

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

Inv. Pett.—88/2023, IA—576/2024 and IA—1382/2024
IN
Company Petition No. (IB)-570(ND)/2023

IN THE MATTER OF (IB)-570(ND)/2023:
(Section: 7 of IBC, 2016)

1. ASK Trusteeship Services Private Limited

(Through ASK Property Investment Advisors Private Limited)
Having its registered office at:
Birla Aurora, Level 16, Office Floor 9,
Dr. Annie Besant Road, Worli, Mumbai-400030

2. ASK India Real Estate Special Opportunities Fund PTE Ltd

Having its registered office at:
101, Cecil Street, 18-12,
Tong Eng Building, Singapore-069533

3. ASK Investment Managers Limited

(earlier known as ASK Investment Managers Private Limited)
Having its registered office at:
Birla Aurora, Level 16, Office Floor 9,
Dr. Annie Besant Road, Worli, Mumbai-400030

**... Applicants/
Financial Creditors**

Versus

ATS Heights Private Limited

Having its registered office at:
711/92, Deepali, Nehru Place,
New Delhi-110019

**... Respondent/
Corporate Debtor**

AND IN THE MATTER OF INV. PETT. NO. 88/ND/2023:
(Section: 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016)

ATS Knightsbridge Buyer Welfare Association

Plot No. A, 01/A, Sector 124, Noida,
Uttar Pradesh-201305

... Applicant/Intervenor

AND IN THE MATTER OF IA. NO. 576/ND/2024:

(Section: 60(5) of IBC, 2016)

ATS Heights Private Limited

Having its registered office at:
711/92, Deepali, Nehru Place,
New Delhi-110019

**... Applicant/
Corporate Debtor**

Versus

1. Ask Trusteeship Services Private Limited

(Through ASK Property Investment Advisors Private Limited)

Having its registered office at:
Birla Aurora, Level 16, Office Floor 9,
Dr. Annie Besant Road, Worli, Mumbai-400030

2. Ask India Real Estate Special Opportunities Fund PTE Ltd

Having its registered office at:
101, Cecil Street, 18-12,
Tong Eng Building, Singapore-069533

3. ASK Investment Managers Limited

(earlier known as ASK Investment Managers Private Limited)

Having its registered office at:
Birla Aurora, Level 16, Office Floor 9,
Dr. Annie Besant Road, Worli, Mumbai-400030

**... Non-Applicants/
Financial Creditors**

AND IN THE MATTER OF IA. NO. 1382/ND/2024:

(Section: 16(2) & 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016)

1. ASK Trusteeship Services Private Limited

(Through ASK Property Investment Advisors Private Limited)

Having its registered office at:
Birla Aurora, Level 16, Office Floor 9,
Dr. Annie Besant Road, Worli, Mumbai-400030

2. ASK India Real Estate Special Opportunities Fund PTE Ltd

Having its registered office at:
101, Cecil Street, 18-12,
Tong Eng Building, Singapore-069533

3. ASK Investment Managers Limited

(earlier known as ASK Investment Managers Private Limited)

Having its registered office at:

Birla Aurora, Level 16, Office Floor 9,
Dr. Annie Besant Road, Worli, Mumbai-400030

**... Financial Creditors/
Applicants**

Versus

ATS Heights Private Limited

Having its registered office at:

711/92, Deepali, Nehru Place,
New Delhi-110019

**... Corporate Debtor/
Respondent**

Order Delivered on: 22.04.2024

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Petitioner : Sr. Adv. Arun Kathpalia, Adv. Diksha Gupta, Adv. Arunav Guha Roy, Adv. Anushree Poddar

For the Respondent : Adv. Divyansh Rai, Adv. Krish Kalra

For the Intervener : Sr. Adv. Mohapathy Ganesh, Adv. Sandeep Chilana, Adv. Abdullah Tanveer, Adv. Anjali Jain

ORDER

The captioned petition has been jointly preferred by **ASK Trusteeship Services Private Limited** representing **ASK Real Estate Special Opportunities Fund** and **ASK Real Estate Special Opportunities Fund II** in capacity of being its investment manager, **ASK India Real Estate Special Opportunities Fund PTE Ltd** and **ASK Investment Managers Limited** (collectively referred to as "**ASK Entities/Petitioners**") for initiation of CIRP qua the Corporate Debtor/

Respondent i.e. **ATS Heights Private Limited**. The petition has been preferred for initiation of CIRP qua the CD on account of the default committed by it in redeeming the debentures issued by it, in terms of the deed entered into between the parties in this regard.

2. It is the case of the Petitioners that the Financial Creditor advanced an aggregate principal amount of Rs. 285,00,00,000/- in two rounds to the CD by way of subscription to debentures categorised as optionally convertible debentures (“**OCD**”) and non-convertible debentures (“**NCD**”) in first round and another round of NCD categorised as “**Senior NCDs**” to finance real estate project being developed by the CD namely ‘**ATS Knightsbridge**’ situated in Noida, Uttar Pradesh. The Petitioners/Financial Creditors have further espoused that the OCDs, NCDs and the Senior NCDs (“**Debentures**”) qualify as “financial debt” within the meaning of Section 5(8)(c) of the code and the Financial Creditors fall within the meaning of “financial creditor(s)” as provided under section 5(7) of the code.

3. The Petitioners submitted that the default has also been committed by the CD in repayment of the financial debt owed by it to its another financial creditor viz. Piramal Capital & Housing Finance Limited (“Piramal”). The CD solicited financial assistance from Piramal under three distinct facilities viz:

- a. Debenture Subscription of Rs. 215,00,00,000/- from Piramal (**‘Piramal Facility 1’**) by way of Debenture Trust Deed dated 29.01.2016 executed between CD and IDBI Trusteeship Services Limited (debenture trustee for

Piramal debentures). CD issued upto 21,500 redeemable, secured, unlisted, non-convertible debentures of a face value of Rs. 1,00,000/- each.

- b. Term loan of Rs. 275,00,00,000/- (Rupees Two Hundred and Seventy-Five Crores) from Piramal (**'Piramal Facility 2'**) vide loan agreement dated 21.09.2018 executed inter alia between the Corporate Debtor and Piramal.
- c. Emergency Credit Line Guarantee Scheme of Rs. 47,15,00,000/- (Rupees Forty Seven Crores and Fifteen Lakhs Only) from (**'Piramal Facility 3'**) via loan agreement dated 08.08.2022 executed inter alia between the Corporate Debtor and Piramal.

4. It is the case of the Applicants that the Piramal Facility 1, Piramal Facility 2 and Piramal Facility 3 qualify as 'financial debt' in terms of the provisions of Section 5(8) of the code and that the CD failed to make requisite scheduled repayments qua the same which is evident from the credit rating of the CD dated 28.07.2023 issued by the Credit Information Bureau (India) Limited which reflected an outstanding amount of Rs. 72,25,98,554 against the principal amount of Piramal Facility 2 and an outstanding amount of Rs. 47,15,00,000 against the Piramal Facility 3. Further, the CD also defaulted in repayment of Piramal Facility 1 which is evident by the statement of account issued by Piramal qua the said facility up till 31.05.2023. The said statement of account reflects the amount of Rs. 3,19,53,279/- as interest overdue and an amount of Rs. 14,66,50,566/- as principal amount outstanding against the Piramal Facility 1 as on 31.05.2023.

5. The CIBIL Report further reflects that the Piramal Facility 1 and Piramal Facility 2 have been assigned by Piramal to JM Financial Asset Reconstruction Company (“**ARC**”). The factum of assignment of the two facilities has been confirmed by the CD vide its e-mail dated 22.08.2023. As per Reserve Bank of India (Transfer of Loan Exposure) Directions, 2021 (as updated on 05.12.2022), stressed loans “which are in default” are transferred to an ARC. Hence, the assignment of Piramal Facility 1 and Piramal Facility 2 to the ARC establishes that defaults have been committed by the CD qua the said facilities thereby necessitating such assignment by Piramal.

6. The CIBIL Report and the factum of assignment of the two debts to ARC confirm that the CD defaulted in repayment of amounts under Piramal Facility 1 and Piramal Facility 2, thus it committed default under Explanation to Section 7(1) of IBC, 2016 has occurred.

7. It is also the case of the Petitioner that the CD defaulted in repayment of the financial debts owed to the Financial Creditors as the OCDs and NCDs amounting to Rs 200 Crores subscribed by Financial Creditors which were to be redeemed by 07.03.2023 and Senior NCDs amounting to Rs. 85 Crores subscribed to by the Financial Creditors were to be redeemed by the CD by 30.06.2023. The CD did not redeem the said Debentures till date and therefore, the Debentures subscribed to by the Financial Creditor are due and payable as on date. Therefore, without prejudice to the above, the CD is admittedly in default of the other financial debts owed by the Corporate Debtor to the Financial Creditors.

8. Per contra, in the reply filed by it, the Respondent/CD has espoused that the purported default as alleged by the Financial Creditors in the present proceedings is a figment of its imagination and is an attempt to coerce the Respondent to payout sums to the alleged Financial Creditors which are otherwise not due and payable by the Respondent to the alleged Financial Creditor.

9. It is also the plea raised by the Corporate Debtor that the Petitioner is alleging the default which has not even been alleged by the Piramal Capital and Housing Finance Limited or its assignee i.e. JM Financial Asset Reconstruction Company. According to it, the assignee i.e. JM Financial Asset Reconstruction Company, in co-operation with the Respondent is restructuring the facilities availed by the Respondent from Piramal.

10. Besides the aforementioned, the Respondent raised the following other issues:-(i) the institution of the present proceedings for default of third party, apart from being not maintainable is in bad faith; (ii) non-initiation of CIRP either by Piramal or JM Financial Asset Reconstruction Company, by filing any application under Section 7 of IBC, 2016, is proof of the fact that the Respondent is going concern and capable of fulfilling its financial obligations; (iii) the purported application have been filed by the alleged financial creditor for default of a purported debt which admittedly has not been disbursed by the financial creditor to the Respondent; (iv) once the alleged financial creditor/ASK entities have already filed an application bearing C.P. (IB) No. 569 of 2023 under the

provisions of Section 7 of the Code against the Respondent, the present application qua the same alleged default in repayment of financial debt cannot be maintained; (v) from the perusal of the application and the documents enclosed therewith, it is revealed that the alleged financial creditor before instituting the present application against the Respondent for default in repaying the alleged financial debt extended to it by Piramal has not even intimated either Piramal or JM Financial Asset Reconstruction Company regarding the present proceedings; (vi) Piramal or JM Financial Asset Reconstruction Company has not even been impleaded as party to the present proceedings, thus the application is not maintainable; (vii) the Applicants being not financial creditors, but being only speculative investors could not have instituted the present proceedings; (viii) neither the Applicants are financial creditors nor the sums being claimed to be due constitute debts; (ix) owing to the subsistence of the force majeure which covid-19, the timelines under the Agreements for making the alleged payments stands extended w.e.f. March 2020 and continues till date; (x) no demand of amount of debt was ever made by the Creditor; (xi) even if the redemption of the outstanding debentures were to be made on 07.06.2023 and was not made, the non-redemption would not constitute any default, in view of the provisions of Section 10A of IBC, 2016; (xii) on many occasions the financial creditor/ASK Entities did not release any funds at all for operating and construction expenses in blatant dis-regard of the Project's need and committed possession timelines to the customers and various other stakeholders.

11. We heard the counsels for the parties and perused the record. As far as the issue of filing the petition, regarding the default of third party is concerned, as can be seen from explanation to Section 7(1) of IBC, 2016, for the purposes of sub-Section 1 of Section 7, a default includes even the one in respect of a financial debt owed not only to the Applicant Financial Creditor but also to any other financial creditor to the Corporate Debtor. The explanation reads thus:-

“7. Initiation of corporate insolvency resolution process by financial creditor.—

.....

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.”

12. Besides, the Section 7(1) of IBC, 2016, categorically provides that a financial creditor either by itself or jointly with (other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government) may file an application for initiating Corporate Insolvency Resolution Process against a Corporate Debtor. The Section 7(1) of the IBC, 2016, reads thus:-

“7. Initiation of corporate insolvency resolution process by financial creditor.—(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.”

