deed, allotment shall be liable to be cancelled and possession of the premises along with structure thereon if any shall be resumed by the lessor (Authority).</u></p> <p>The lessee will not make any alteration or additions to the said building or other erections for the time being on the demised premises, erect or permit to erect any new building on the demised premises without the prior written consent of the Lessor and in case of any deviation from such terms of plan, shall immediately upon receipt of notice from the Lessor requiring him to so, correct such deviation as aforesaid. <i>[See Pg 74 of the Appeal Paper book]</i></p> <p><b>Cancellation of Lease Deed:</b> In addition to the other specific clauses relating to cancelation, the <u>Lessor as the case may be will be free to exercise its right of cancellation of lease in the case of:</u></p> <ol style="list-style-type: none"> <li>1. Allotment being obtained through misrepresentation/ suppression of material facts, misstatement and/or fraud.</li> <li>2. Any violation of directions issued and regulation framed by Lessor or by any other statutory body.</li> <li>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.</li> </ol>
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		<p>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 forfeited 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.</p> <p>5.If the allotment is cancelled on the ground mentioned in sub clause 1 above, then the entire amount deposited by the lessee till date of cancellation shall be forfeited by the Lessor and no claim whatsoever shall be entertained in this regard. <i>[See Pg 76 and 77 of the Appeal Paper book]</i></p> <p><b>Other Clauses:</b></p> <p>9. Dwelling Units flats shall be used for residential purpose only incase of default, <u>render the allotment/lease liable for cancellation</u> and the Allottee/Lessee/sub-lessee will not be paid any compensation thereof. <i>[See Pg 78 of the Appeal Paper book]</i></p> <p>12. The Lessee shall not be allowed to assign or change his role, <u>otherwise the lease shall be cancelled and the entire money deposited shall be forfeited.</u></p> <p><i>[See Pg 78 of the Appeal Paper</i></p>
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Therefore, all of the above clauses as under the Lease Deed are categorically indicative of the fact that, let alone transferring ownership after the lease deed to the Lessee, in fact, even during the subsistence of the lease period itself, the Lessors can cancel the Lease Deed as per its own accord.

(vi) It also apposite to highlight at this juncture, that the Lease Deed further imposes strict obligations upon the Lessee to maintain the concerned plot of land. In case such obligations are not complied with by the Lessee, the Lease Deed stipulates that it shall be liable to incur penalties as the Chief Executive Officer may deem fit. Therefore, it is pertinent to highlight and note herein, that if substantial transfer of ownership had accrued to the Lessee, it would be the discretion of the Lessee as to whether it chose to maintain the concerned Plot or not. However, in the present case the owner i.e. the Lessor has made it an imperative obligation for the Lessee to maintain the property, failure of which shall lead to penal consequences. The following clause illustrates the aforementioned:

**Maintenance:**

1. The Lessee at his own expenses will take permission for sewage. Electricity and water connections from the concerned departments.
2. The Lessee shall have to plan a maintenance programme whereby the entire demised premises and buildings shall be kept:
  - a. In a state of good and

