

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT-V**

I.A. 2680 OF 2023

IN

CP(IB) No.380 OF 2021

Under Section 60(5) of the Insolvency &
Bankruptcy Code, 2016

Vistra ITCL (India) Limited

...APPLICANT

vs.

**Mr. Vithal Madhukar Dahake,
Resolution Professional of Radius Estate
Projects Private Limited**

...RESPONDENT

IN THE MATTER OF:

SBICAP Trustee Company Limited

**...FINANCIAL CREDITOR/
PETITIONER**

vs.

Radius Estate Projects Private Limited

**...CORPORATE DEBTOR/ORIG.
RESPONDENT**

Order Dated: 07.05.2024

Coram:

Hon'ble Ms. Reeta Kohli, Member (Judicial)

Hon'ble Sh. Sanjiv Dutt, Member (Technical)

Appearance:

For the Applicant: Sr. Adv. Zal Andhyarujina a/w Adv. Aditya
Shiralkar, Adv. Nanki Grewal, Adv. Raveena Modi
& Adv. Yesha Badani i/b Wadia Ghandy & Co.

For the Respondent: Adv. Vidity Divya Kamat

1. The above application bearing I.A. No.2680 of 2023 has been filed by Vistra ITCL (India) Limited (hereinafter referred to as the “**Applicant**”) on 05.05.2023 seeking direction against Mr. Vithal Madhukar Dahake, Resolution Professional of Radius Estate Projects Private Limited (hereinafter referred to as the “**Respondent**”) under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 (hereinafter called as “**IBC**”) praying for following reliefs:-

“It is, therefore, prayed that this Hon'ble Tribunal be pleased to:-

- a. Order and direct the Respondent i.e. the interim Resolution Professional of the Corporate Debtor, to classify and categorize the Applicant as a “secured financial creditor” of the Corporate Debtor;*
- b. Quash and set aside the Impugned Decision contained in email dated 6th April 2023 of the Respondent....;*
- c. That pending the hearing and final disposal of the present Application, the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor be stayed;*
- d. For ad- interim relief in terms of prayer- clause (c) above;*
- e. For costs of the Application against the Respondent; and*
- f. For such further and other reliefs as this Hon’ble Tribunal may deem fit”.*

Brief facts of the case:

2. The Applicant was appointed as a Debenture Trustee vide Debenture Trustee Agreement dated 05.09.2017 executed between Aaditri Constructions Private Limited (as the Issuer Company) and the Applicant (as the Debenture Trustee) in respect of its proposed issue of Debentures on private placement basis. The parties entered a modified Supplemental Debenture Trust Deed dated 25.09.2017 which was ultimately replaced by a Debenture Trust Deed dated 03.08.2018 (hereinafter referred to as the “**DTD**”). The DTD was

executed between (i) Aaditri Constructions Private Limited (ACPL), therein referred to as the “**Issuer Company**”, (ii) the Applicant i.e., Vistra ITCL (India) Limited, therein referred to as the “**Debenture Trustee**”, (iii) Radius & Deserve Builders LLP, therein referred to as the “**Developer**”, (iv) Mr. Sanjay Chhabria, therein referred to as “**Promoter 1**”, and (v) Ms. Ritu Chhabria, therein referred to as “**Promoter 2**”. The Company, the Developer and the two Promoters were collectively referred to as the “**Obligors**” in the DTD. Pursuant thereto, the Company i.e., Aaditri Constructions Private Limited had issued 3,95,00,000 secured optionally convertible debentures (hereinafter referred to as “the **Debentures**”) having face value of Rs.100/- each aggregating to Rs.395,00,00,000/- (“**Subscription Amount**”) to the Debenture Holders. Out of the said Subscription Amount, a total sum of Rs.340,00,00,000/- was disbursed to Aaditri Constructions Private Limited in several tranches from 04.10.2017 to 04.04.2019 against issuance of said Debentures.

3. Pursuant to the above issue of Debentures, Radius Estate Projects Private Ltd. (hereinafter referred to as “**the Corporate Debtor**”) had created the following securities in favour of the Applicant to secure the repayment of Debentures:-

- (i) A registered Supplemental Indenture of Mortgage dated 29.03.2019 (hereinafter referred to as the “**Supplemental IoM**”) was executed between (i) the Corporate Debtor (therein referred to as the “**Mortgagor**”), (ii) Sumer Radius Realty Private Limited (therein referred to as the “**Confirming Party 1**”); (iii) Sumer Buildcorp Private Limited (therein referred to as the “**Confirming Party 2**”) and (iv) the Applicant (therein referred to as the “**Debenture Trustee/ Mortgagee**”). It was registered with the Sub-Registrar of Assurances vide registration no.3300 of 2019. By virtue of the Supplemental IoM, the Corporate Debtor granted, transferred, conveyed, assigned and assured in favour of the Applicant, as and by way of a first and exclusive mortgage and charge, the Mortgaged Property defined therein on the terms and conditions

mentioned therein to secure the outstanding amounts in relation to the Debentures.