13. Also, in exercise of the powers conferred by sub-Section 1 of Section 7 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government has notified certain persons who may file an application for initiating Corporate Insolvency Resolution Process against a Corporate Debtor before the Adjudicating Authority on behalf of the financial creditor. The authorities includes a trustee (including a Debenture Trustee). The notification dated 27.02.2019 reads thus:-

**“MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 27th February, 2019**

S.O. 1091(E).- *In exercise of the powers conferred by sub-section (1) of section 7 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby notifies following persons who may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority, on behalf of the financial creditor: -*

- (i) a guardian*
- (ii) an executor or administrator of an estate of a financial creditor;*
- (iii) a trustee (including a debenture trustee); and*
- (iv) a person duly authorised by the Board of Directors of a Company”*

14. Even otherwise also, as can be seen from Part-IV of the application, the financial creditors had jointly extended the financial facility to the CD by way of subscription to optionally convertible debentures as well as non-convertible debenture under various security agreements. It is not so that the default is only

qua the subscription made to the debentures issued by the CD, only by Piramal. Apparently, the subscription to debentures was also made by the ASK Entities i.e. the Financial Creditors/ Petitioners in the present petition. The Part-IV of the application reads thus:-

PART – IV

PARTICULARS OF FINANCIAL DEBT		
1.	<p>- TOTAL AMOUNT OF DEBT GRANTED</p> <p>- DATE(S) OF DISBURSEMENT</p>	<p>a. The following are the particulars of the financial debt owed by the Corporate Debtor to the Financial Creditors:</p> <p>b. The Financial Creditors i.e., the ASK entities had advanced an aggregate principal amount of Rs. 285,00,00,000/- (Rupees Two Hundred and Eighty-Five Crores only) to the Corporate Debtor company by way of subscription of debentures categorised as optionally convertible debentures (“OCDs”) and non-convertible debentures (“NCDs”) and another round of non-convertible debentures categorised as “Senior NCDs” to finance a real estate project being developed by the Corporate Debtor by the name of ‘ATS Knightsbridge’. The said subscription was undertaken in two rounds and the pattern of subscription is as under:</p> <p><u>First round subscription (aggregating to Rs. 200 Crores):</u></p> <p>c. ASK RESOF subscribed to 4,000 Secured, Rated, Listed, Redeemable NCDs of Rs. 1,00,000/- each, aggregating to Rs. 40,00,00,000 (Rupees Forty Crores). A Securities Subscription Agreement dated 02.03.2017 (hereinafter referred to as “R1 SSA 2”) was executed between, inter alia, Corporate Debtor (as the Debenture Issuer), Mr. Getamber Anand (as Guarantor and Promoter) and ASK RESOF capturing the said transaction. Copy of the R1 SSA 2 is annexed herewith as Annexure P/17.</p> <p>d. ASK RESOF- II subscribed to 12,000 Secured, Unrated, Unlisted OCDs of Rs. 1,00,000/- each aggregating to Rs. 120,00,00,000 (Rupees One Twenty Crores). A Securities Subscription Agreement dated 02.03.2017 (hereinafter referred to as “R1 SSA 1”) was executed</p>

between, inter alia, Corporate Debtor (as the Debenture Issuer), Mr. Getamber Anand (as Guarantor and Promoter) and ASK RESOF II which captures the terms of the said transaction. Copy of the R1 SSA 1 is annexed herewith as **Annexure P/18**.

e. ASK OFFSHORE subscribed to 3,920 NCDs of 1,00,000/- each aggregating to Rs. 39,20,00,000/- (Rupees Thirty Nine Crores Twenty Lakhs Only).

f. ASK IM subscribed to 80 NCDs of Rs. 1,00,000/- each aggregating to Rs. 80,00,000/- (Rupees Eighty Lakhs Only)

A common Securities Subscription Agreement dated 02.03.2017 (hereinafter referred to as "R1 SSA 3") was executed between, inter alia, Corporate Debtor (as the Debenture Issuer), Mr. Getamber Anand (as Guarantor and Promoter) and ASK OFFSHORE and ASK IM capturing the terms of the subscription. Copy of the R1 SSA 3 is annexed herewith as **Annexure P/19**.

g. In support of the First Round Subscription, the following agreements also came to be executed consequently:

i. Security Holders Agreement dated 02.03.2017 (hereinafter referred to as "R1 SHA") between, inter alia, Corporate Debtor, Mr. Getamber Anand and the ASK entities. Copy of the same is annexed herewith as **Annexure P/20**.

ii. Debenture Trust Deed dated 19.04.2017 (hereinafter referred to as "**R1 Debenture Trust Deed**") appointing Vistra FCI (India) Limited as the Debenture Trustee.

Copy of R1 Debenture Trust Deed is annexed herewith as **Annexure P/21**.

Second round of subscription (Aggregating to Rs. 85 crores)

h. ASK RESOF II subscribed to 638 Senior NCDs of Rs. 10,00,000/- aggregating to Rs. 63,80,00,000/- (Rupees Sixty Three Crores Eighty Lakhs Only).

- i. ASK OFFSHORE subscribed to 208 Senior NCDs of Rs. 10,00,000/- each aggregating to Rs. 20,80,00,000 (Rupees Twenty Crores Eighty Lakhs Only).
- j. ASK IM subscribed to 4 Senior NCDs of Rs. 10,00,000/- each aggregating to Rs. 40,00,000/- (Rupees Forty lakhs only).

Accordingly, a Second Round Securities Subscription Agreement dated 22.12.2017 ("R2 SSA") was executed, *inter alia*, among ATS Heights, Mr. Getamber Anand, and ASK entities whereby the above subscription pattern was agreed. A copy of the same is annexed as **Annexure P/22**.

- k. Consequently, the following agreements also came to be executed pursuant to the second round subscription:

- i. A Debenture Trust Deed dated February 16, 2018 ("R2 DTD") appointing Vistra FICIL (India) Limited as the Debenture Trustee. A copy of the R2 DTD is annexed herewith as **Annexure P/23**.
- ii. A Restated Security Holders Agreement dated ^{22.12.2017} ~~22.12.2017~~ ("Restated SHA") ^{was} ~~was~~ executed between the ASK entities along with Mr. Getamber Anand and the Corporate Debtor in supersession of R1 SIA. Copy of the Restated SIA is annexed herewith as **Annexure P/24**.

Date of Disbursement:

Date of allotment of debentures	Amount of debentures allotted to ASK entities
06.03.2017 (Initial tranche of the first-round subscription and in multiple tranches subsequently)	Rs. 200,00,00,000/- (Rupees Two Hundred Crores only)
29.12.2017 (Second round of subscription)	Rs. 85,00,00,000/- (Rupees Eighty Five Crores)

		<p>Copies of the resolutions passed by the Corporate Debtor allotting the Debentures (defined below) to the Financial Creditors are annexed herewith as Annexure P/25.</p> <p>The OCDs, NCDs and Senior NCDs (hereinafter referred to as "Debentures") qualify as "financial debt" within the meaning of Section 5(8)(c) of the Insolvency and Bankruptcy Code, 2016 ("Code") and the Financial Creditors fall within the meaning of "financial creditor(s)" as provided in Section 5(7) of the Code.</p>
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED	<ol style="list-style-type: none"> 1. The present application is being filed on the basis of the following 'defaults' under the Code by the Corporate Debtor. 2. The Corporate Debtor is in default of financial debts owed to another financial creditor of the Corporate Debtor, namely Piramal Capital & Housing Finance Limited ("Piramal"), some of which have now been assigned to JM Financial Asset Reconstruction Company ('ARC') by Piramal. Therefore, a default has occurred within the meaning of Explanation to Section 7(1) of the Code, as explained hereunder. <u>Date of default:</u> 31.05.2023 (in respect of Piramal Facility 1 and 2 – as defined below). <u>Amount in default:</u> Aggregate amount of Rs. 261,27,92,247/- (Rupees Two Hundred and Sixty One Crores Twenty Seven Lakhs Ninety Two Thousand Two Hundred and Forty Seven Only) in respect of Piramal Facility 1 and 2 (as per CIBIL Report) as explained below. 3. Some of the key facts leading to the abovementioned defaults by the Corporate Debtor are elucidated in the subsequent paragraphs. 4. <u>'Default' by the Corporate Debtor under explanation to Section 7(1) of the IBC, 2016 for default of debt owed to Piramal:</u> <ol style="list-style-type: none"> i. As mentioned above, the Corporate Debtor had sought financial assistance

from Piramal, apart from the investment taken from the ASK entities, under three separate facilities executed with Piramal, which are described as under.

- ii. By way of Debenture Trust Deed dated 29.01.2016 executed *inter alia* between the Corporate Debtor and IDBI Trusteeship Services Limited (as debenture trustee) ("**Piramal Facility 1**"), the Corporate Debtor agreed to issue up to 21,500 (Twenty-one thousand and five hundred) redeemable, secured, unlisted, non-convertible debentures of a face value of Rs. 1,00,000/- (Rupees One Lakh only) each and aggregating to Rs. 215,00,00,000/- (Rupees Two Hundred and Fifteen Crores only). The said debenture issue was subscribed to by Piramal. A copy of the debenture trust deed dated 29.01.2016 is annexed herewith as **Annexure P/26**. A copy of the Private Placement Offer Letter (Form PAS-4) is annexed herewith as **Annexure P/27**.
- iii. The Corporate Debtor availed additional funding from Piramal in the form of a term loan of Rs. 275,00,00,000/- (Rupees Two Hundred and Seventy-Five Crores) to be disbursed in two tranches of Rs. 100 crores and Rs. 175 crores (hereinafter referred to as "**Piramal Facility 2**"). The terms of the loan were captured in a Loan Agreement dated 21.09.2018 executed *inter alia*, between the Corporate Debtor and Piramal. The Loan Agreement dated 21.09.2018 is annexed herewith as **Annexure P/28**.
- iv. In addition to the above facilities, the Corporate Debtor also availed a loan of Rs. 47,15,00,000/- (Rupees Forty seven Crores and Fifteen Lakhs Only) under the terms of the Emergency Credit Line Guarantee Scheme 1.0 and 2.0 (hereinafter referred to as "**Piramal Facility 3**"). In pursuance thereof, a loan agreement dated 08.08.2022 came to be executed *inter alia*, between Piramal and the Corporate Debtor. A copy of the Loan Agreement dated 08.08.2022 is annexed herewith as **Annexure P/29**.

- v. The above mentioned three facilities are also reflected on the website of Ministry of Corporate Affairs ('MCA') as 'charges registered' against the Corporate Debtor. A copy of the list of charges of the corporate debtor as found on the website of the MCA is annexed herewith as **Annexure P/30**.
- vi. Therefore, it is submitted that Piramal Facility 1, Piramal Facility 2 and Piramal Facility 3 qualify as a 'financial debt' under Section 5(8)(c) of the IBC, 2016. Hence, Piramal is a financial creditor of the Corporate Debtor.

Default of the Corporate Debtor towards Piramal

- vii. Recently, it was brought to the knowledge of the Financial Creditors that the Corporate Debtor has defaulted in
- viii. Pertinently, the Credit Information Bureau (India) Limited Report dated 28.07.2023 ("**CIBIL Report**") of the Corporate Debtor reflects an amount of Rs. 72,25,98,554/- (Rupees Seventy Two Crores Twenty Five Lakhs Ninety Eight Thousand Five Hundred and Fifty Four only) i.e., as being overdue (88 days past due date as per CIBIL Report as on 31.05.2023) against the principal amount of Piramal Facility 1. Hence, the Corporate Debtor is in clear default of Piramal Facility 1 which is evidenced from the CIBIL Report. The Piramal Facility 3 extended by Piramal to the Corporate Debtor of Rs. 47,15,00,000 is also shown as outstanding balances in the CIBIL Report and as per the statement of account of Piramal Facility 3. Copy of the CIBIL Report is annexed herewith as **Annexure P/31**. Copy of the statement of account dated 31.05.2023 for Piramal Facility 3 is annexed herewith as **Annexure P/32**.
- ix. It is further submitted that the default of the Corporate Debtor Piramal Facility 1 is also evidenced by the statement of account issued by Piramal *qua* the facilities up till 31.05.2023. The said statement of account reflects amounts of Rs. 3,19,53,279/- (Rupees Three Crores Nineteen Lakhs Fifty Three Thousand

- x. The Corporate Debtor is in default of repayment of interest amounts Piramal Facility 2 which is reflected in the statement of account issued by Piramal as on 31.05.2023 which is annexed herewith as Annexure P/34. The same is also reflected in the CIBIL report .
- xi. Moreover, the aforementioned CIBIL report also reflects the abovementioned debts to have been 'sold to ARC'.
- xii. Due to the above facts, the Financial Creditors issued email dated 21.08.2023 to the Corporate Debtor seeking confirmation of the assignment of the default to the ARC and the documentation pertaining to such assignment in furtherance of the rights of the Financial Creditors under the Restated SHA and the transaction documents. Copy of email dated 21.08.2023 is annexed herewith as **Annexure P/35**.
- xiii. The Corporate Debtor duly replied vide its email dated 22.08.2023 confirming the assignment by Piramal to the ARC. Vide another email of the even date, the Corporate Debtor shared intimations received by the Corporate Debtor from Piramal in respect of *inter alia* assignment of Piramal Facility 1 and Piramal Facility 2 to the ARC. Copy of emails dated 22.08.2023 are annexed herewith as **Annexure P/36 (Colly)**. Copy of notices of assignment dated 08.08.2023 of the debt in relation to Piramal Facility 1 and 2 by Piramal to the ARC are annexed herewith as **Annexure P/37 (Colly)**.
- xiv. Therefore, it is evident that the debt in relation to Piramal Facility 1 and 2 have been assigned by Piramal to JM Financial Asset Reconstruction Company Limited i.e., the ARC upon occurrence of default under Piramal Facility 1 and 2.

xv. It is submitted that sale of a financial asset (i.e., the loans in this case), by a lender to an asset reconstruction company in itself indicates the said loan to be a stressed asset where defaults have been committed by the borrower. Pertinently, as per the Reserve Bank of India (Transfer of Loan Exposure) Directions, 2021 (updated as on 05.12.2022), stressed loans "which are in default" are permitted to be transferred to ARCs. Therefore, from a perusal of the above and the CIBIL Report, it is clear that the Corporate Debtor has defaulted in repayments of amounts under Piramal Facility 1 and 2 which resulted in Piramal transferring them to the ARC. Copy of Reserve Bank of India (Transfer of Loan Exposure) Directions, 2021 (updated as on 05.12.2022) is annexed herewith as **Annexure P/38**.