		<p>substantial repairs and in good sanitary condition to the <u>satisfaction of the Lessor at all times.</u></p> <p>b. And to make available required facilities as well as to keep surroundings in all times neat and clean, good healthy and safe conditions according to the convenience of the inhabitants of the place.</p> <p>3. That the Lessee shall abide by all regulations, bye-laws, directions and guidelines of the Lessor framed /issued under section 8, 9 and 10 or under an other provisions of U.P Industrial Area Development Act 1976 and rules made therein.</p> <p>4. <u>In case of non-compliance of terms and directions of lessor, the Lessor shall have the right to impose such penalty as the chief executive Officer may consider just and expedient.</u></p> <p>The Lessee/sub lessee shall make such arrangements as are necessary for the maintenance of the building and common services and of the building is not maintained properly, the Chief Executive Officer or any officer authorized by the 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/regulations 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 by the lessor shall</p>
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		<p>be entertained and decision of the Chief Executive Officer of the Lessor in this regard shall be final. <i>[See Pg 75 and 76 of the Appeal paper book]</i></p> <p>(vii) Lastly, in case the ownership was transferred to the Lessee, the Lessee would have the power to make alterations to the concerned plot as and when it deemed necessary. However, in the present case, the Lease Deed specifically states that the Lessee cannot make any alterations to the concerned plot of land, without the consent of the Lessor. The relevant paragraph illustrating the same has been extracted hereinbelow:</p> <p><b>Misuse, Additions, Alterations Etc</b></p> <p>The lessee will not make any alteration or additions to the said building or other erections for the time being on the demised premises, erect or permit to erect any new building on the demised premises without the prior written consent of the Lessor and in case of any deviation from such terms of plan, shall immediately upon receipt of notice from the Lessor requiring him to so, correct such deviation as aforesaid. <i>[See Pg 74 of the Appeal Paper book]</i></p>
10.	Judicial Pronouncements with respect to operating lease and financial lease	(i) The Supreme Court in the case of <i>Asea Brown Boveri Ltd v. Industrial Finance Corporation of India and Others (2004) 12 SCC 570 [Para 12-17]</i> has acknowledged the criteria's laid down by the Indian Accounting Standards and states that one of the principal features of a Financial

		<p style="text-align: right;">14</p> <p>Lease Deed is that the said Lease is non-cancellable. This judgment has also been followed by the Delhi High Court in <i>Commissioner of Income Tax v. Motor and General Finances Ltd 2009 SCC Online Del 4258 [ Paras 8-11]</i>.</p> <p>(ii) A perusal of the aforementioned judgments shall indicate that, the present case does not meet the criteria's of a finance lease:</p> <ul style="list-style-type: none"> <li>• The Lease is cancellable.</li> <li>• There is no substantial transfer of all the risks and rewards incident to ownership of an asset.</li> <li>• The lessor is interested in the assets as opposed to a financial lease wherein the Lessor is only a financier and is not interested in the assets.</li> </ul>
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13. Before discussing the Indian Accounting Standards and considering the arguments as submitted with regard to the requirements as can be seen from the respective charts, it would be appropriate to refer to Judgement in the matter of **“Asea Brown Boveri Ltd. Versus Industrial Finance Corporation of India and Others”** reported in (2004) 12 SCC 570 (SCC Online Web Edition) (copy is filed with Diary No.24100 by the Respondent). This matter of “Asea Brown” related to lease finance agreement dated 4<sup>th</sup> December, 1990 with Respondent No.3 of that matter, pursuant to which

the Appellant took 56 cars under the lease finance from Respondent No.3 in that matter. Subsequently, Respondent No.3 became notified party under Section 3(2) of the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 due to certain illegal transactions covering period between 1.4.1991 and 6.6.1992. The transaction dated 4<sup>th</sup> December, 1990 was not referable to the concerned period. The Central Government appointed Respondent No.1 of that matter under Section 3(1) of 1992 Act over properties belonging to Respondent No.3. The Appellant in that matter continued to make payments to Respondent No.1. Subsequently, Special Court refused to treat the transaction as one of lease finance and treated it only as lease. When the matter went to the Hon'ble Supreme Court of India, it was observed (in para -8 as under):-

“Thus the Special Court has rigidly applied the rules of pleadings but a perusal of the order shows that there has been no effort to scrutinize and interpret the documents evidencing the transaction so as to determine the real nature thereof.”

14. The Hon'ble Supreme Court dealt with the issue as to what is a lease finance. Para – 13 to 17 of the Judgement of Hon'ble Supreme Court may be reproduced:-

“**13.** What is a lease finance? According to *Dictionary of Accounting & Finance* by R. Brockington (Pitman Publishing, Universal Book Traders, 1996 at p. 136) :

"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)

**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)

**15.** According to *Lease Financing & Hire Purchase* by Vinod Kothari (2nd Edn., 1986, at pp. 6 & 7), a finance lease, also called a capital lease, is nothing but a loan in disguise. It is only an exchange of money and does not result into creation of economic services other than that of intermediation. The learned author has quoted T.M. Clark, one of the most authentic writers on the subject who defines lease and operating lease in the undergoing words:

"A financial lease is a contract involving payment over an obligatory period of specified sums sufficient in total to amortise the capital outlay of the lessor and give some profit."