- (ii) A Second Supplemental Indenture of Mortgage dated 16.04.2019 (hereinafter referred to as the “**Second Supplemental IoM**”) was executed between (i) the Corporate Debtor (therein referred to as the “**Mortgagor**”), (ii) Radius And Deserve Builders LLP (therein referred to as the “**Developer**”), (iii) Aaditri Constructions Private Ltd. (therein referred to as the “**Borrower**”), (iv) Mr. Sanjay Chhabria and Mrs. Ritu Chhabria, (therein referred to as the “**Obligors**”) and (v) the Applicant (therein referred to as the “**Debenture Trustee/ Mortgagee**”) and the same was registered with the Sub-Registrar of Assurances vide registration no. 3856 of 2019. Under the Second Supplemental IoM, the Corporate Debtor created in favour of the Applicant, a first and exclusive charge and mortgage over the Additional Mortgaged Property as defined therein on the terms and conditions mentioned therein.
4. The Debentures were also secured under Personal Guarantees of the two Promoters named above, Corporate Guarantee of the Developer named above and pledge of shares held by the said two Promoters in the Issuer Company.
5. However, various events of default took place on part of the Issuer Company i.e., Aaditri Constructions Private Limited in terms of the DTD and the Transaction Documents which were not cured by it within the agreed time. The Issuer Company also failed to redeem the Debentures upon maturity as per the terms of the DTD and the Transaction Documents. The first event of default took place on 04.11.2018. Therefore, the Applicant vide notice dated 28.07.2021 called upon the Issuer Company and the Obligors to redeem the Debentures forthwith. However, the Issuer Company failed to redeem the Debentures and accordingly, the default occurred on 28.07.2021.
6. Pursuant to the above, the Applicant filed a Company Petition No.198 of 2022 before this Hon’ble Tribunal against the Issuer Company i.e., **Aaditri Constructions Private Limited** (hereinafter referred to as

“ACPL”) under Section 7 of the Code and ACPL was admitted to Corporate Insolvency Resolution Process (CIRP) vide order dated 28.03.2023. The Applicant had filed its claim in the CRIP of ACPL which was accepted and the Applicant was classified as a “Financial Creditor”.

7. In addition, the captioned Company Petition No.380 of 2021 was filed by the Petitioner i.e., **SBICAP Trustee Company Limited** against the Corporate Debtor i.e., **Radius Estate Projects Private Limited** under Section 7 of the Code and the same was admitted on 06.09.2021 and the Respondent was appointed as the Interim Resolution Professional (**IRP**) for carrying out the CIRP of the Corporate Debtor in accordance with the provisions of the Code and the relevant Regulations.
8. Accordingly, the Applicant claiming to be a Secured Financial Creditor of the Corporate Debtor filed its claim in Form C with the Respondent i.e., Mr. Vithal Madhukar Dahake vide an email dated 02.12.2021. However, the Respondent vide his email dated 06.04.2023 rejected the claim of the Applicant as Secured Financial Creditor and asked the Applicant to file its claim in Form F as ‘**any other secured creditor**’. The relevant extract of the said email is reproduced as under:-

“...We regret to inform you that we cannot consider your claim as Secured Financial Creditor, as it does not fall within the ambit of Financial Debt as per section 5(8) of IB&C 2016. You may however be able to claim as Secured Any other creditor. Hence you are requested to please submit your claim in prescribed form F as Any other Secured Creditor.”

9. Hence, the present Interlocutory Application has been filed challenging the aforesaid decision of the Respondent/RP.

Grounds of challenge by the Applicant

10. According to the Applicant, the terms of the DTD read with the Mortgage Deeds i.e. Supplemental IOM and Second Supplemental IOM clearly reveal that the Corporate Debtor is not only a security

provider but has also undertaken the liability to repay the Secured Obligations (as defined under the DTD) of its sister concern, that is, ACPL, the Issuer Company arising in relation to the Debentures in favour of the Applicant and/or its principals/beneficiaries, being Debenture-Holders.