'Default' of the Corporate Debtor towards the Financial Creditors herein i.e., ASK entities.

5. The OCDs and NCDs amounting to Rs. 200 Crores issued by the Corporate Debtor to the Financial Creditors were to be redeemed by 07.03.2023 (i.e., sixth anniversary of the allotment of the OCDs and NCDs). However, the said debentures have not been redeemed by the Corporate Debtor till date.
6. Additionally, it was agreed between the Financial Creditors and the Corporate Debtor to revise the redemption date in respect of the Senior NCDs (amounting to Rs. 85 Crores) held by the Financial Creditors to 30.06.2023. In this regard, an Agreement of Modification dated 05.01.2023 ("Amendment Agreement") was executed, post execution of an earlier amendment agreement dated 02.03.2021 that had already extended the redemption date to 28.01.2022. As per Clause 2.6(i) of

the Amendment Agreement, failure to redeem the Senior NCDs by 30.06.2023 would constitute an event of default under the transaction documents. Accordingly, the redemption amount in respect of the Senior NCDs was due and payable from 30.06.2023. However, the Senior NCDs were not redeemed by 30.06.2023. A copy of the agreement of modification dated 02.03.2021 and the Amendment Agreement dated 05.01.2023 are annexed herewith as **Annexure P/39 (Colly)**.

7. The Corporate Debtor has therefore failed to redeem the Debentures held by the Financial Creditors i.e., ASK entities. However, under clause 2.3(c) of the Restated SHIA, the Corporate Debtor is liable to repay the redemption amount for the Debentures only upon the redemption of the debt owed to Piramal (extended vide Piramal Facility 1 and Piramal Facility 2) which were subsequently assigned to the ARC. Therefore, due to such subordination of the debt owed to ASK entities by the Corporate Debtor to the debt owed by the Corporate Debtor to another financial creditor, there is no possibility of repayment of the debt owed to the Financial Creditors even though the timeline for repaying the same has lapsed. As Piramal has also not been repaid its dues (due to which Piramal Facility 1 and 2 have been assigned to the ARC), the Corporate Debtor is effectively absolved from repaying the debt owed to the Financial Creditors till such time the debt owed to Piramal (now assigned to the ARC) is repaid. Pertinently, the debt owed to the Financial Creditors is intricately linked to the debt owed to Piramal (now assigned to the ARC) due to

the above subordination of debt owed to ASK entities. Considering that the default of the debt owed to Piramal has been assigned to the ARC, the Financial Creditors have preferred the instant Application on the basis of such "cross default" as provided under the Explanation to Section 7(1) of the Code.

8. The Financial Creditors are accordingly constrained to file the instant Application under the Explanation to Section 7(1) of the Code for the default by the Corporate Debtor of debt owed to another financial creditor.
9. Pertinently, as per Explanation to Section 7(1) of the Code, a "default" under Section 7(1) includes a default in respect of a financial debt owed not only to the Financial Creditor in the present Application but to any other financial creditor of the Corporate Debtor. Section 7(1) of the Code, along with the explanation, is reproduced hereunder:

"7. (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. Explanation.— For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor."

10. It is necessary to note that "default" has been defined under Section 3(12) of the Code as "non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be". It is undisputed that the ASK entities are financial creditors and are entitled to maintain the present Application claiming default by the Corporate Debtor in repayment of the financial debt owed by it to another financial creditor.

11. Without prejudice to the above, the Corporate Debtor has also committed multiple breaches under the Transaction Documents executed between the Corporate Debtor and the ASK entities, which constitute events of default under the terms of the Transaction Documents. In view of the same, the ASK entities issued legal notices dated 03.02.2021 and 10.06.2022 *inter alia*, to the Corporate Debtor and Mr. Getamber Anand highlighting the multiple breaches which constitute an event of default under the Transaction Documents. Copy of the legal notice dated 03.02.2021 and 10.06.2022 are annexed herewith as **Annexure P/40** and **Annexure P/41** respectively.
12. Moreover, under Clause 11.2 of the Restated SHA, which provides for the consequences of EOD ~~and~~ specifically under Clause 11.2(a), ASK entities are entitled to seek payment of "Default Interest" from the Company as provided in Clause 7(c) of the Restated SHA at an XIRR of 24%. In view of the multiple EODs committed, ASK entities had issued a legal notice of EOD dated 08.05.2023 to the Corporate Debtor seeking payment of default interest within a period of 15 days. The same has not been complied with to date and the Corporate Debtor has defaulted in the payment of the said debt on the due date i.e., 24.05.2023. A copy of the EOD notice dated 08.05.2023 is annexed herewith as **Annexure P/42**.
13. Therefore, the amount of default owed by the Corporate Debtor to the Financial Creditors is Rs. 1084,44,00,000 (Rupees One Thousand and Eighty Four Crores and Forty Four Lakhs only) as on 02.09.2023, and the same qualifies as a 'financial debt' as per the Code which is due and payable by the Corporate Debtor to the Financial Creditors. The Financial Creditors reserve the right to initiate appropriate legal proceedings as available to it under the transaction documents and in law. A copy of the calculation of the amount of default owed by the Corporate Debtor to the Financial Creditors is annexed herewith as **Annexure P/43**.

	<p>14. Without prejudice to the above, it is submitted that all the entries in the CIBIL Report are defaults of financial debts owed by the Corporate Debtor to various financial creditors and hence the Corporate Debtor is admittedly also in default of the other financial debts owed to various other financial creditors and therefore the Explanation to Section 7(1) of the Code stands satisfied otherwise as well.</p> <p>Hence, the present Application.</p>
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15. Thus, we do not find any force in the plea/objections raised on behalf of the CD regarding the locus standi for filing the present petition.

16. In view of the aforementioned analysis and discussion, we are unable to appreciate even the plea raised on behalf of the CD that how the loan initiation of CIRP either by Piramal or JM Asset Financial Reconstruction Company would come in the way of admission of the present petition. Indubitably, the Applicants are financial creditors qua the Corporate Debtor and they are entitled to institute the present proceedings not only for the debt owed to them, but also the one, owed to other financial creditor of the Corporate Debtor. Here, it would not be out of context to note that the objective of IBC, is to ensure that the CD is put back to its feet and is rescued. Thus, when as per the stand taken by the CD itself, in its reply that it suffered from financial crunch and leanness, apparently, it needs to be rescued by resorting to the available process.

17. The only reason to refer to the default qua Piramal is that the Financial Statement of ATS Heights Private Limited reflects the lapse committed in redemption of not only qua the Petitioners, but also qua the Piramal and it is only after the default committed in redemption of debenture qua Piramal that the present petition has been preferred. The clause 14 of the Financial Statement dated 31.03.2022 reads thus:-

(Amounts in INR Hundreds, unless otherwise stated)

14 Borrowings

Particulars	Nominal interest rate %	Maturity	Non-Current		Current	
			As at 31 March 2022	As at 31 March 2021	As at 31 March 2022	As at 31 March 2021
Non-convertible debentures						
Secured-listed	13.00%	06 March 2023	-	80,00,000.00	80,00,000.00	-
Secured-listed	10.00%	28 January 2022	-	-	85,00,000.00	85,00,000.00
Secured-unlisted	12.00%	2022-2023	57,60,000.00	1,07,66,028.04	29,49,265.92	-
Less: Unamortised ancillary borrowing cost			-	-	-	-
			57,60,000.00	1,87,66,028.04	1,94,49,265.92	85,00,000.00
Term loan in Indian rupees from PCHFL	12.00%	2024-2025	1,72,90,415.17	1,72,30,886.05	-	-
Optionally convertible debentures						
Secured - unlisted	13.00%	07 March 2023	-	1,20,00,000.00	1,20,00,000.00	-
Unsecured - unlisted	13.00%	6 March 2023	-	25,00,000.00	25,00,000.00	-
Total long-term borrowings			2,30,50,415.17	5,04,96,914.09	3,39,49,265.92	85,00,000.00
Amount disclosed under the head "Borrowings (Current Liabilities)" (Refer note 17)			-	-	(3,39,49,265.92)	(85,00,000.00)
			2,30,50,415.17	5,04,96,914.09	-	-

A. Security and Revised Repayment Terms:

Security Details:

1. Secured, Listed Non-Convertible debentures ("NCD-ASK")

8,000 (31 March 2021: 8,000) Non-Convertible Debentures @ Rs 1,00,000.00 each with coupon rate of interest@ 13% p.a. and repayable on 6th March 2023.
850 (31 March 2021: 850) Non-Convertible debentures @ Rs 10,00,000.00 each with coupon rate of interest@ 10% p.a. and repayable on 28th January 2022.

2. Secured, Unlisted Non-Convertible debentures ("NCD-Piramal")

Non-Convertible Debentures @ Rs 1,00,000.00 each with coupon rate of interest@12% p.a. and repayable after 5th December 2022.

3. Secured, Unlisted Optionally Convertible Debentures ("OCD-ASK")

12,000 (31 March 2021: 12,000) Optionally Convertible Debentures @ Rs 1,00,000.00 each with coupon rate of interest@13% p.a. and repayable on 7th March 2023.

4. Unsecured, Unlisted Optionally Convertible Debentures ("OCD-STG")

Optionally Convertible Debentures @ Rs 1,00,000.00 each with coupon rate of interest@13% p.a. and repayable on 6th March 2023.

Nature of Security- NCD-ASK: *

1. The second ranking charge in the nature of mortgage with the debenture trustee on the land and all development thereon.
2. Second ranking charge over present and future receivables of the company from the mortgaged properties and
3. Personal guarantee by Mr. Getamber Anand.

Nature of Security- NCD-Piramal:

1. Exclusive Charge by way of a registered mortgage of the Mortgaged Properties i.e. project to be developed by the Company in Sector 124, NOIDA on land admeasuring 24,749 sq. mtr. ("Project - I") and project to be developed by the Company in Sector 124, NOIDA on land admeasuring 21,591 sq. mtr. ("Project - II") in favour of the Debenture Trustee;

2. First exclusive charge by way Deed of Hypothecation over the Projects Receivables along with the Projects Escrow Account, Retention Account, Operating Account Existing Bank Accounts (until closed in terms of the Debenture Trust Deed) and other bank accounts where the Projects Receivables may be lying, present and future;
3. First exclusive charge created by way of the Company's Deed of Hypothecation on moveable fixed assets and other assets (both present and future) of the Company subject to charge to be created for equipment finance obtained for the Project including raw materials and work in progress of Project;
4. An exclusive pledge of 10,000 (Ten Thousand) equity shares constituting 100% (hundred percent) of the issued and paid up capital of the Company held by the Company's Shareholders, to be created in Dematerialized form and Non Disposal Undertaking from Mr. Getamber Anand and STG Softek Private Limited, assuring that that shares held by Mr. Getamber Anand and STG Softek Private Limited in ATS Infrastructure Limited shall not be transferred till the due discharge of Secured Obligations by the Company;
5. Unconditional and irrevocable Personal Guarantee from Mr. Getamber Anand and Mr. Shakti Nath in favour of the Debenture Trustee;
6. Unconditional and irrevocable Corporate Guarantee from ATS Homes Private Limited and Logix Soft-Tel Private Limited in favour of the Debenture Trustee;
7. Demand Promissory Note.

Nature of Security- OCB-ASK: NIL*

1. The second ranking charge in the nature of mortgage with the debenture trustee on the land and all development thereon.
2. Second ranking charge over present and future receivables of the company from the mortgaged properties and
3. personal gurantee by Mr. Getamber Anand.

Note: * - As on date of this balance sheet existing charge holder has not provided his consent for ceding of security

B. Term Loan- Piramal Capital and Housing Finances Ltd

(a) Terms of Repayment of Term Loans

(i) The Loan shall be repaid as per revised repayment schedule starting from 5th July 2024.

(b) Nature of Security of each type of Secured Loans :

- (i) First ranking pari passu charge, along with the Existing Debenture Trustee, created by way of a registered Mortgage over the Mortgaged Property, subject to the charge and rights of NODDA in that regard;
- (ii) First ranking pari passu charge, along with the Existing Debenture Trustee, created by way of the Deed of Hypothecation, on the Receivables and moveable assets and bank accounts in relation to the Projects;
- (iii) First ranking pari passu charge, along with the Existing Debenture Trustee, created on the Accounts, by way of the Deed of Hypothecation in respect of all the Receivables from the Projects, including from the sale and/or lease of Units thereof;
- (iv) First ranking pari passu charge, along with the Existing Debenture Trustee, created by way of pledge of Pledged Shares;
- (v) Personal Guarantee of the Personal Guarantor;
- (vi) Corporate Guarantee of the Corporate Guarantor;
- (vii) Demand Promissory Note;

Default in repayment of borrowings

As at 31st March 2022, the company has defaulted in repayment of borrowings (Non Current and Current) including interest thereon details of which are as under.

