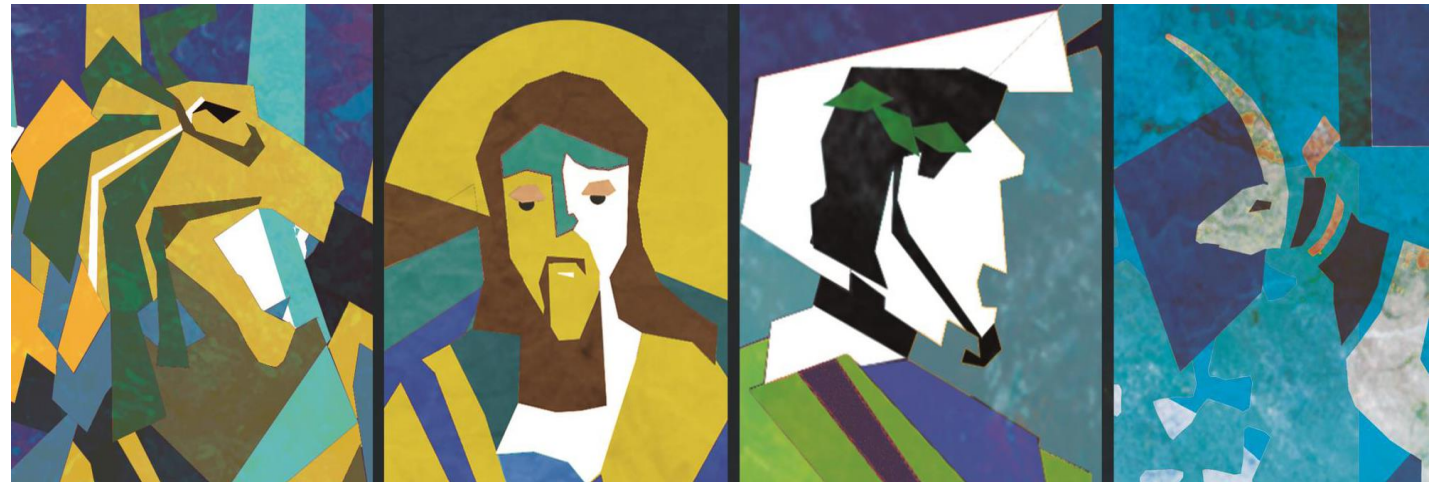


*De Jure*

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**LANDOWNER OF DEVELOPMENT AGREEMENT – WHETHER FINANCIAL CREDITOR OR NOT? – NCLAT UPHOLDS NCLT’S DECISION**



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## INTRODUCTION

This article focuses on the view taken by the National Company Law Appellate Tribunal ("**NCLAT**") as to whether a landowner who has granted development rights of his land to a developer under a scheme of development, proposed by way of a development agreement, is classified as a 'financial creditor' or otherwise, when such a developer entity goes into Corporate Insolvency Resolution Process ("**CIRP**") under provisions of IBC (as defined below).

The case of 'Ashoka Hi-Tech Builders Private Limited ("**Appellant**") vs Sanjay Kundra and Anr'<sup>1</sup> ("**Respondent**") deals with the very issue as to whether a landowner in a development agreement can be classified as a financial creditor when the Corporate Debtor / Developer goes into CIRP, within meaning of Section 5(8) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

## FACTUAL MATRIX OF THE CASE

As per the development agreement dated April 1, 2009 ("**Agreement**"), the Appellant was the owner of 11.40 acres of agricultural land on which the Agreement was to be executed. As per the terms of the Agreement, the Developer/ Corporate Debtor was to carry out construction on the land and upon completion thereof, the total saleable component was to be divided between the landowner and the developer.

On commencement of CIRP of the Corporate Debtor, the Appellant submitted its claim before the Resolution Professional and was thereby admitted to the Committee of Creditors ("**CoC**").