11. It is submitted that the Corporate Debtor has not only mortgaged the properties defined under the Mortgage Deeds but also given a covenant to repay the Secured Obligations (as defined under the DTD) to the Applicant under Clause 2 of the Mortgage Deeds. The relevant extract of Clause 2 of the Supplemental IoM dated 29.03.2019 is reproduced below:

"2.1 Pursuant to the Finance Documents and in consideration of the Debenture Holders having subscribed to the Debentures, the Mortgagor covenants and agrees with the Mortgagee that the Mortgagor shall discharge the Secured Obligations in accordance with the terms and conditions in the Finance Documents ... "

The relevant extract of Clause 2 of the Second Supplemental IoM dated 16.04.2019 is reproduced as under:

"2.1 Pursuant to the said DTD and in consideration of the Debenture Holders having subscribed to the Debentures, the Mortgagor, the Borrower, the Developer and the Obligors do hereby jointly and severally covenant with the Debenture Holders and Mortgagee that they shall comply with the terms and conditions of the said DTD and that they shall discharge the Secured Obligations in accordance with the terms and conditions in the said DTD, including this Indenture ... "

12. The Ld. Counsel for the Applicant has also referred to 'Clawback clause' **7(e)** of the IoM stating therein that in view of the fact that the liability has been fastened upon the Mortgagor in this clause thus it makes the Corporate Debtor liable to repay being a mortgagor in the IoMs. The relevant clause is reproduced hereunder:-

"7(e) Clawback

Notwithstanding that the Mortgagor or Issuer or any other persons may have paid all amounts due in respect of the Secured Obligations and/ or any discharge, release or

settlement from time to time; if any security, disposition or payment granted or made to the Debenture Trustee and/ or the Debenture Holders in respect of the Secured Obligations is avoided or set aside or ordered to be surrendered, paid away, refunded or reduced by virtue of any Applicable Law relating to bankruptcy, insolvency, liquidation, winding-up, industrial sickness, composition or arrangement for the time being in force or for any other reason, the amount so avoided, set aside, ordered to be surrendered, paid away, refunded, reduced or shared shall not be considered to have been paid and Debenture Trustee and/ or the Debenture Holders shall be entitled thereafter to enforce this Indenture as if no such discharge, release or settlement had occurred.”

It is thus submitted that the Corporate Debtor had given a guarantee under the Mortgage Deeds in the nature of a covenant to repay the Secured Obligations (as defined under the DTD) to the Applicant. The counsel for the Applicant has also referred to the clause 12(a) and 12 (j) of IoM to support his contention.

13. It is contended that the liability or debt arising out of the Mortgage Deeds in respect of the Debentures falls squarely within the provisions of Section 5(8) of the IBC which defines the term "financial debt" as under :-

"5. (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-.....

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

The Applicant is, therefore, a "financial creditor" of the Corporate Debtor, who has acted as security provider and obligor in this regard and the claim of this Applicant as a "secured financial creditor" deserves to be admitted by the Respondent.

14. The Applicant submitted that it is settled law that subscription towards debentures carries "a time value for money" and, therefore, such amounts are "financial debts" under the IBC. Accordingly, in this case, the failure on the part of *inter-alia* the Corporate Debtor to repay the Secured Obligations (as defined under the DTD) to the Applicant amounts to a "financial debt". The Applicant further

submits that by refusing to classify the Applicant's claim as a "Financial Debt", the Respondent has acted without any application of mind and has gravely misconstrued and misinterpreted provisions of the IBC and especially Section 5 (8) of IBC.

15. It is submitted that the DTD and the Mortgage Deeds are a part of the same transaction which is clear from the very terms and tenor of these documents. Clause 4 of the Mortgage Deeds expressly records that the security being the properties mortgaged therein are in consideration of the subscription of Debentures by the Debenture Holders and as an additional continuing security for the discharge of the Secured Obligations (as defined under the DTD). It is pointed out that the Corporate Debtor and the Issuer Company are sister concerns and form part of one group of companies, being the Radius Group. The Mortgage Deeds and DTD were executed by the same persons, being Mr. Sanjay Chhabria and Mrs. Ritu Chhabria, the main promoter and head-honcho of the Radius Group. It is important to note that the shareholders of the Issuer Company and the Corporate Debtor at the respective times of the execution of the said documents were common i.e., Mr. Sanjay Chhabria and Mrs. Ritu Chhabria. Further, the promoters and directors of the Issuer Company and the Corporate Debtor at the respective times of the execution of the said documents were also common.
16. It is further submitted that a mere perusal of Section 18 of the IBC and Regulations 13 and 14 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations") makes it clear that the resolution professional is merely supposed to verify and collate claims and ultimately determine the amount of each claim. Under Section 18 of the IBC, the Respondent's duties are inter-alia restricted to "receive and collate all the claims submitted by creditors to him". Therefore, the Respondent could only receive the claim of the Applicant and collate all the claims made by the Corporate Debtor's creditors including that of the Applicant. It is submitted that the Respondent has failed to provide any reasoning for the Applicant to submit its claim in Form F under the IBC. The Respondent has failed to distinguish between a financial creditor and any other creditor in respect of the Applicant.