Nature of borrowings including debt Securities	Name of Lender	Amount not paid on due date	Whether Principal or interest	No. of days delay or unpaid	Remarks, if any
Non Convertible Debentures	Debenture holders	85,00,000.00	Principal	62	Management is in discussion with lender for extension of Maturity Date, with effect from last maturity date.
Non Convertible Debentures	Debenture holders	1,06,34,846.57	Interest including redemption premium	62	Management is in discussion with lender for extension of Maturity Date, with effect from last maturity date.

18. As can be seen from the aforementioned, the NCD/OCD had got matured on 06.03.2023, 28.01.2023 and 07.03.2023, but the CD defaulted in redeeming the same.

19. The Petitioners have also placed on record the record of Financial Information-Form C and Form D reported to the NeSL as (Annexure P-44 colly) to the petition. Form D of the report viz. record of default indicates the debt, but the debtor could dispute the same. The relevant excerpts of the Form C and Form D reads thus:-

Debt Information			
Type of debt	financial	Debt Reference No.	INE679U07026
Debt Start Date	07/03/2017	Debt Currency	INR
Sanction Currency	INR	Sub Type - Debt	DBBO
Funded Type	Funded	Security Flag	unsecured
Sanctioned Amount	800000000.00	Facility Name	Private Placement
Total Outstanding Amount	1388800000.00	Amount Overdue	1388800000.00
Account Closed Flag	no		

Default Details			
Date Of Default	06/03/2023	Default Amount	1388800000
Total Outstanding Amount	1388800000		1419

X X X

Debt Information			
Type of debt	financial	Debt Reference No.	INE679U08040
Debt Start Date	29/12/2017	Debt Currency	INR
Sanction Currency	INR	Sub Type - Debt	DBBO
Funded Type	Funded	Security Flag	unsecured
Sanctioned Amount	8500000000.00	Facility Name	Private Limited
Total Outstanding Amount	2842000000.00	Amount Overdue	2842000000.00
Account Closed Flag	no		

Default Details			
Date Of Default	07/03/2023	Default Amount	2842000000
Total Outstanding Amount	2842000000		1761

X X X

Debt Information			
Type of debt	financial	Debt Reference No.	INE679U07034
Debt Start Date	07/03/2017	Debt Currency	INR
Sanction Currency	INR	Sub Type - Debt	DBBO
Funded Type	Funded	Security Flag	unsecured
Sanctioned Amount	1200000000.00	Facility Name	Private Limited
Total Outstanding Amount	4657000000.00	Amount Overdue	4657000000.00
Account Closed Flag	no		

Default Details			
Date Of Default	07/03/2023	Default Amount	4657000000
Total Outstanding Amount	4657000000		1423

X X X

Date of Submission	09-08-2023 11:14:50
Type of Submission	Default Submission
Submission ID	1
Submitted by (CREDITOR)	M/s CREDITOR GROUP REPRESENTED BY VISTRA ITCL (INDIA) LIMITED
Debtor	M/s ATS HEIGHTS PRIVATE LIMITED
Default Amount	4657000000.00
Status of Authentication by Debtor	DISPUTED
Reason For Dispute	Remarks - other-We are not in default because of transactional complexity.
Authentication Completed on	11-08-2023 13:11:04

X X X

Date of Submission	09-08-2023 10:55:50
Type of Submission	Default Submission
Submission ID	1
Submitted by (CREDITOR)	M/s CREDITOR GROUP REPRESENTED BY VISTRA ITCL (INDIA) LIMITED
Debtor	M/s ATS HEIGHTS PRIVATE LIMITED
Default Amount	1388800000.00
Status of Authentication by Debtor	DISPUTED
Reason For Dispute	Remarks - other-We are not in default because of transactional complexity.
Authentication Completed on	11-08-2023 13:11:04

Date of Submission	09-08-2023 13:58:07
Type of Submission	Default Submission
Submission ID	2
Submitted by (CREDITOR)	M/s CREDITOR GROUP REPRESENTED BY VISTRA ITCL (INDIA) LIMITED
Debtor	M/s ATS HEIGHTS PRIVATE LIMITED
Default Amount	3188000000.00
Status of Authentication by Debtor	DISPUTED
Reason For Dispute	Remarks - other-We are not in default because of transactional complexity.
Authentication Completed on	11-08-2023 13:11:05

X X X

Date of Submission	09-08-2023 11:18:44
Type of Submission	Default Submission
Submission ID	1
Submitted by (CREDITOR)	M/s CREDITOR GROUP REPRESENTED BY VISTRA ITCL (INDIA) LIMITED
Debtor	M/s ATS HEIGHTS PRIVATE LIMITED
Default Amount	2842000000.00
Status of Authentication by Debtor	DISPUTED
Reason For Dispute	Remarks - other-We are not in default because of transactional complexity.
Authentication Completed on	11-08-2023 13:11:04

20. Once, the CD has accepted its liability regarding redemption of debentures in its Financial Statements dated 31.03.2022, it is difficult to accept its plea

regarding there being no debt and default. There is no requirement in terms of the IBC to implead all the financial creditors as the parties to the application filed under Section 7 of the IBC, 2016 and on commencement of CIRP, in terms of the provisions of Regulations 6, 6A, 7, 8, 8A, 9 and 9A of the IBBI (Resolution Process for Corporate Persons) Regulations 2016, all the claimants including the financial creditors may stake their claim before RP. Thus, the plea of non-joinder of necessary parties raised by the Corporate Debtor is nixed.

21. In terms of the provisions of Section 5(8)(c) of IBC, 2016, the plea of the Applicant being not Financial Creditor and only a speculative inspector cannot be accepted. The Section 5(8)(c) (ibid) clearly provides that a financial debt means any amount raised pursuant to debenture inter alia. The provisions reads thus:-

“Section 5. Definitions.—

.....

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

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis; (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

[Explanation---For the purposes of this sub-clause,--

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, allottee and real estate project shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

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

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

22. Regarding the plea of Section 10A of IBC, 2016, it is seen that the application under Section 7 of IBC, 2016, could not have been filed where default could arise between 25.03.2020 to 24.03.2021. In the present case, the default

occurred on 06.03.2023, 28.01.2023 and 07.03.2023, thus it cannot be held that the present petition is barred by Section 10A of IBC, 2016.

23. Regarding the plea of force majeure, we find that in the reply filed by it, the Corporate Debtor has taken four different pleas viz:- (i) the Petitioners are not financial creditors and they have filed the present petition for the default committed by some other financial creditor; (ii) the CD has not committed any default; (iii) the Petitioners did not extend the financial assistance when needed by the CD and (iv) the CD could not continue with construction on account of force majeure i.e. Covid-19. Such contradiction writ large from Paras 3-5, 7-10, 13-15 and 18-63 of the reply which reads thus:-

*“3. It is submitted that the alleged Financial Creditors/ASK Entities have not approached this Hon’ble Tribunal with clean hands and have suppressed material facts to mislead and prejudice the mind of this Hon’ble Tribunal. In fact, the alleged Financial Creditor have instituted the present application to harass the Respondents and prosecute the Respondents for an alleged default which has not been asserted or claimed by Piramal Capital & Housing Finance Limited (“**Piramal**”) or the assignee i.e., JM Financial Asset Reconstruction Company. On the contrary it is submitted that JM Financial Asset Reconstruction Company, the assignee of the financial facilities in cooperation with the Respondent is restructuring the facilities availed by the Respondent from Piramal. Therefore, the institution of the accompanying proceedings for a default of a third party against the Respondent apart from not being maintainable is in bad faith.*

4. In furtherance to the aforesaid it is submitted that the purported default as alleged by the Financial Creditors/ASK Entities in the

present proceedings is a figment of its imagination and merely an attempt to coerce the Respondent to payout sums to the alleged Financial Creditors/ASK Entities which are otherwise not due and payable by the Respondent to the alleged Financial Creditor. Significantly, no pleadings or reasoning has been made by the alleged Financial Creditor in the purported application thereby justifying it filing the present application on behalf of Piramal or JM Financial Asset Reconstruction Company. In the absence of any pleadings the present application deserves to be dismissed. The fact, that neither Piramal or JM Financial Asset Reconstruction Company have initiated any proceedings under the provisions of IBC is proof of the fact that the Respondent is a going concern and capable of fulfilling its financial obligations.

5. *Without prejudice to the aforesaid, it is submitted that the purported application has been filed by the alleged Financial Creditors for default of a purported debt which admittedly has not been disbursed by the alleged Financial Creditors to the Respondent, therefore, the present application under reply is not maintainable in law and deserves to be dismissed. Admittedly, the alleged Financial Creditor has filed the present application with ulterior motives and for purposes other than for the resolution of insolvency, therefore, in terms of Section 65 of the Code the present application deserves to be dismissed with heavy cost on the alleged Financial Creditor.*

X X X

7. *In addition to the aforesaid, a bare perusal of the application and the documents annexed by the alleged Financial Creditor along with application would evidence that the alleged Financial Creditor before instituting the present application against the Respondent for default of an allege financial debt extended to it by Piramal has not even intimated either Piramal or JM Financial Asset*

Reconstruction Company regarding the present proceedings. It was incumbent on the alleged Financial Creditor to have issued a prior intimation to Piramal and JM Financial Asset Reconstruction Company regarding the present proceedings.

8. *Further, the alleged Financial Creditor while filing the present application has not even made Piramal or JM Financial Asset Reconstruction Company a party to the accompanying proceedings and in their absence and on their behalf instituted the accompanying proceedings seeking admission of the Respondent to CIPR for an alleged default which is not even being asserted by Piramal or JM Financial Asset Reconstruction Company. It is submitted that both Piramal or JM Financial Asset Reconstruction Company are not just important parties but are necessary parties for effective adjudicating of the accompanying proceedings. Since, the alleged Financial Creditor has failed to implead Piramal or JM Financial Asset Reconstruction Company as party to the present proceedings the present application deserves no indulgence of this Ld. Tribunal and ought to be dismissed. Clearly, the alleged Financial Creditors have filed the present application with ulterior motives, therefore, the accompanying proceedings does not mandate any indulgence from this Ld. Tribunal.*

9. *Without prejudice to the aforesaid, it is further submitted that the alleged default of the alleged financial debt extended by the alleged Financial Creditor to the Respondent is in any event irrelevant for the purposes of the present application, since the cause of action of the present application is the alleged default of the alleged facilities extended by Piramal to the Respondent, which were subsequently assigned to JM Financial Asset Reconstruction Company by Piramal. In any event the alleged Financial Creditors have already invoked the jurisdiction as available under the provisions of Section 7 of the Code for the alleged default of alleged financial debt*

extended by it to the Respondent vide C.P. (I.B.) No.569 of 2023. Hence, the varied submissions regarding the alleged default of the alleged financial debts committed by the Respondent are devoid of any merits or consideration for the purposes of the present application and in any event barred by the doctrine of res subjudice.

10. *Since the alleged Financial Creditors have already invoked the jurisdiction of this Ld. Tribunal for alleged default of an alleged debt extended by them to the Respondent, which is pending before this Ld. Tribunal, adjudication of similar pleas and issues in the accompanying proceedings is an abuse of process of law and wastage of the judicial time of this Ld. Tribunal,*

X X X

13. *Without prejudice to the aforesaid, it is further submitted that the present Application filed by the alleged Financial Creditors is devoid of any merit and is not maintainable. The Applicants do not have any right to approach this Hon'ble Tribunal as they are not **'financial creditor'** within the meaning of the Insolvency and Bankruptcy Code 2016 (**'IBC'**) and are only **'speculative investors.'** The fact that the alleged Financial Creditors are just **'speculative investors'** is evident from several terms and conditions of the purported Security Subscription Agreement /investment agreement relied upon by them in the present proceedings. Relevant Clauses of the Security Subscription Agreements are as follows:*

"5. ASK REAL ESTATE SPECIAL OPPORTUNITIES FUND, a *venture capital fund registered with Securities and Exchange Board of India bearing registration number IN/VCF/10-11/0185 in form of a trust established under the Indian Trusts Act, 1882 having its principal office at Mumbai and its trustees as ASK Trusteeship Services Private Limited, a company in terms of the Companies Act, 2013 and having its registered*

office at Birla Aurora, 16 Level, office floor 9, Dr. Annie Besant Road, Worli, Mumbai - 400030 (hereinafter referred to as "ASK RESOF" or "Investor", which expression shall, unless it be repugnant to the subject or context thereof, include its successors and/or assigns, including in the event of any in-specie distribution of assets, the beneficiaries of such distribution and their successors and assigns);”

“1. Definitions and Interpretation

1.1 Definition

aa) **"Debenture Document(s)"** means this Agreement, the Security Holders Agreement, the Security Documents, including the Debenture Trust Deed, and such other deeds and documents as are required for the purposes of recording the investment of, and the rights and privileges of, the Debenture Holders in and against the Company and the Promoters;

bb) **"Debentures"** shall mean the NCDs and the OCDs collectively and Debenture shall mean any one of them as the context may require;

cc) **"Debenture Holders"** shall mean the Investor and/or any other person who holds any Debenture, from time to time;

dd) **"Debenture Trust Deed"** shall mean a debenture trust deed executed between the Company, the Promoters and the Debenture Trustee for the benefit of the Debenture Holders;

ii) **"Equity Shares"** shall mean equity shares, whether Class A Equity Shares or Class B Equity Shares, of the Company of face value Rs. 10 (Rupees Ten Only);

ss) **"Investor Securities"** shall mean 4,000 (Four thousand) NCDs subscribed in terms of this Agreement and the 1 (One) Class B Equity Share acquired by the Investor as a condition precedent to the subscription of the NCDs, collectively and Investor Security shall mean any one of them as the context may require;

eee) **"NCDs"** shall mean the non-convertible debentures of face value Rs. 1,00,000 (Rupees One lakh Only) each issued/to be issued by the Company having rights, privileges and other terms as specified in the Debenture Documents, including in