\* \* \*

An operating lease is any other type of lease – that is to say, where the asset is not wholly amortised during the non-cancellable period, if any, of the lease and where the lessor does not rely for his profit on the rentals in the non- cancellable period."

**16.** The features of the financial lease, according to the learned author are as under:

"1. The asset is use-specific and is selected for the lessee specifically. Usually, the lessee is allowed to select it himself.

2. The risks and rewards incident to ownership are passed on to the lessee. The lessor only remains the legal owner of the asset.

3. Therefore, the lessee bears the risk of obsolescence.

4. The lessor is interested in his rentals and not in the asset. He must get his principal back along with interest. Therefore, the lease is non- cancellable by either party.

5. The lease period usually coincides with the economic life of the asset and may be broken into primary and secondary period.

6. The lessor enters into the transaction only as a financier. He does not bear the costs of repairs, maintenance or operation.

7. The lessor is typically a financial institution and cannot render specialized service in connection with the asset.

8. The lease is usually full-pay-out, that is, the single lease repays the cost of the asset together with the interest."

**17.** 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.”

In the above Judgement, we are not concerned with part where the Hon’ble Supreme Court referred to International Accounting Standards Committee. Rest of the Judgement is material. Under Section 5(8)(d), we are concerned with Indian Accounting Standards. With this in view, if para – 63 of the Indian Accounting Standards (referred supra) is perused, the present lease deed does not have any Clause of transfer of ownership of the underlying asset (which is land) (and not flats harped on by Appellant) to the lessee or flat buyers who would be sub-lessees at the end of the lease term. We are aware that under paragraph – 63, this is one of the factors but then it is an important factor when we read the Judgement of the Hon’ble Supreme Court in the matter of “Asea Brown” where Hon’ble Supreme Court referred to the issue as to what is a lease finance in the context of commercial transactions. Para – 61 of the Indian Accounting Standards,

while dealing with classification of lease, states that the lessor shall classify each of its leases as either an operating lease or a fiancé lease. In the present matter, there is no such classification done by the lessor when the lease deed was executed. Of course, that would not be a deciding factor as, even if a document is stated to be a financial lease or an operating lease, it would be necessary to consider the contents to ascertain real nature of the transaction. Material is Para – 62 of Accounting Standards (referred supra) which states that a lease is classified as a finance lease “if it transfers substantially all the risks and rewards incidental to ownership of an underlying asset.” Paragraphs – 63 and 64 records the factors or indicators which individually or in combination are required to be seen if it is a financial lease. The Respondent has in comparative chart filed, referred to various clauses to forcefully put on record that the present lease deed is not a finance lease. Even without referring to them when we keep in view the guiding factor if the lease transfers “substantially all the risks and rewards incidental to ownership”, we find that the present lease deed hopelessly fails in this regard. We have gone through the contents of the lease deed (Annexure A-2 – Page 57 to 87) (Page Nos.86 and 87 are a subsequent communication which is not part of the lease deed). The lease deed is heavily tilted in favour of the Appellant controlling almost all the aspects and while passing over the risks to the Corporate Debtor, keeps the rewards with Lessor, except the liberty to sell the flats which would be constructed.

15. We proceed to refer to portions of the lease deed which would rather show that rewards incidental to ownership of the underlying asset which is land, were not transferred.