17. It is contended that the Impugned Decision of the IRP/Respondent suffers from non-application of mind as the Respondent has failed to give any reasons whatsoever to arrive at the aforesaid conclusion and has, in fact, transgressed and overreached the authority and powers conferred on him by the IBC and Regulations thereunder. Without prejudice to the above and without admitting, it is submitted that the absence of any reasoning has left the Applicant deprived of the opportunity to address deficiencies, if any or provide further information that may have been necessary for the Respondent to assess the claim. The Impugned Decision is, therefore, arbitrary, capricious and in violation of the principles of natural justice. Therefore, it is urged that the rejection of the claim filed by the Applicant is non-est and without authority and consequently, the action of the Respondent/RP on this count deserves to be quashed and set aside.

Reply of the Respondent

18. The Learned Counsel for the Respondent has filed the Affidavit-in-Reply and refuted all the allegations and averments contained in the Application.
19. It is submitted that a Development Management Agreement dated 21.09.2017 was entered between M/s Radius and Deserve Builders LLP (**Developer**) and ACPL/the Issuer company, for appointment of ACPL as the **Development Manager** for the purposes of development of a sanctioned project on a portion of larger land admeasuring 53,192.35 sq. mts. situated at Revenue Village Wadhavali, Taluka Kurla, situated at R. C. Marg, Chembur-400074 in the Registration Sub-District of Mumbai Suburban. Pursuant to the first Development Management Agreement, ACPL provided a non-interest bearing deposit of Rs. 50,00,00,000/- and an interest-bearing loan of Rs.345,00,00,000/- to the Developer for the purposes of the Sanctioned Project. A subsequent Development Management Agreement dated 03.08.2018 was executed which replaced the earlier Agreement.
20. ACPL being in need of capital for satisfying its obligations under the new Development Management Agreement approached the Applicant in its capacity as the Trustee of HDFC Capital Affordable

Real Estate Fund — I, acting through its investment manager HDFC Capital Advisors Limited, for making an investment in ACPL. Therefore, a Debenture Trust Deed dated 03.08.2018 was executed between the Applicant, ACPL, M/s Radius and Deserve Builders LLP (**Developer**), Mr. Sanjay Chhabria (**Promoter 1**) and Mrs. Ritu Chhabria (**Promoter 2**) to record the terms and conditions for issuance of Debentures, appointment of Debenture Trustee and matters connected therewith.

21. One of the terms of the issue of Debenture as recorded in Recital “O” of the said Agreement was that the Debenture Payments and discharge of Secured Obligations under the said Deed and other Transaction Documents in respect of the Debentures shall be secured by ACPL, M/s Radius and Deserve Builders LLP (Developer), Mr. Sanjay Chhabria (Promoter 1) and Mrs. Ritu Chhabria (Promoter 2) by creating security in favour of the Debenture Trustee for the benefit of the Debenture Holders.
22. Thereafter, a Supplemental Indenture of Mortgage dated 29.03.2019 and a Second Supplemental Indenture of Mortgage dated 16.04.2019 were executed wherein the Corporate Debtor has agreed to confirm an exclusive first ranking charge by way of mortgage in favour of the Applicant on the mortgaged properties. Referring to clause 2 of the above Mortgage Deeds, the Applicant had contended that the Corporate Debtor had given an alleged Guarantee and had covenanted to repay the Secured Obligations. Therefore, the debt arising out of the aforesaid Mortgage Deeds falls within the definition of the term of ‘financial debt’ as defined under Section 5 (8) (c) of the IBC. However, the contention of the Respondent is that the same does not fall within the definition of ‘Financial Debt’ and as such, the said claim was put under verification and the Applicant was requested to file the said claim as ‘Other Secured Creditor’.
23. It is further submitted that no amount has been disbursed to the Corporate Debtor by the Applicant and the mortgage was created on the sums borrowed by ACPL/Issuer Company against the issuance of optionally convertible Debentures under which disbursement was made by the investors to ACPL and not to the Corporate Debtor. It is asserted that the Corporate Debtor is neither a shareholder in ACPL nor a beneficiary to the amount claimed by the Applicant. It is

submitted that the transaction of mortgage does not fall within the meaning of “financial debt” as per Section 5(8) of the IBC and, therefore, the said debt cannot be treated as a “financial debt”.

24. It is pointed out that the Hon’ble Supreme Court in the matter of **Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited** has held that when the corporate debtor creates mortgage to secure payment obligation of a third party, without disbursement of any debt to itself (the corporate debtor), the mortgagee, even if becoming a secured creditor because of creation of mortgage, can only be described as ‘indirect secured creditor’ and cannot be treated as a ‘direct secured creditor’ so as to become a ‘financial creditor’ because the mortgage transaction is not envisaged to be a ‘financial debt’ in Section 5(8) with its sub- clauses (a) to (i).
25. Therefore, it is contended that the mortgage created by the Corporate Debtor in favour of the Applicant where the mortgage deed contains covenant to pay, is not a ‘Deed of Guarantee’. Hence, according to the Respondent, a claim which is based on mortgage does not fall under the category of ‘Secured Financial Creditor’ but would fall under the ambit of ‘Other Secured Creditor’.