Part A of Schedule 6 hereof and to be listed on The Bombay Stock Exchange; provided however that to the extent (1) any NCDs are acquired by the Company at anytime including through exercise of any call option available with the Company such acquired debentures shall be immediately cancelled and (2) if with consent of the Investors, any Debentures are acquired by any of the Promoters ("Acquired Debentures"), then such debentures shall immediately on acquisition thereof be restructured and not be considered as NCDs but shall become part of Promoter Contribution, shall be entitled to monies only in accordance with the Waterfall and shall be subordinate obligations of the Company ranking subordinate to the Debentures and junior to all claims of the Debenture Holders;

ggg) "OCDs" shall mean the optionally convertible debentures of face value Rs. 1,00,000 (Rupees One lakh Only) each issued/ to be issued by the Company having rights, privileges and other terms as specified in Part B of Schedule 6 hereof;

vvv) "Security Holders Agreement" shall mean an agreement dated on or about the date of this Agreement between the Investor, ASK OFFSHORE, ASK IM, ASK RESOF II, the Shareholder, the Guarantor, the Confirming Party and the Company, inter alia, regulating certain governance and operations matters in relation to the Company and/or the Project;

"2.2 Subscription

(a) At the Closing Date, the Investor shall, subject to the terms and conditions of this Agreement including fulfilment, on or before the Long Stop Date, of each of the Conditions Precedent hereof to the satisfaction of the Investor and/or waiver thereof, at the discretion of the Investor and whether at the request of the Company or the Promoters or otherwise, invest an amount equivalent to Rs. 40,00,00,000 (Rupees Forty crores) ("Investment Amount") in the Company, and subscribe to 4,000 (Four thousand) NCDs at par."

"2.3 *The Company undertakes, and the Promoters agree to cause the Company, to issue to the Investor the relevant amount of NCDs as specified in clause 2.2 above, on the terms and*

conditions specified in this Agreement and the other Debenture Documents on the Closing Date and the Company also undertakes, and the Promoters agree to cause the Company, to make payments of all the amounts due in relation to the NCDs timely to the holders thereof. The Company and the Promoters agree that each NCO shall be issued to the Investor at par/face value and without addition of any premium.”

“2.5 It is agreed by the Company and the Promoters that the obligation of the Investor to invest the Investment Amount towards subscription of NCDs is subject to fulfilment or waiver of applicable Conditions Precedent.”

14. *In any event, neither the sums being claimed to be due constitute a **‘financial debt’** nor has any **‘default’** occurred within the meaning of the Code. As such, the present Application is wholly misconceived and a mere attempt to browbeat the Respondent into paying sums that are otherwise not due and payable.*

15. *It is submitted that the amounts alleged to be a **‘debt’** and **‘outstanding and payable’** by the Respondent to the Financial Creditors and allegedly defaulted by the Respondent is not a financial debt within the meaning of Section 5(8) of the Code, which position is also admitted by the alleged Financial Creditors. Consequently, the present application seeking initiation of insolvency proceedings is misconceived and devoid of any merits, and not maintainable. Relevant Clauses of Agreement are as follows:*

“5. ASK REAL ESTATE SPECIAL OPPORTUNITIES FUND-II *an alternative investment fund registered with Securities and Exchange Board of India bearing registration number IN/AIF2/14-15/0115 in form of a trust established under the Indian Trusts Act, 1882 having its principal office at Mumbai and its trustees as ASK Trusteeship Services Private Limited, a company in terms of the Companies Act, 2013 and having its registered office at Birla Aurora, 16 Level, office floor 9, Dr. Annie Besant Road, Worli, Mumbai - 400030 (hereinafter*

referred to as "ASK RESOF II", which expression shall, unless it be repugnant to the subject or context thereof, include each its successors and/or assigns, including in the event of any in-specie distribution of assets, the beneficiaries of such distribution and their successors and assigns);

"1. Definitions and Interpretation

1.1 Definition

aa) "**Debentures**" shall mean the Senior NCDs, NCDs and the OCDs collectively and Debenture shall mean any one of them as the context may require;

z)"**Debenture Document(s)**" means this Agreement, the Existing Subscription Agreements, the Security Holders Agreement, the Security Documents, including the Debenture Trust Deed, and such other deeds and documents as are required for the purposes of recording the investment of, and the rights and privileges of, the Debenture Holders in and against the Company and the Promoters;

kk) "**Existing Debentures**" means the NCDs and the OCDs;

uu) "**Investor Securities**" shall mean the aggregate of the 638 (Six hundred and Thirty Eight) Senior NCDs subscribed in terms of this Agreement by ASK RESOF II, 208 (Two hundred and Eight) Senior NCDs subscribed in terms of this Agreement by ASK OFFSHORE and the 4 (Four) Senior NCDs subscribed in the terms of this Agreement by ASK IM collectively, and Investor Security shall mean any one of them as the context may require;

iii) "**NCDs**" shall mean the non-convertible debentures of face value Rs. 1,00,000 (Rupees One lakh Only) each issued/to be issued by the Company having rights, privileges and other terms as specified in the Debenture Documents, including in Part A of Schedule 6 hereof and to be listed on The Bombay Stock Exchange; provided however that to the extent (1) any NCDs are acquired by the Company at anytime including through exercise of any call option available with the Company such acquired debentures shall be immediately cancelled and (2) if with consent of the Investors, any Debentures are acquired by any of the Promoters ("Acquired Debentures"), then such debentures shall immediately on acquisition thereof be

restructured and not be considered as NCDs but shall become part of Promoter Contribution, shall be entitled to monies only in accordance with the Waterfall and shall be subordinate obligations of the Company ranking subordinate to the Debentures and junior to all claims of the Debenture Holders;

kkk) "OCDs" shall mean the optionally convertible debentures of face value Rs. 1,00,000 (Rupees One lakh Only) each issued/to be issued by the Company having rights, privileges and other terms as specified in Part B of Schedule 6 hereof;

xxx) "Security Documents" means the personal guarantee(s) of the Guarantor, the Debenture Trust Deed, the various deeds and documents, if any, required to create and perfect a mortgage over the Property and a charge over all receivables I movables of the Project, in each case for the benefit of any of the Debenture Holders and in each case as required in accordance with this Agreement or the other Debenture Documents;

yyy) "Security Holders Agreement" shall mean an agreement dated on or about the date of this Agreement between the Investors, ASK RESO F, the Shareholder, the Guarantor, the Confirming Party and the Company, inter alia, regulating certain governance and operations matters in relation to the Company and/or the Project;

aaaa) "Senior NCDs" or "Senior Debentures" shall mean the non-convertible debentures of face value Rs. 10,00,000 (Rupees Ten lakh Only) each issued/to be issued by the Company having rights, privileges and other terms as specified in the Debenture Documents, including in Part C of Schedule 6 hereof and to be listed on The Bombay Stock Exchange; provided however that to the extent (1) any Senior NCDs are acquired by the Company at anytime including through exercise of any call option available with the Company such acquired debentures shall be immediately cancelled and (2) if with consent of the Investors, any Debentures are acquired by any of the Promoters ("Acquired Senior Debentures"), then such debentures shall immediately on acquisition thereof be restructured and not be considered as Senior NCDs but shall become part of Promoter Contribution, shall be entitled to monies only in accordance with

the Waterfall and shall be subordinate obligations of the Company ranking subordinate to the Debentures and junior to all claims of the Debenture Holders;

2.3. The Company undertakes, and the Promoters agree to cause the Company, to issue to the Investors the relevant amount of Senior NCDs as specified in clause 2.2 above, on the terms and conditions specified in this Agreement and the other Debenture Documents on the Closing Date and the Company also undertakes, and the Promoters agree to cause the Company, to make payments of all the amounts due in relation to the Senior NCDs timely to the holders thereof. The Company and the Promoters agree that each Senior NCO shall be issued to the Investors at par/face value and without addition of any premium.

2.5 It is agreed by the Company and the Promoters that the obligation of the Investors to invest the respective portion of the Investment Amount towards subscription of respective Senior NCDs is subject to fulfilment or waiver of applicable Conditions Precedent.

2.6 The Parties agree that the terms of the Senior NCDs as specified in Part C of Schedule 6 shall be in addition to the other terms as specified in the Debenture Documents. Without prejudice to the generality of the aforesaid, the Parties agree that:

- a) Each Senior NCO shall earn interest in the form of Coupon on a per annum basis payable on the principal amount of each Debenture and solely from the Remainder Amounts. It is clarified that the Coupon would only be payable to the extent of the Remainder Amounts available annually, but subject to clause 2.6(c) below, at the end of each Financial Year unless the Board determines an earlier payout from the Remainder Amounts; provided also that to the extent that there are insufficient Remainder Amounts at the end of any Financial Year, the excess Coupon would not accrue but would be accrued in the year in which there are Remainder Amounts and would be paid out of the Remainder Amounts;*

- b) *Senior Redemption Premium and principal sums shall each be due and payable notwithstanding anything to the contrary contained in this Agreement on the Redemption Date for such Senior NCD;*
- c) *Any payment of Coupon, Senior Redemption Premium or principal sums of the Senior Debentures shall on the relevant due date be paid to persons who are the holders of the Senior NCDs on the relevant Record Date and provided, to the extent required, consent of holders of Piramal Debentures or LIC HFL, as the case may be, is obtained for such payment or the Piramal Debentures and LIC Loans have been redeemed/repaid, as the case may be, on or before such date of payment;*
- d) *If any payment was due on a day which was not a Business Day, then the immediately preceding Business Day would be considered as the due date for the purposes of payment but all interest, premium etc would be calculated till the actual due date;*
- e) *The principal amount of the Senior NCDs, the Coupon and the Senior Redemption Premium would be secured by the following:*
 - 1. *Second ranking Charge in the nature of mortgage with the Debenture Trustee on the Land and all developments thereon;*
 - 2. *Second ranking Charge over present and future receivables of the Company from the mortgaged properties; and*
 - 3. *Personal Guarantee by the Guarantor*

The aforesaid security in 1 and 2 would be created subject to the same being allowed by existing or proposed lenders of the Company or in case the existing and proposed lenders of the Company are fully satisfied in which case the Company shall, and the Promoters shall cause the Company to, obtain all consents, including any permission to mortgage from NOIDA, for such security creation and shall also undertake all other actions and filings as is required or desirable for the creation and perfection of such security. The aforesaid security when created

shall rank *pari passu* for the benefit of all the Senior NCDs, the NCDs and the OCDs.

“3. CONDITIONS PRECEDENT

3.1 *The obligations of the Investors under this Agreement and the other Debenture Documents including its obligation to subscribe to any Debenture and make payment of any part of the Investment Amount shall be conditional upon the issuance of the CP Fulfillment Certificate by the Company and the fulfillment (or, where permissible under applicable Law, waiver by the Investors, in their sole discretion) of the following conditions precedent, in each case, to the satisfaction of the Investors, who shall be entitled to act in their sole discretion (“Conditions Precedent”):*

1. *Evidence of receipt of requisite approvals from, the Board and shareholders of the Company and the Promoters (to the extent required) to execute this Agreement and the other Debenture Documents and to undertake and perform the transactions and other obligations contemplated under this Agreement and the Debenture Documents;*
2. *The Investors should have concluded appropriate due diligence, including legal and tax, on the Lands, the Company and the Project and any concerns arising therefrom should have been settled to the satisfaction of each Investor;*
3. *The Company and all other persons parties to the various Project Documents (other than any builder buyer agreements) should not have been in material breach of any of the terms thereof save and except as disclosed to the Investors prior to the date hereof;*
4. *Except for Piramal Finance Limited, its debenture trustee, the Existing Debenture Holders and the Debenture Trustee, no Person should have claimed any Encumbrance and no Person should have encroached upon the Land or the Project or any development thereon or any receivables or claims arising thereon;*
5. *The Company, the Promoters and the Investors should have agreed to the business plan attached as Schedule 7*

(the "Business Plan") for the Project, indicating cash flow, development milestones, key expenditure items, schedule for making payments, etc. and this Business Plan should have been adopted by the Board and a certified true copy of the resolution regarding such adoption should be provided to the Investors and to ASK RESOF;

- 6. The Company should have obtained a signed certificate, in a form approved by the Investors, from a registered independent chartered accountant acceptable to the Investors confirming that the issuance of the Senior Debentures does not breach any borrowing limits binding on the Company;*
- 7. The proposed Senior Debenture Holders should have obtained the benefit of the Debenture Trust Deed;*
- 8. The Guarantor should have issued a personal guarantee (in a form acceptable to the Investors) guaranteeing the obligations of the Company upon the occurrence of an Event of Default;*
- 9. The Company should have issued to and delivered to the Investors cheques dated as of the Redemption Date ("PDCs") for the principal sums of the respective portion of the Investment Amount, the Coupon and the Senior Redemption Premium till the Redemption Date for the Senior Debentures, duly signed and executed by Mr. Getamber Anand as a signatory of the said bank account;*
- 10. The Guarantor should have confirmed that all approvals required for the Company to bind it to the transactions contemplated under this Agreement and the Debenture Documents have been legally and validly obtained;*
- 11. No Material Adverse Effect should have been continuing or be threatened;*
- 12. The Company should have delivered a valuation certificate from a chartered accountant for the Lands, including development rights therein and any receivables arising therefrom which have not become overdue by more than 180 (one hundred and eighty) days, valuing it at no lower than the total value of the aggregate of the Investment Amount and the amounts invested in terms of the Existing Subscription Agreements;*

20. Each of the Existing Debenture Holders and the Debenture Trustee shall have agreed to the issuance of the Senior NCDs, the extension, when created, of pari passu security for the benefit of the Senior Debenture Holders, the modifications of the terms of the NCDs and the OCDs and the modification of the terms of the Debenture Documents; and

21. The Company should have delivered to the Investors a non-objection certificate on behalf of holders and trustee of Pi ramal Debentures.