16. We will refer to page number of the lease deed (rather than page number of the Appeal) while referring to the contents of the lease deed with the Corporate Debtor. The Appellant put condition to the Corporate Debtor that the lessee will be allowed to transfer/sell upto 49% of its shareholding, subject to the condition that the original shareholder indicated (on the date of submission of the tender) shall continue to hold at least 51% of shareholding till the temporary Occupancy/Completion Certificate of at least one phase of the project is obtained from NOIDA". (See Page – 3). The lease deed specifies that the same was being executed in consideration of total premium of Rs.46 Crores + and 10% i.e. Rs.4,61,46,999.65 has been paid by the lessee. Then there is chart of 20 dates between 11.09.2010 to 11.03.2020 relating to instalments and interest to be paid. There is provision of compounding interest in case of default. Page – 4 of the lease deed states that premium referred to in the document means total amount payable to the lessor for the allotted plot. At Page -5 of the lease, it is stated that in consideration of the “yearly lease rent hereby reserved”, the lessor hereby demise on lease to the lessee the plot concerned. Page – 5 shows that the demised premises is for a term of 90 years commencing from 30<sup>th</sup> July, 2010 reserving rights as mentioned in (a) & (b). The rights under or above the demised premises with regard to mains, drains, sewers or electrics are



saved in favour of the Appellant. Clause (b) (Page – 6 of the Lease Deed) reads as under:-

“b) The lessor reserves the right to all mine and minerals, claims, washing goods, earth oil, quarries, in 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 time 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.”

[Emphasis supplied]

17. The figure mentioned at Page – 3 as 10% of the amount paid towards premium is repeated at Page – 6 referring to the same amount as lease rent. It is stated Lessee has paid Rs.46,14,699.96 as lease rent being 1% of the plot premium for the first 10 years of lease period. Thus lease rent and premium are used interchangeably. There is one Clause (V) giving option to the lessee to pay lease rent equivalent to “11 years @ 1% of the premium of the plot per year as “One Time Lease Rent”” (which is a subject to) “unless the Lessor decides to withdraw this facility”. The Clause states that on payment of onetime lease rent, no further annual lease rent would be required to be paid for the balance lease period and that this option may be exercised at any time during lease period provided the lessee has paid the earlier lease rent due and lease rent already paid will not be considered in onetime lease rent option. Page – 7 shows that liabilities to pay all rates,

taxes, charges, etc. assessed or imposed by the lessor or any Government Authority were that of the lessee. Relevant part (at Page -7 of Lease Deed) reads as under:-

- “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.”

Then the Clause goes on to state that the allottee/sub-lessee should be citizen of India and should be competent and that the husband wife and that dependent children would be considered single entity. Sub-Clause (iii) at Page – 7 and 8 reads as under:-

- “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.”

18. Thus the lessee was entitled to sub-lease to the allottees in terms specified by the Appellant. Even the permission to transfer the part of the built up space was controlled with conditions as specified at Page – 8 of the lease deed where one of the conditions “e” reads as under:-

“e) 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.”

Thus, it can be seen that even the sublease to be created by the lessee, the form and format was being prescribed by the Appellant.

19. Page – 9 of the lease deed shows that the Appellant laid down norms of development and Page – 10 shows into how many phases, the work should be completed was also specified. Under the head of construction (Page – 10 of the Lease Deed), Appellant specified as to the time to submit building plan, time within which the construction should start, requirement of getting Occupancy Certificate of first phase and also the project. Clause 3 and 4 (Page – 10 of the Lease Deed) referred to the right of the Appellant to cancel lease if the construction is not executed in time. Even the number of phases were fixed which were stated to be 5 phases to be completed in 7 years.