Analysis and Findings:

26. Heard the Ld. counsels for the Applicant and the Respondent/RP at length and carefully perused the documents placed on record by them.
27. After having heard the Ld. Counsel for the parties and upon perusal of the records, it is evident that the Respondent rejected the claim of the Applicant amounting to Rs.874,03,27,404/- (Eight hundred seventy-four crore three lakh twenty seventy thousand and four hundred and four rupees) as secured financial creditor vide email dated 06.04.2023 and instead directed the Applicant to file its claim as ‘other secured creditor’ as the claim of the Applicant did not fall within the parameters of ‘financial debt’ as defined under section 5(8) of IBC. The determination of this issue involves not only consideration of facts and circumstances of the case but also a careful analysis and examination of the relevant terms and conditions of the DTD and the mortgage deeds executed between the

Issuer Company/ACPL, the Developer, the two promoters/Obligors, the Corporate Debtor/Mortgagor and the Applicant. Brief facts of the case have already been narrated in para 2 above and need no reiteration. As stated above, ACPL/Issuer Company had issued 3,95,00,000 secured optionally convertible debentures having face value of Rs.100 each aggregating to Rs. 395,00,00,000/- at the internal rate of return (IRR) of 22% compounded quarterly to the Debenture Holders on private placement basis. The Applicant was appointed as Debenture Trustee vide Debenture Trustee Agreement dated 05.09.2017 in terms of Rule 18 (1)(c) of Companies (Share Capital and Debentures) Rules 2014 by ACPL/Issuer Company in terms of law to protect the interests and rights of Debenture Holders.

28. Thereafter, the DTD dated 03.08.2018 was executed between the parties which records the various terms, conditions and stipulations as well as the Issuer Company's and the Debenture Trustee's obligations in respect of the debentures including redemption of the principal amount, interest payment etc. The DTD also incorporates the manner in which the discharge of Issuer Company's obligations will be secured by mortgaging properties with the Debenture Trustee and the rights and remedies available to the Debenture Trustee in the event of default. It is the admitted case of the parties that amount of Rs.340 crores was disbursed to ACPL/Issuer Company in different tranches from 04.10.2017 to 04.04.2019. Maturity date under the DTD was fixed as 5 years from the release of the first tranche i.e., 04.10.2017. The debentures were thus to be mandatorily redeemed on 04.10.2022 i.e. the date of maturity as per Clause 6 of the DTD. It is pertinent to note that ACPL/Issuer Company failed to redeem the debentures and consequently the Event of Default was triggered in terms of DTD and the Company Petition No. 918 of 2022 filed by the Applicant against ACPL/Issuer Company already stands admitted vide order of this Tribunal dated 28.03.2023.
29. As stipulated under DTD "**Finance Documents**" shall mean the Debenture Trust Deed, the Transaction Documents and all other agreements executed by the Issuer in connection with the issuance of the Debentures and the "**Transaction Documents**" includes Security Documents, Private Placement Offer Letter, other agreements and documents contemplated in connection with the issue of Debentures. Clause 7.7 of the DTD deals with the creation

of Mortgage by the Developer as well as the Obligors on the Mortgaged properties by way of exclusive first charge in favour of the Debenture Trustee through execution and registration of Mortgage Deeds in consideration of the Debenture Holders having subscribed to the Debentures. **“Secured Obligations”** shall mean all present and future obligations and liabilities (whether financial, performance or otherwise, whether actual or contingent and whether owed jointly or severally or in any other capacity whatsoever) of the Obligors to the Debenture Holders including in connection with the issue and subscription of the Debentures, the Debenture Payments and the creation and maintenance of Security and all costs and expenses incurred in relation thereto under the **Transaction Documents**”. Further, the **‘Security Documents’** includes Debenture Trust Deed, Deeds of Mortgage, Personal/Corporate Guarantee etc. The **“Security Providers”** means all the persons who created the security interest in favour of the Applicant so as to secure the dues under the DTD. The above said definitions become more relevant as the Corporate Debtor became a security provider qua the Applicant by virtue of Supplemental Indenture of Mortgage (IOM) dated 29.03.2019 and also the Second Supplemental Indenture of Mortgage dated (IoM) 16.04.2019.