“3.2 The Company and the Promoters shall use best efforts to ensure the expeditious fulfillment of each of the Conditions Precedent. The Company shall issue a CP Fulfilment Certificate to the Investors immediately upon satisfaction of all the Conditions Precedent along with evidence of satisfaction of each Condition Precedent unless the fulfillment thereof has been waived by the Investors. If the Company or the Promoters are seeking a waiver of any of the Conditions Precedent, then the Company shall issue a waiver request to the Investors requesting it to waive such Condition Precedent. The waiver request shall be in writing, signed by a director of the Company and shall explain in reasonable detail the reason why the particular Condition Precedent could not be met. The waiver request shall also describe the steps which the Company is taking and/or proposing to take to satisfy the particular Condition Precedent. If upon receipt of the CP Fulfilment Certificate, the Investors are of the opinion that any condition has not been fulfilled, they or any of them shall issue a notice to the Company informing it of the condition which has not been fulfilled and thereafter the Company and the Promoters shall make all efforts to fulfil the relevant condition as soon as reasonably possible thereafter and in any case on or before the Long Stop Date, failing which the Investors shall be under no obligation to invest. Each CP Fulfilment Certificate shall contain the amounts sought from the Investors and which shall, in respect of each Investor not be higher than ASK RESOF II Investment Amount, ASK OFFSHORE Investment Amount or the ASK IM Investment Amount (as applicable), and in aggregate not be higher than the Investment Amount.”

X X X

18. *It is further submitted neither any alleged debts nor any alleged defaults exist which are necessary ingredients to be satisfied before preferring the present application. Evidently, the present application is an abuse of process of law to arm twist the Respondent to succumb to its demands. Moreover, contrary to the Applicants assertions, the Respondent has not breached or defaulted on any of the terms of the Agreements. The Respondent denies all your assertions as set out in the Application unless expressly admitted herein.*

19. *In any event, no amounts are due in view of the Covid-19 pandemic which constitutes a force majeure event as recognized by the Delhi High Court even when expressively not mentioned within the Agreements. It is submitted that the Debenture Trust Deed/Investment Agreement are in nature of a commercial agreement and therefore, as per relevant trade usages and even otherwise, the terms/clauses of force majeure are automatically incorporated in these Agreements. In any event, in such contracts, the clauses of force majeure are clearly implied and not expressly provided for. Owing to the subsistence of these force majeure events, the timelines under the Agreements for making the said allegedly payments therefore stand suspended/extended w.e.f. from March 2020 and in any event continues till date. As such, it cannot be stated that the Company has committed any default or owes any debt to the Financial Creditor at present in view of the fact that any and all timelines stand extended in view of the force majeure provisions.*

20. *Furthermore, the amounts towards interest being sought by you under the Investment Agreements are clearly oppressive, exorbitant and usurious and as such cannot be sought for, especially during the present times when the Company's entire real estate business*

has been adversely impacted owing to the Covid-19 pandemic situation.

AMOUNTS ALLEGED TO BE IN DEFAULT ARE INFLATED AND EXAGGERATED

21. In any event and without prejudice to the aforesaid submissions, it is specifically denied that any amount was due on 31.05.2023 and that the payment on which has been defaulted by the Respondent. Furthermore, as also detailed herein, it is clear that the sum of INR 261,27,92,247 (Rupees Two Hundred and Sixty-One Crores Twenty-Seven Lakhs Ninety-Two Thousand Two Hundred and Forty-Seven only) (amount in default as on 31.05.2023) that has been alleged to be due or in default in the instant proceedings are in any event illegal, exaggerated and hence cannot be said to be the due amounts. It is therefore clear that to date there has been no valid demand made by the Financial Creditors/ASK Entities against the Respondent. In any event, as is clear from the below facts, no such demand can be made against the Respondent at this stage. The amounts being asserted by the Financial Creditors/ASK Entities in the present proceedings are inflated and exaggerated, hence, neither due nor payable.

22. The Financial Creditors/ASK Entities have failed to furnish any document on record that entitles them to claim a sum of INR 261,27,92,247/-from the Respondent. They have also failed to share the break-up or methodology for arriving at this outstanding figure as claimed by them.

THE RESPONDENT HAS NOT COMMITTED ANY DEFAULTS WITH RESPECT TO THE FORCE MAJEURE EVENTS I.E., THE COVID-19 PANDEMIC

23. *It is submitted that the Security Subscription Agreement/ Investment Agreement is a commercial agreement and therefore, as per relevant trade usages and even otherwise, the terms/ clauses of force majeure are automatically incorporated in these Agreements. In any event, in such contracts, the clauses of force majeure are clearly implied and not expressly provided for.*
24. *It is submitted that time was not of the essence in any of the agreements between the Parties. Moreover, the Parties had always considered that the alleged time/ alleged stipulated dates under the Agreement could not be set in stone and were extendable.*
25. *Keeping the aforesaid factors in mind, in terms of the admitted force majeure events and the impossibility of performance at this stage, the time for performance under the Agreement correspondingly stands extended during the continuation of the said force majeure events.*
26. *In any event, under Section 56 of the Indian Contract Act, 1872 and even otherwise, the time for performance stands extended and/ or the obligations stand frustrated owing to the impossibility to perform the Agreement.*
27. *It is submitted that owing to the Covid-19 pandemic, lockdowns, bans etc., there was no way for the Respondent to continue with the construction of the project i.e., ATS Knightsbridge in order to redeem the OCDs on time. As such, in any event, the time stands extended owing to the impossibility of performance under the Agreement and the consequent frustration of the said Agreement.*
28. *In this regard, it is submitted that the ongoing Covid-19 crisis is an extraordinary and unprecedented crisis and is beyond the control of the parties. The crisis has been aggravated manifold due to the curtailed economic activity and the already existing financial vulnerabilities in the economy. It is predicted that the present crisis*

will push the economy into a recession worse than the 2008 financial crisis. As such, the country is facing its greatest challenge in recent times.

- 29. It is submitted that the governmental authorities had imposed drastic restrictions on the businesses functioning across the country. These restrictions imposed by the government authorities led to our economic activities virtually being brought to a halt, liquidity shortages and other disruptions in our business. The impact of the pandemic is uniquely challenging as due to the mobility constraints there was a serious and profound impact on all businesses in the country, including the real estate sector.*
- 30. In recognition of the unprecedented impact of the pandemic, the Government of India issued an order no. F18/4/2020-PPD dated 19 February 2020 and clarified in February 2020 itself that the disruption of supply chains due to outbreak of the Covid-19 pandemic would constitute a force majeure event. As such, even the Government of India is commercially treating the outbreak as an extraordinary event akin to a force majeure event and exempting the parties from complying with the contractual and other obligations.*
- 31. Thereafter, on 11 March 2020, the World Health Organization declared that the Covid-19 outbreak is characterized as a pandemic. This was followed by the Government of National Capital Territory of Delhi invoking provisions of the Epidemic Diseases Act 1897 on 12 March 2020 which signified the existence of a public health emergency in NCT of Delhi. Owing to the foregoing, our business activity, which had been crippled because of the onset of the pandemic, completely collapsed from March 2020 onwards.*

32. Subsequently, even the Government of India announced its decision under notification (No. 33-4/2020/NDM-I) dated 14 March 2020 to treat COVID-19 as a "notified disaster". As such, all governmental authorities recognized that the Covid-19 was an unprecedented disaster.
33. Thereafter, the Government of Uttar Pradesh, Delhi Government etc. imposed severe lockdown restrictions owing to which movement of persons / collection of people could not take place and normal business activity could not be carried out.
34. In parallel to this, the Government of India imposed a Janata curfew on 22.03.2020 and a nationwide lockdown on 24.03.2020 (which was thereafter extended on multiple occasions and in fact continues to be in force in many nearby regions). As a result of this, the entire Country was put under a lockdown and only essential services such as hospitals, ration shops etc. were allowed to operate.
35. Considering that the Respondent's operations were non-essential services as per the said order and subsequent notifications/orders issued by various governments, it became illegal for it to even open its offices, let alone carry out its business activities. Therefore, as a result of these restrictions, the Respondent's construction business operations came to a complete standstill. It is submitted that this is an unprecedented situation and has affected all business operations in the country.
36. In view of the pandemic, the governmental authorities have taken several drastic steps including the postponement of all financial, disclosure and other compliance related obligations and the Courts have granted urgent reliefs to the parties. For instance, the Reserve Bank of India has introduced several relief measures such as imposing a moratorium/deferment of 3 months on payment of loan

instalments and interest on working capital facilities, and exemptions from several compliance and disclosure requirements. As such, the present crisis is so unprecedented that the banks are also being directed to not take any coercive action for financial defaults and in fact are not even declaring accounts as NPAs despite the defaults.

- 37. The Reserve Bank of India has also recognized the liquidity stress in the economy and introduced various policies vide Statement on Developmental and Regulatory Policies dated 27 March 2020. The Statement recognizes that due to lockdown nearly all of the businesses have come to a standstill which is leading inter alia to a sudden liquidity stress in the markets. It also emphasizes the need for "easing financial stress caused by COVID-19 disruptions by relaxing repayment pressures and improving access to working capital".*
- 38. Similarly, the Securities and Exchange Board of India ('SEBI) has issued various circulars exempting various entities from its compliance and disclosure requirements, listing obligations etc. As such, even SEBI has recognized that the businesses are unable to function and carry out even their day-to-day affairs due to prevailing mobility restrictions and other logistical challenges.*
- 39. Moreover, the Ministry of Road Transport and Highways, the Government of India has also introduced several relief measures for its sub-contractors vide its Office Memorandum No. COVID-19/RoadMap/JS(H)/2020 dated 18 May 2020. These relief measures include measures such as allowing extension of time to contractors under respective force majeure provisions, waiver of penalty for delay in submission of Bank Guarantees etc. The scale of these reforms shows the negative impact of the pandemic on the businesses in the country.*

40. *Apart from the regulators, even the courts in the country have taken cognizance of the disruptions caused by the Covid-19 crisis and extended limitation/interim orders irrespective of the conditions prescribed therein (if any). For instance, the Hon'ble Supreme Court of India vide Orders dated 23 March 2020 and 6 May 2020 extended the period of limitation in respect of all matters w.e.f. 15 March 2020 in Suo Motu Writ Petition No. 3/2020. The said Orders were passed in recognition of the impact of the pandemic.*
41. *Similarly, the Hon'ble Delhi High Court directed vide an administrative order bearing No. 373/Est/E1/DHC dated 23 March 2020 that the limitation period in all pending cases shall not run during the lockdown period. Subsequently, it also extended all interim orders in pending matters w.e.f. 16 March 2020 vide its order dated 25 March 2020 passed in Writ Petition Urgent 2/2020 till 15 May 2020 or further orders. Similar omnibus orders have been passed by nearly all other High Courts extending the interim orders which have expired or were about to expire after mid-March 2020. These omnibus orders demonstrate the scale of the crisis the businesses are currently experiencing in the country.*
42. *It is submitted that the Hon'ble Supreme Court passed an order dated 08.03.2021 in Suo Moto Writ Petition (Civil) No. 3 of 2020 extending the period of limitation prescribed under the general law of limitation or any other special law for any suit, appeal, application, or proceedings. The Hon'ble Court held that the period between 15.03.2020 till 14.03.2021 shall stand excluded.*
43. *In this regard, reference may also be made to the Hon'ble Delhi High Court's judgment in **Halliburton Offshore Services v. Vedanta Ltd, O.M.P. (1) (COMM) 88/2020 (Judgment dated 29 May 2020)** that the ongoing COVID-19 pandemic constitutes a force majeure event. This was further reiterated in **MEP Infrastructure***

Developers Ltd. v. South Delhi Municipal Corporation and Others, W.P. (C) 2241/2020 (Judgment dated 12.6.2020) wherein the Hon'ble High Court observed that the ongoing pandemic has substantially altered ground realities. Similarly, the Hon'ble High Court held the following: in **Mumbai International Airport Limited v. Airports Authority of India and An. (OMP)(Comm.) 174/2020**):

"20. (...) The COVID-2019 pandemic was, undisputedly, an "epidemic or plague within India". The resultant restrictions, lockdowns and advisories issued by the Central and State Governments and Authorities also, in my view, qualify as an "event or circumstance of a nature analogous" to the events set forth in clauses (i) to (viii) of Article 16.1.3 and are also, therefore, "Force Majeure". Even if one were not to seek recourse to clause (x), the said restrictions, lockdowns and advisories undoubtedly constituted "consequences" of the COVID-2019 pandemic which, too, are specifically covered by Article 16.1.3.