20. Page -11 of the Lease Deed refers to Mortgage. Even here, if the lessee was to mortgage the land to financial institutions/banks to raise loan,

permission of the Appellant was necessary and priority of charge of the Appellant was kept. Page – 13 refers to misuse, additions, alterations, etc. with regard to the flats that the lessee shall not use flat for any purpose other than residential purpose and in case of violation of the above condition, the allotment shall be liable to be cancelled and possession of the premises along with structure thereon, if any, shall be resumed by the Appellant. There are further conditions put with regard to alterations or additions, etc. The liability to pay taxes, charges, etc. was put on lessor (Page – 14 of the Lease Deed). At Page – 14, there is Clause with regard to overriding power over Government properties with right to mines, minerals, etc. on or under the concerned plot, which is similar to the Clause noticed at Page – 6 of the lease deed. Thus, the Appellant reserved right to even remove the vertical support for the surface of the plots/flats and what should be the compensation, the right was reserved with the Appellant which is stated to be “final and binding on the lessee/sub-lessee”. Page – 15 of the Lease Deed states that in addition to 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 case of incidents as mentioned at the concerned page. Clause – 7 at Page – 17 of the Lease Deed reads as under:-

- “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.”

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.

25. The Appellant has argued that the Adjudicating Authority did not record reasons while rejecting the Application. When we were going through the Impugned Order, the Adjudicating Authority referred to the claims made by the Appellant on the basis of Indian Accounting Standards and the Lease Deed and the arguments of the RP. While going through the details recorded by the Adjudicating Authority, by the time when we reached the points of determination recorded by the Adjudicating Authority, it appeared to us that the Appellant was clearly not making out a case for itself. The Adjudicating Authority recorded in para – 18(b) of the Impugned Order that considering various terms of the types of financial lease versus operational lease, the Adjudicating Authority was finding that the lease deed is not a financial lease as per terms laid down under guidelines of Indian Accounting Standards. No doubt that Adjudicating Authority should have recorded further reasons. However, this by itself would not be a reason to interfere with the Impugned Order.

26. In Appeal, the Appellant has alternatively tried to claim that the transaction had “a commercial effect of borrowing”. We have already referred (in above paragraph – 5 of the Judgement) to the contents of the Appeal in this regard. We do not find any substance in the effort of the Appellant to strain facts for us to accept that there is “a deemed disbursement” whereby the payment of upfront lease premium was financed by way of an inbuilt finance facility from the Appellant when it permitted the Respondent to pay premium in instalments. We do not think that by such artful use of words, the transaction can be converted into one of a financial debt.

27. Learned Counsel for the Appellant submitted that Section 5(8)(f) shows that it is not necessary that there should be disbursement of money to make the same of financial debt. According to the Appellant permitting payment of premium in instalments by the lessee should be treated as having commercial effect of borrowing. Reliance is placed on Judgement in the matter of **“Pioneer Urban Land and Infrastructure Limited and Another Versus Union of India and Others”** (2019) 8 SCC 416 – SCC OnLine SC 1005 where Section 5(8)(f) was discussed by the Hon’ble Supreme Court in paragraphs – 75 to 77.

28. Pursuant to a Report prepared by Insolvency Law Committee dated 26<sup>th</sup> March, 2018 “amendments were made which deem allottees of real estate projects to be Financial Creditors so that they may trigger the IBC under Section 7 against real estate developers”. In that context, various Writ Petitions were filed before the Hon’ble Supreme Court and the Hon’ble



Supreme Court considered the constitutional validity of the amendments made. It was in that context that in para – 77, Hon’ble Supreme Court observed as under:-

“77. A perusal of these definitions would show that even though the petitioners may be right in stating that a “borrowing” is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression “borrow” is wide enough to include an advance given by the homebuyers to a real estate developer for “temporary use” i.e. for use in the construction project so long as it is intended by the agreement to give “something equivalent” to money back to the homebuyers. The “something equivalent” in these matters is obviously the flat/apartment. Also of importance is the expression “commercial effect”. “Commercial” would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is “raised” under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the “commercial effect” of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have “commercial” interests in the same – the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even without adverting to the explanation introduced by the Amendment Act.”

29. 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.

31. We do not find any substance in the Appeal. The Appeal is dismissed.  
No Orders as to costs.

[Justice A.I.S. Cheema]  
Member (Judicial)

[Justice Anant Bijay Singh]  
Member (Judicial)

[Shreesha Merla]  
Member (Technical)

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