30. Clause 12 of the DTD lists various events from sub-clauses 12.1 to 12.33, which shall individually constitute an Event of Default (EOD) mainly including failure or breach by any of the Security Providers to comply with the terms and conditions of the Transaction Documents, non-redemption of the Debentures in full on the maturity date, default in payment of Debenture Payments and occurrence of any event having material adverse effect on the rights of the Debenture Holders. Failure to redeem debentures upon maturity by making the payment of the entire amount towards the debenture payment and Secured Obligations, thus, constituted major Event of Default under the DTD. It is pertinent to note that on the occurrence of default, the rights of the Applicant/Mortgagee have been defined in IoM dated 29.03.2019 as under:-

“EVENTS OF DEFAULT

- a. *It is hereby agreed and declared that if upon the occurrence of an Event of Default, then and in that event, the Mortgagee may through a written notice*

given to the Mortgagor/Confirming Party, exercise any or all rights and remedies available to them in terms of the Finance Documents; by law, contract or in equity, including without limitation one or more of the following:

- i. Demand cure of any Event of Default under any of the Finance Documents;*
- ii. enforce, at its sole discretion, any Security Interest and exercise all contractual and legal rights/ remedies under the Finance Documents”.*

31. Clause 13 of the DTD deals with the ‘consequences of an event of default’. It provides that upon the occurrence of an event of default, the applicant will be entitled to call upon ACPL and/or the other obligors to forthwith redeem all the outstanding debentures. In such case, ACPL will be liable to redeem and the other obligors will be jointly and severally liable to cause ACPL to redeem all the outstanding Debentures and pay the Debenture Holders such that the Debenture Holders receive the outstanding principal amount of the Debentures along with the agreed rate of return. As far as mortgaged properties are concerned, the Applicant on occurrence of default shall be entitled to enter upon and take possession of the mortgaged properties and cause the sale, transfer, appropriation and disposal of such properties without the intervention/permission of any court of law. In the event ACPL fails to forthwith repay the Secured Obligations along with the agreed rate of return, then without prejudice to the rights and remedies of the Applicant under Applicable Law, the Applicant shall be entitled to enforce the mortgage and charge on the mortgaged properties and cause the sale, assignment and transfer thereof without intervention of court; enforce the Personal Guarantee and the Corporate Guarantee; enforce the pledge created over the Pledged shares, enforce any other security created pursuant to the Transaction Documents etc. Thus, on perusal of aforesaid clauses of the DTD and IoMs, it clearly emerges that in the event of default, the Applicant is only entitled to enforce the security interest in the mortgaged properties qua the Corporate Debtor/ Mortgagor towards satisfaction of the Secured Obligations.

32. In the facts and circumstances of the present case, the following three issues emerge for consideration : -

- a) ***Whether having regard to the terms of the Mortgage Deeds, the Corporate Debtor/Mortgagor can be termed as a Co-Obligor/Guarantor to the Applicant?***
- b) ***Whether the Applicant can be treated as a Financial Creditor under the IBC?***
- c) ***Whether the decision of the Respondent/RP in treating the Applicant as ‘Other Secured Creditor’ is correct?***

Issue (a): Whether having regard to the terms of the Mortgage Deeds, the Corporate Debtor/Mortgagor can be termed as a Co-Obligor/Guarantor to the Applicant?

33. The Ld. Sr. Counsel for the Applicant has laid great emphasis on the subscription of debentures and Covenant to pay principal and interest undertaken by ACPL/Issuer Company as well as the Corporate Debtor/Mortgagor. The case of the Applicant is that in view of the fact that the Corporate Debtor has signed the IoMs as a Mortgagor and keeping in view the terms of DTD and IoMs, the Corporate Debtor/Mortgagor is deemed Co-obligor/guarantor to the Applicant. According to the Applicant, since the covenant to pay provides for the payment of the Secured Obligations under the DTD, the Mortgagor being the Corporate Debtor stands in the position of a Co-obligor. In treating the Mortgagor as a co-obligor, the Applicant primarily relies on the Covenants to pay mentioned in clause 2 of the Supplemental IoMs already reproduced above.

34. To substantiate his arguments, the Ld. Sr. Counsel drew our attention to Section 68 (1)(a) of the Transfer of Property Act, 1882 which recognizes the Mortgagee’s right to sue for the mortgage money where the mortgagor binds himself to repay the same:-

“68. Right to sue for mortgage-money—(1) The mortgagee has a right to sue for the mortgage money in the following cases and no others, namely:—

(a) where the mortgagor binds himself to repay the same;.....”.

Reference was made to the judgement of ***Sidramaya Nilkanthayaswami Wantmurimath and Others v. Danawa Kom***

Shidaramappa Deshmur and Others ILR 1954 Bombay 717

wherein it is held that a covenant to pay is a contractual obligation assumed by the mortgagor under the mortgage and casts an obligation on the mortgagor to pay in terms of the Covenant. Such a covenant is capable of being enforced independently by the Mortgagee as an independent contractual remedy.