23. The COVID-2019 pandemic, and its sequelae in the form of the various restrictions imposed by the Governmental authorities, on which MIAL relies, were clearly beyond the reasonable control of MIAL. It cannot be said that MIAL could, with the exercise of good industry practice or reasonable skill and care, have avoided either the COVID-2019 pandemic, or the imposition of the restrictions and lockdown that followed thereupon. Nor could it be said that the COVID-2019 pandemic, or the resulting restrictions and lockdowns, resulted from any negligence or misconduct of MIAL, or the failure of MIAL to perform its obligations under the OMDA. Conditions (b), (c) and (d) of "force majeure", as set out in Article 16. 1.2 of the OMDA, therefore, stand satisfied in the present case."

44. Furthermore, the Parliament has recently passed the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 vide which it has amended the Insolvency and Bankruptcy Code 2016 to provide permanent immunity to corporate debtors from initiation of any

insolvency process for any default occurring in the period of six months or such further period as may be notified but not exceeding one year from 25 March 2020. In fact, the Amendment Act stipulates that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

45. It is submitted that these extreme steps evidence the crisis the country was undergoing and showed how severe the impact on the businesses has been. The intent of these reforms was to ensure that the businesses have sufficient liquidity, and they are able to re-start their activities and start generating revenues. These force majeure conditions have been recognized by all authorities and have persisted longer than anticipated by anyone. Therefore, it is undisputed that the Respondent could not have taken any steps in furtherance of its contractual obligations under the Agreement.

46. It is submitted that the unforeseen impact of this pandemic is therefore required to be taken into consideration under the Agreement and the corresponding period is required to be excluded in its entirety while calculating the time period available to the Respondent.

47. It is submitted that the onset of the pandemic had rendered the performance of the contractual obligations frustrated and impossible and as such no default can be attributed to the Respondent. The Covid-19 pandemic, which was evidently beyond what was contemplated by the Parties at the time of entering into the said obligations and is beyond the control of the Parties, has made the performance of the contractual obligations by the Respondent impossible and thus frustrated.

48. Therefore, the timelines under the Agreement (and or the other agreements - even if they apply qua the Respondent's obligations)

for allegedly making the said payments stands suspended/extended owing to the onset of the Covid-19 pandemic. As such, it cannot be said that the alleged repayment 22 dates as specified in the previous agreements could not be extended particularly when the same fell in the midst of the lockdowns and the pandemic.

PRESENT INSOLVENCY PROCEEDINGS NOT MAINTAINABLE AND BARRED UNDER SECTION 10A OF THE CODE SINCE ALLEGED DEFAULT OCCURRED DURING SUSPENDED PERIOD

49. It is submitted that Parliament has passed the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 vide which it has amended the Insolvency and Bankruptcy Code 2016 to provide permanent immunity to corporate debtors from initiation of any insolvency process for any default occurring in the period of six months or such further period as may be notified but not exceeding one year from 25 March 2020. Infact, the Amendment Act stipulates that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

50. It is submitted that even if we assume that the redemption of the outstanding debentures (OCDs & NCDs) were to be made on 07.06.2023 which was later on revised to 30.06.2023 and the non-redemption of the same by Respondent resulted in an event of default which further resulted into filing the present proceedings, even then the present proceedings are barred in view of the protection provided to the Corporate Debtor under Section 10 A of the Code. Considering the Covid-19 Pandemic a force majeure event, all such payments stand suspended/extended.

51. It is submitted that since the alleged defaults alleged to have been committed by the Respondent have occurred during the suspended

period as defined under Section 10A of the Code hence, the present proceedings preferred by the alleged Financial Creditor against the Respondent is not maintainable and barred under law. It is submitted that Section 10A of the Code prohibits filing of an application for initiation of insolvency proceedings for any default arising after 25.03.2020, till the end of the Specified Period without an inquiry into the cause of default. In the present case since the default has occurred after 25.03.2020 and before the end of the specified period, the present application is barred by the force of Section 10A and deserved to be rejected outrightly by this Hon'ble Tribunal.

52. It is submitted that even if this Hon'ble Tribunal arrives at a finding that a debt exists whose default has been committed by the Respondent even in such a scenario the present proceedings are not maintainable being barred under the provision of Section 10A of the Code owing to the onset of the Covid-19 Pandemic and its after effect.

53. In light of the aforesaid, it is submitted that the present Application/Petition is misconceived and ought not to be allowed to be used as a pressure tactic to extort money from the Respondent. Accordingly, the present Application ought to be rejected.

APPLICANTS DELIBERETLY WITHHELD THE FUNDINGS

54. It is stated that the alleged Financial Creditors/ ASK Entities are joint signatories of the Respondent's current Account nos. 7811474358 and 9613740402 maintained with Kotak Mahindra Bank with the primary motive that the Applicants were keen to oversee the deployment of funds received by the Respondent from the Applicants pursuant to the issuance of the above-stated securities. It was also a common understanding between the parties that the release of funds from the said current accounts

would not be unreasonably withheld by Applicants/ ASK entities as the funds were needed to carry out the construction and development activities.

55. *Further, on many occasions and for prolonged stretches of time, the alleged Financial Creditors/ ASK Entities did not release any funds at all for operating and construction expenses in blatant dis-regard of the Project's need and committed possession timelines to the customers and various other stakeholders. In spite of the Respondent's continuous follow-ups with the alleged Financial Creditors/ ASK Entities, their disbursement requests fell on deaf ears and money was not released to meet project expenses. Additionally, the Applicants, despite the repeated requests of the Respondent, did not sign the claques qua the development of the project leading to the further delay in completion of the Project.*
56. *It is pertinent to mention that the Applicants/ ASK Entities turned blind eye to the Respondent's request to release the funds lying in Current Account no. 7811474358 to pay the outstanding wages, salaries, statutory dues, construction and operating expenses of the Project, but to the Respondent's dismay, no cooperation in this regard had been provided to the Respondent by the Applicants/ ASK Entities.*
57. *Moreover, an unfortunate event that occurred at the project site was brought to the notice of the alleged Financial Creditor wherein, the they were appraised about the incident which took place on 26.06,2023, a site worker, namely Avnish Kumar Singh (Pump Operator) Employee ID MR03987 poured petrol over himself and attempted to immolate himself and commit suicide. Fortunately, nearby workers and security guards saw him doing so and snatched the lighter and match box before, in the nick of time or a grave tragedy could have occurred. The salary of this employee is*

Rs 17,000/- per month which was pending since March 2023. The said incident provoked other staff working at the project site, and they started threatening to take legal action against the company. The said event has been even reported to the concerned police station.

- 58. On 18.05.2022 the account balance of the joint account in which the alleged Financial Creditors are Joint signatory was INR 6,67,46,988/- The Respondent was desperately following up with the Applicants for release of funds to meet Project expenses.*
- 59. However, to the utter shock and dis-may of the Respondents, the alleged Financial Creditor/ ASK Trusteeship Services Pvt. Ltd, in gross abuse of their power did not release even a Rupee to the Respondent for months, causing irreparable and irreversible harm to the Project's progress. Further, they did not even release money to pay monthly GST, which is a statutory due. Finally, after much hue and cry the monies were released after 64 days by the alleged Financial Creditors without giving any reasons for the delay in the disbursal. This incident led to the resignation of almost 18 staff members working on the project site, since they could not receive their monthly Wages due to inaction of the alleged Financial Creditor in releasing of funds.*
- 60. All this time, the Respondent was continuously requesting the alleged Financial Creditors to release the money lying in the accounts for project construction, as works at site were stalled causing utter distress to the Respondent and delay in completion of the project. Despite, repeated request of the Respondent to the alleged Financial Creditors to release the payments from the balance of INR 7,19,83,471/- which was lying in Current Account no. 7811474358 the alleged Financial Creditors paid no heed*

purposely leaving the Respondent helpless and distressed and causing unrest at the site amongst the workers as well.

61. *From the above-stated facts and calculated misdemeanor of the alleged Financial Creditors/ ASK Entities, it is evident that these cold and calculated moves of the alleged Financial Creditors/ ASK Entities, were pre-meditated and filled with malafide intent to financially weaken the Respondent and make it vulnerable to legal action and to push it to insolvency. From the very beginning, the intent was to ensure that the Project doesn't progress and in turn, the Respondent is left distraught, and its reputation is wrecked.*
62. *Pertinently, the Bank accounts have been in grip of the alleged Financial Creditors/ ASK Entities and non-release of funds by them resulted in slowing down Project construction. This in turn delayed the customer collections from existing sales due to non-achievement of milestones and hampered new sales. Since money was not flowing in and collections dwindled, the Respondent found it difficult to meet its loan obligations and the account was slipping towards being an NPA. Continuously, the circular flow of money was disrupted by the alleged Financial Creditors/ ASK Entities malafide and ill-intended actions, causing grievous injury to the project and the company.*
63. *The only logical conclusion based on this purposeful and continuing noncooperative and obstructive behavior of the alleged Financial Creditors/ ASK Entities is that the alleged Financial Creditor/ ASK Trusteeship Services Pvt. Ltd's sole interest is to service its loan account and to bring the Respondent down on its knees. The alleged Financial Creditors/ ASK Entities entered into this financing arrangement with the Respondent with sole objective of earning interest at skyrocketing rates and it is neither interested in*

the well-being or progress of the Housing Project, nor in providing any financial assistance to the Respondent.”

24. As can be seen from the provisions of Section 7(3)(5) of IBC, 2016 and Regulation 2A of the IBBI (Resolution Process for Corporate Persons) Regulations 2016, for the purpose of admission or rejection of an application filed under Section 7 of IBC, 2016, this Tribunal may refer to the record of default recorded with the Information Utility or such other record of evidence of default as may be specified. The Regulation 2A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 reads thus:-

“2A. Record or evidence of default by financial creditor.—*For the purposes of clause (a) of sub-section (3) of section 7 of the Code, the financial creditor may furnish any of the following record or evidence of default, namely:-*

- (a) certified copy of entries in the relevant account in the bankers’ book as defined in clause (3) of section 2 of the Bankers’ Books Evidence Act, 1891 (18 of 1891);*
- (b) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, where the period of appeal against such order has expired.”*

25. In the present case, the default has been acknowledged in the Financial Statement of the CD. Besides, the Petitioners have also filed the record of default recorded with the Information Utility, though disputed by the CD.

26. The Section 7 does not provide that the dispute raised by the CD can be ground to nix the application filed under Section 7(2) of IBC, 2016. Thus, we need to go by the record of default registered with IU. Once, in the Financial

Statement, the CD has acknowledged the default, we are unable to appreciate the plea raised on behalf of the CD that no notice of demand was sent by the Applicants. The Demand Notice is not the precondition for filing the application under Section 7(2) of IBC, 2016. The Corporate Debtor has not raised any plea regarding disciplinary action against the IRP proposed by the CD. Even otherwise also, the RP has given the declaration that no disciplinary proceedings are pending against him. The declaration reads thus:-

“Madam/Sir,

I, Gaurav Katiyar, an insolvency professional registered with Indian Institute of Insolvency Professionals of ICAI having registration number IBBI/IPA-001/IP-P00209/2017-18/10409 have been proposed as the interim resolution professional by the Financial Creditor, namely M/s. Ask Trusteeship Services Private Limited (through Ask Property Investment Advisors Private Limited), M/s. Ask India Real Estate Special Opportunities Fund Pte. Ltd. and M/s. Ask Investment Managers Limited, in connection with the proposed corporate insolvency resolution process of M/s ATS Heights Private Limited.