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Thereafter, on an application filed by the Home-buyers, the National Company Law Tribunal ("**NCLT**") passed an Order whereby the Appellant was removed from the CoC on grounds that it was not a financial creditor since no amount of money was disbursed for time value of money,

The NCLT placed reliance on the Judgement/Order dated September 19, 2022, passed in the case of Namdeo Ramchandra Patil and Ors vs. Vishal Ghisulal Jain<sup>2</sup> ("**Namdeo Judgement**"), wherein the circumstances were similar and held that:

1. On perusal of Section 5(8)(f) Explanation (i) and (ii), it is clear that a pre-condition for a debt to be a financial debt is disbursement against the time value of money and when any amount is raised from an allotment under a real estate project, such transaction is also covered under Section 5(8)(f). The pre-requisite for application of Explanation (i) of Section 5(8)(f) is raising an amount from allottee. The present case is not one where an amount has been raised from the Appellants. Submission of the Appellant that they are allottees within meaning of Section 2(d) of the Real Estate (Regulation and Development) Act, 2016 ("**RERA Act**"), does not make their transaction a financial debt under the IBC. In fact, it shall be noted that a landowner is covered under the definition of Promoter under the RERA Act.
2. It relied on the landmark judgement of the Hon'ble Apex Court in the case of 'Pioneer Urban Land and Infrastructure Ltd vs Union of India'<sup>3</sup> wherein it was stated that the definition of financial debt under Section 5(8) of IBC goes on to state that a debt must be disbursed against consideration for time value of money, wherein emphasis was placed on the meaning of the term 'disbursed'.

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<sup>2</sup> Company appeal (AT) (INS) No. 821 and 932 of 2021

<sup>3</sup> (2019) 8 SCC 416

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3. It placed further reliance on the judgement of the Hon'ble Supreme Court of India in the case of 'Anuj Jain, IRP for Jaypee Infratech Ltd vs Axis Bank and Ors'<sup>4</sup>, wherein it was stated that there is not an iota of doubt that for a debt to become a 'financial debt' under the IBC, the basic elements are that it ought to be a disbursement against the consideration for time value of money. The essential element of disbursement, and that to against time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within meaning of Section 5(8) of the IBC.
4. In light of the above, landowners are not covered within the scope of the definition of 'financial debt' under IBC.

## NCLAT DECISION

NCLAT held that the view taken in the Namdeo Judgement fully covers the issues and the Adjudicating Authority has rightly referred to the Judgement holding that the Appellant is not a financial creditor under IBC. The Agreement makes it clear that the Appellant was a collaborator in the Agreement and not a financial creditor. There was no disbursement for time value of money within meaning of Section 5(8) of IBC.

## OUR VIEW

We believe the decision of the NCLAT to exclude a landowner from the scope of the definition of a 'financial creditor' under IBC may be the correct interpretation of the terms 'financial creditor' and 'financial debt', defined under IBC. As we understand, for a debt to be classified as a financial debt, disbursement against time value of money is an essential

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ingredient which is not present in case of a landowner. Further, Section 2 of the RERA Act defines the term 'Promoter' wherein the developer as well as the landowner come within scope of the definition of a Promoter.

However, it is pertinent to note, that while the NCLAT has explicitly excluded a landowner from falling under the category of a financial creditor, it has not been concluded as to whether or not a landowner is a creditor in the first place.

We also need to be mindful of the fact that when such a developer entity goes into liquidation/ CIRP under IBC and substantial construction work has been completed on the land of the landowner and the scheme of development proposed between the landowner and the developer is that of sharing of either constructed portion on the land or on a revenue sharing basis, in lieu of the grant of development rights, then what would be the priority in distribution of assets of such a corporate debtor for a landowner who has been deprived not only of his land but also of his share (*revenue or units in the building*) in terms of the provisions under Section 53 of IBC.

We await further clarification from our judicial authorities on the same.

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