35. In this regard, the Applicant has also placed reliance on the order of the Co-ordinate bench of this Tribunal in ***State Bank of India vs PE Electronics Ltd. 2018 SCC Online NCLT 26427*** wherein it is held that the co-obligors are considered to be financial debtors under the IBC. It is also submitted that the creditors of such co-obligors are considered to be Financial Creditors under IBC, as held by Hon'ble NCLAT in ***Zubin Barucha vs Reliance AIF Management Company Ltd. 2023 SCC online NCLAT 167.***
36. On the other hand, the case of the Respondent/RP is that the Debenture Trust Deed (DTD) dated 03.08.2018 and also the Supplemental IoMs dated 29.03.2019 and 16.04.2019 have been executed in order to secure all outstanding amounts in relation to Debentures to confirm an exclusive first ranking charge in favour of the Applicant by way of mortgage of the properties specified therein. It is under the said IoMs that the Corporate Debtor/Mortgagor along with other signatories have agreed to create an exclusive first charge, mortgage and security on the mortgaged properties by way of registered mortgage in favour of the Applicant. It is contended by the Ld. Counsel for the Respondent that these mortgage deeds and DTD do not create any guarantee by the Corporate Debtor. In fact, it is an admitted case of both the parties that there is no deed of guarantee having been executed in favour of the Applicant by the Corporate Debtor, notwithstanding clause 2 of the mortgage deeds, i.e. covenant to pay wherein the mortgagor has agreed with the Applicant that the mortgagor will comply with the terms and conditions of the financing documents i.e., DTD and shall repay the mortgage debt. It is thus asserted by the Counsel for the Respondent/RP that the covenant to pay cannot by any stretch of imagination be construed to be a 'Guarantee' provided by the Corporate Debtor in favour of the Applicant.

37. After hearing the rival contentions, it is now proposed to evaluate the same on merits. The Ld. Senior Counsel for the Applicant has placed strong reliance on the 'Covenant to pay' clauses in the IoMs dated 29.03.2019 and 16.04.2019 and contended that the undertaking given by the Corporate Debtor to the Applicant to discharge the obligations of ACPL/Issuer Company under the DTD constitutes a guarantee which is specifically covered by Section 5 (8)(i) of the IBC. The relevant clause 2 from the Supplemental IoM dated 16.04.2019 is reproduced as under:-

2. COVENANT TO PAY

2.1 Pursuant to the said DTD and in consideration of the Debenture Holders having subscribed to the Debentures, the Mortgagor, the Borrower, the Developer and the Obligors do hereby joint and severally covenant with the Debenture Holders and the Mortgagee that they shall comply with the terms and conditions of the said DTD and that they shall discharge the Secured Obligations in accordance with the terms and conditions in the said DTD, including this Indenture.

2.2 The Mortgagor, the Borrower, the Developer and the Obligors hereby further covenant with the Mortgagee that in the event they fail to discharge the Secured Obligations on the respective due date(s) as set out in the said DTD, then and in every such case the Mortgagor, the Borrower, the Developer and the Obligors shall pay default interest at the rate mentioned in the said DTD and it is hereby further agreed that the provisions relating to default in discharge of the Secured Obligations shall not in any way be deemed to authorize the Mortgagor, the Borrower, the Developer and the Obligors to allow any Secured Obligation to fall in arrears nor shall it in any way interfere with, prejudice, limit or affect the powers of sale or entry or any other rights, authorities, powers or remedies for securing and enforcing the discharge of the Secured Obligations.

38. A close and careful analysis of Clause 2.1 of the IoM dated 16.04.2019 reveals that the 'covenant to pay' applies not only to the Corporate Debtor /Mortgagor alone as the Applicant is trying to argue but it covers ACPL/the Borrower, the Developer and the Obligors as well all of whom have jointly and severally undertaken to discharge the Secured Obligations in accordance with the terms and conditions of the DTD. Similarly, clause 2.2 of the said IoMs also makes it clear that in the event of failure to discharge the Secured Obligations on the due dates as mentioned in the DTD, the Corporate Debtor /Mortgagor, ACPL /the Borrower, the Developer and the Obligors shall pay default interest at the rate mentioned in

the DTD. In other words, the 'Covenant to Pay' here is a limited obligation confined to the payment of the only default interest sans the principal amount. There is no express or implied covenant to pay in regard to the principal amount of the Debentures and the normal IRR agreed under the terms of the DTD. Further, clause 2.2 provides that none of these four parties will do anything to prejudice or affect the rights and remedies of the Applicant /Mortgagee for securing and enforcing the discharge of Secured Obligations under the DTD.