In accordance with rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, I hereby:

- i. Agree to accept appointment as the interim resolution professional if an order admitting the present application is passed;*
- ii. State that the registration number allotted to me by the Board is IBBI/IPA-001/IP-P00209/2017-18/10409 and that I am currently qualified to practice as an insolvency professional;*

iii. *Disclose that I am currently having the following assignments in hand:*

Sl. No.	Assignment as	Number of assignment(s)	No.	Name of corporate debtor	Date of commencement of process	Expected date of closure of process
Corporate Processes						
1	IRP	1	1	"Avalon Regal Court "of GRJ Distributors & Developers Private Limited	03.06.2022	Matter stayed by Hon'ble NCLAT vide order dated 13.06.2022, CIRP closure date cannot be ascertained.
2	RP	2	1	Value Infratech India Private Limited	03.01.2020	Resolution plan is pending before Hon'ble NCLT
			2	Earthcon Universal Infratech Private Limited	08-01-2020	Resolution plan is pending before Hon'ble NCLT
3	Liquidator (including voluntary liquidations)	3	1	Zynke Exports Private Limited	01-04-2020	02.02.2023
			2	PICO Event Marketing (India) Private Limited	22.10.2020	22-04-2023
			3	Zoya Exports Private Limited	16.12.2022	10.11.2023
4	Authorised Representative	Nil				
Individual Processes						
5	Resolution Professional	4 assignments of personal guarantors				
6	Bankruptcy Trustee	Nil				
7	Any other	Nil				

iv. *Certify that there are no disciplinary proceedings pending against me with the Board or Indian Institute of Insolvency Professionals of ICAI;*

v. *Affirm that I am eligible to be appointed as a resolution professional in respect of the corporate debtor in accordance with*

the provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016;

- vi. Make the following disclosures in accordance with the code of conduct for insolvency professionals as set out in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016;*
 - a. I hereby declare that I am eligible to be appointed as Interim Resolution Professional/ Resolution Professional/ in the case of the Corporate Debtor in view of the fact that I fall within the ambit of 'Independent Person' qua the Corporate Debtor as defined in explanation to Regulation 3 of The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.*
 - b. I hereby declare that I do not have any pecuniary or personal relationship with the Corporate Debtor, as stipulated under Schedule-I of The Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.*
 - c. I hereby declare that I do not have any pecuniary or personal relationship with any of the stakeholders entitled to distribution under Section 53 or 178 of the code.*
 - d. I shall maintain integrity by being honest, straightforward and forthright in all professional relationships.*
 - e. I shall not misrepresent any facts or situations and should refrain from being involved in any action that would bring disrepute to the profession.*
 - f. I shall act with objectivity in my professional dealings by ensuring that my decisions are made without the presence of any bias, conflict of interest, coercion, or undue influence of*

any party, whether directly connected to the insolvency proceedings or not.

g. I shall not acquire, directly or indirectly, any of the assets of the debtor, nor knowingly permit any relative to do so.

h. I shall maintain complete independence in my professional relationships and shall conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.”

27. The application is also complete in all respects.

28. As far as the plea of financial health of the CD is concerned, the Respondent itself has admitted that it needs the financial aid, which the Petitioners denied. Further, in terms of the view taken by Hon'ble Supreme Court in subsequent judgment of Hon'ble Supreme Court in **M. Suresh Kumar Reddy vs. Canara Bank & Ors.** (Civil Appeal No. 7121 of 2022), the view taken in Vidarbha Industries could be watered down. The relevant excerpt of the judgment reads thus:-

*“9. The view taken in **Innoventive Industries** has been followed by this Court in the case of **E.S. Krishnamurthy and others**. Paragraph nos. 32 to 34 of the said decision read thus:*

32. In Innoventive industries [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407, paras 28 and 30 : (2018) 1 SCC (Civ) 356], a two-Judge Bench of this Court has explained the ambit of Section 7 IBC, and held that the adjudicating authority only has to determine whether a “default” has occurred i.e. whether the “debt” (which may still be disputed) was due and remained unpaid. If the adjudicating authority is of

the opinion that a “default” has occurred, it has to admit the application unless it is incomplete. Speaking through Rohinton F. Nariman, J., the Court has observed : (SCC pp. 438-39, paras 28 & 30)

“28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the

application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

* * *

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating

authority that the adjudicating authority may reject an application and not otherwise.'

33. *In the present case, the adjudicating authority noted that it had listed the petition for admission on diverse dates and had adjourned it, inter alia, to allow the parties to explore the possibility of a settlement. Evidently, no settlement was arrived at by all the original petitioners who had instituted the proceedings. The adjudicating authority noticed that joint consent terms dated 12-2-2020 had been filed before it. But it is common ground that these consent terms did not cover all the original petitioners who were before the adjudicating authority. The adjudicating authority was apprised of the fact that the claims of 140 investors had been fully settled by the respondent. The respondent also noted that of the claims of the original petitioners who have moved the adjudicating authority, only 13 have been settled while, according to it “40 are in the process of settlement and 39 are pending settlements”. Eventually, the adjudicating authority did not entertain the petition on the ground that the procedure under IBC is summary, and it cannot manage or decide upon each and every claim of the individual homebuyers. The adjudicating authority also held that since the process of settlement was progressing “in all seriousness”, instead of examining all the individual claims, it would dispose of the petition by directing the respondent to settle all the remaining claims “seriously” within a definite time-frame. The petition was accordingly disposed of by directing the respondent to settle the remaining claims no later than within three months, and that if any of the remaining original petitioners were aggrieved by the settlement process, they would be at liberty to approach the adjudicating authority again in accordance*

with law. The adjudicating authority's decision was also upheld by the appellate authority, who supported its conclusions.

34. *The adjudicating authority has clearly acted outside the terms of its jurisdiction under Section 7(5) IBC. **The adjudicating authority is empowered only to verify whether a default has occurred or if a default has not occurred. Based upon its decision, the adjudicating authority must then either admit or reject an application, respectively.** These are the only two courses of action which are open to the adjudicating authority in accordance with Section 7(5). The adjudicating authority cannot compel a party to the proceedings before it to settle a dispute.*

(emphasis added)

10. *Thus, once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the application under Section 7. “Default” is defined under sub-section (12) of Section 3 IBC which reads thus:*

“3. Definitions: - *In this Code, unless the context otherwise requires—*

.. .. .

(12) *“default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be;”*

Thus, even the non-payment of a part of debt when it becomes due and payable will amount to default on the part of a corporate debtor. In such a case, an order of admission under Section 7 IBC must follow. If NCLT finds that there is a debt, but it has not become due and payable, the

application under Section 7 can be rejected. Otherwise, there is no ground available to reject the application.

11. Reliance is placed on the decision of this Court in **Vidarbha Industries** and in particular, what is held therein in paras 86 to 89 which reads thus:-

“86. Even though Section 7(5)(a) IBC may confer discretionary power on the adjudicating authority, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner.

87. Ordinarily, the adjudicating authority (NCLT) would have to exercise its discretion to admit an application under Section 7 IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the corporate debtor in payment of the debt, unless there are good reasons not to admit the petition.

88. The adjudicating authority (NCLT) has to consider the grounds made out by the corporate debtor against admission, on its own merits. For example, when admission is opposed on the ground of existence of an award or a decree in favour of the corporate debtor, and the awarded/ decretal amount exceeds the amount of the debt, the adjudicating authority would have to exercise its discretion under Section 7(5)(a) IBC to keep the admission of the application of the financial creditor in abeyance, unless there is good reason not to do so. The adjudicating authority may, for example, admit the application of the financial creditor, notwithstanding any

award or decree, if the award/ decretal amount is incapable of realisation. The example is only illustrative.

89. *In this case, the adjudicating authority (NCLT) has simply brushed aside the case of the appellant that an amount of Rs 1730 crores was realisable by the appellant in terms of the order passed by APTEL in favour of the appellant, with the cursory observation that disputes if any between the appellant and the recipient of electricity or between the appellant and the Electricity Regulatory Commission were inconsequential.”*

(emphasis added)

12. *A review petition was filed by Axis Bank Ltd. seeking a review of the decision of **Vidarbha Industries** on the ground that the attention of the Court was not invited to the case of **E.S. Krishnamurthy**. While disposing of review petition by order dated 22nd September 2022, this Court held thus:*

“The elucidation in paragraph 90 and other paragraphs were made in the context of the case at hand. It is well settled that judgments and observations in judgments are not to be read as provisions of statute. Judicial utterances and/or pronouncements are in the setting of the facts of a particular case.

To interpret words and provisions of a statute, it may become necessary for the Judges to embark upon lengthy discussions. The words of Judges interpreting statutes are not to be interpreted as statutes.”

13. *Thus, it was clarified by the order in review that the decision in **Vidarbha Industries** was in the setting of facts of the case before this Court. Hence, the decision in **Vidarbha Industries** cannot be read*

*and understood as taking a view which is contrary to the view taken in the cases of **Innoventive Industries** and **E.S. Krishnamurthy**. The view taken in **Innoventive Industries** still holds good.”*

29. In view of the aforementioned analysis and discussions, we are left with no option, but to admit the present application. Ordered accordingly. As has been ruled by Hon’ble Supreme Cour in the case of **E S Krishnamurthy & Ors. vs. M/s Bharath Hi Tech Builders Pvt. Ltd.** in (Civil Appeal No. 3325 of 2020) after arriving at the finding that the default has been committed, this Tribunal may strive that the matter is settled. The relevant excerpt of the judgment of Hon’ble Supreme Court reads thus:-

“28 Undoubtedly, settlements have to be encouraged because the ultimate purpose of the IBC is to facilitate the continuance and rehabilitation of a corporate debtor, as distinct from allowing it to go into liquidation. As the Statement of Objects and Reasons accompanying the introduction of the Bill indicates, the objective of the IBC is to facilitate insolvency resolution “in a time bound manner” for maximization of the value of assets, promotion of entrepreneurship, ensuring the availability of credit and balancing the interest of all stakeholders. What the Adjudicating Authority and Appellate Authority, however, have proceeded to do in the present case is to abdicate their jurisdiction to decide a petition under Section 7 by directing the respondent to settle the remaining claims within three months and leaving it open to the original petitioners, who are aggrieved by the settlement process, to move fresh proceedings in accordance with law. Such a course of action is not contemplated by the IBC.”

30. Thus, we deem it pertinent to observe that in the interest of home buyers, the IRP would religiously discharge his duty under Section 20 of IBC, 2016, and would keep the CD as going concern. In order to ensure that the CD operates as going concern and its assets are managed properly, we appoint Hon'ble Mr. Justice Sunil Gaur (Mob. No. 997100718) as Monitor over the IRP to supervise the CIRP process. He would be assisted by Ms. Fiza Advocate (Mob. No. 9560603333) as Co-Monitor in the matter. The fee of the Monitor would be Rs. 6 lacs and that of Ms. Fiza Advocate would be 2.5 lacs till appointment of CoC. After appointment of CoC, it would be for CoC/AR qua the home buyers to take a decision regarding the Monitoring the affairs of the CD by Hon'ble Mr. Justice Sunil Gaur and Ms. Fiza Advocate. The fee of the 'Monitor' and 'Co-Monitor' would be initially paid by the Applicant in advance, and the same would be subsequently reimbursed to it as CIRP cost. If the CoC/AR decides the continuance of Monitoring of CIRP by Hon'ble Mr. Sunil Gaur, assisted by Adv. Fiza after appointment of CoC, their fee would be negotiated between them and CoC/AR, as the case may be. The IRP would report the progress regarding CIRP to Monitor on every alternate day. The Monitor is also requested to endeavour that the matter is resolved between the Petitioners before us and the Corporate Debtor and the project is completed to the benefit of the home buyers. For the purpose the Monitor may call the meeting of the Applicants, IRP and the Suspended Management. We also issue a specific direction that the suspended promoters/directors qua the CD and its management would extend all co-

operation in terms of the provisions of Section 19(1) of the IBC, 2016, to RP and the Monitor.

31. **In the wake, moratorium as provided under Section 14 of IBC, 2016 is declared qua the CD and** as a necessary consequence thereof the following prohibitions are imposed, which must be followed by all and sundry:

- (a) The institution of suits or continuation of pending suits or proceedings against the Respondent including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) Transferring, encumbering, alienating or disposing of by the Respondent any of its assets or any legal right or beneficial interest therein;
- (c) Any action to foreclose, recover or enforce any security interest created by the Respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (d) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Respondent.

32. Accordingly, in the wake of prayer made in IA-1382(ND)2024, **Mr. Gaurav Katiyar** having **Registration No: IBBI/IPA-001/IP-P00209/2017-18/10409** whose name is proposed by Applicant is appointed as IRP, subject to the condition that no disciplinary proceeding is pending against him and disclosures as required under IBBI Regulations, 2016 are made by him within a period of one week from this Order. It is further ordered that Mr. Lekhraj Bajaj shall take

charge of the CIRP of the Corporate Debtor with immediate effect and would take steps as mandated under the IBC specifically under Section 15, 17, 18, 20 and 21 of IBC, 2016 read with extend provisions of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

33. The initial expenses of CIRP i.e. Rs. 2,50,000/- would be initially paid by Applicants, which would be subsequently adjusted as CIRP cost.

34. A copy of this Order shall immediately be communicated by the Registry/Court Officer of this Tribunal to the Petitioner /Financial Creditor, the Respondent/Corporate Debtor and the IRP mentioned above.

35. In addition, a copy of this Order shall also be forwarded by the Registry/Court Officer of this Tribunal to the IBBI for their records.

IA-1382/2024

For the reasons stated therein, the application is allowed and the name of newly proposed IRP **Mr. Gaurav Katiyar** having **Registration No: IBBI/IPA-001/IP-P00209/2017-18/10409** is taken on record as an IP proposed by the Petitioners to appointed as IRP.

IA-576/2024

In view of the aforementioned, the order passed in IB-570/ND/2023 the IA is disposed of.

Inv. Petition-88/2023

The prayer made in the captioned petition is that the construction work should not be hampered and the home buyers should not be adversely affected. We have already passed an order in this regard in C.P (IB)-570/ND/2023. Nevertheless, it is further directed that the IRP would ensure that the project continue and construction work is not hampered. The Suspended Promoters/Management of CD would ensure full compliance of Section 19(1) of IBC, 2016.

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)