39. Furthermore, in case the Corporate Debtor/Mortgagor fails to comply with the aforesaid covenant to pay the default interest, the only recourse open to the Applicant/ Mortgagee is to enforce its Security Interest in the mortgaged properties in accordance with the terms and conditions of the DTD and the Mortgage Deeds. The mere fact that only the Corporate Debtor / Mortgagor had undertaken the 'Covenant to Pay' the default interest under the IoM dated 29.03.2019 will also make no difference for the forgoing reason. Thus, it is crystal clear that there is no obligation on the Corporate Debtor /Mortgagor to pay dues of the Applicant / Mortgagee under the Mortgage Deeds other than in terms of DTD and the IoMs dated 29.03.2019 and 16.04.2019. In view of this, it can by no means be claimed that the aforesaid 'Covenant to Pay' Clause ought to be construed as a 'Guarantee' in terms of Section 126 of the Indian Contract Act, 1872.
40. It is well-settled that the test to find out whether the Mortgagor has bound himself to pay the amount is to see what remedy the Mortgagee is intended to have for the recovery of the amount. The general rule is that a remedy limited to a particular mode of recovery excludes the general personal liability for such payment. When the remedy of the Mortgagee is intended to be only against Mortgaged property, there is no personal liability, even if the Mortgagor has stated in the Mortgage document that he will pay the money. In the instant case, it is noticed that the remedy available to the Applicant /mortgagee is to have its security interests enforced from the Security Providers in accordance with the terms and conditions of the DTD and the IoMs. Therefore, it cannot by any stretch of imagination be claimed that the Corporate Debtor / mortgagor has assumed or undertaken any personal liability or provided any

‘guarantee’ to the Applicant/Mortgagee or that the former has assumed the role of a “Co-obligor” qua the Applicant.

41. As far as the provisions of Section 68 (1)(a) of the Transfer of Property Act are concerned, it is well established that a mere promise to pay does not import a personal liability because such a covenant is to be found in every form of mortgage. The essential thing to see is whether the covenant creates a legal obligation which does not merely give the borrower the option of paying the loan amount and redeeming the security but also confers on the mortgagee a right enforceable against the mortgagor to realise his money otherwise than out of the mortgaged security. In Mulla’s “Transfer of Property Act” (4th Edition), it has been stated at page 443 that a promise to pay does not give the right of personal remedy if a mortgagor binds himself to pay only out of the property mortgaged or a particular fund. It is always a matter of construction whether there is a covenant enforceable against the person of the mortgagor personally. One must look to the nature and terms of the security for determining whether there is or is not a personal covenant on the part of the borrower to repay the loan amount. Viewed in this perspective, a careful examination of the terms and conditions of the DTD and the two IoMs in the instant case clearly brings out that the Applicant/ Mortgagee is only vested with a right to enforce its security interest in the mortgaged properties and that the Corporate Debtor/ Mortgagor has nowhere undertaken a personal obligation to discharge the Secured Obligations in regard to the Debentures otherwise than out of such Mortgaged properties.
42. It is now proposed to ascertain the intention of the parties in this regard and their relationship qua the Applicant/Mortgagee as gathered from the recitals in the DTD and the Mortgage Deeds. From perusal of the documents on record, it is evident that the expression “Co-Obligor” is not defined either in the DTD or in the IoMs dated 29.03.2019 and 16.04.2019. A perusal of the DTD shows that ACPL, Radius and Deserve Builders LLP (“the Developer”) and Mr. Sanjay Chhabria and Mrs. Ritu Chhabria (“Promoters”) have been collectively referred to as “**Obligors**” therein. On perusal of the Supplemental IoMs dated 29.03.2019 and 16.04.2019, it is observed that the Corporate Debtor is referred to as “**the Mortgagor**”, the Applicant is referred to as “**the Debenture Trustee/ Mortgagee**”

and Mr. Sanjay Chhabria and Mrs. Ritu Chhabria are collectively referred to as “**Obligors**”. It is also pertinent to mention that both Mr. Sanjay Chhabria and Mrs. Ritu Chhabria had already executed Personal Guarantees in favour of the Applicant and thereby both stood in the position of Obligors qua the Applicant. Similarly, Corporate Guarantee had been executed by the Developer in favour of the Applicant. However, as far as the Corporate Debtor /Mortgagor is concerned, no specific formal Deed of Guarantee was executed in favour of the Applicant. If the intention of the parties had been to fasten a personal liability or obligation on the Corporate Debtor/Mortgagor under the terms of the DTD and IoMs, nothing would have prevented them from seeking a Corporate Guarantee from it and then lawfully and legitimately treating the Corporate Debtor/Mortgagor as an ‘Obligor’ or ‘Co-Obligor’ under the DTD as well as the Mortgage Deeds.

43. It is very strange that on the one hand, the Applicant treats the Corporate Debtor /Mortgagor as the Co-obligor in respect of the Secured Obligations and on the other hand, it has never addressed a single notice to the latter invoking the ‘Covenant to Pay’ clause of the IoMs and demanding repayment of the amount in default along with agreed interest etc. It is pertinent to mention that on occurrence of certain events of default, the Applicant sent EOD notice dated 28.07.2021 to ACPL (Issuer Company), Radius and Deserve Builders LLP (Developer), Mr. Sanjay Chhabria (Promoter 1/Obligor) and Mrs. Ritu Chhabria (Promoter 2/Obligor), calling upon them to forthwith redeem the debentures by paying the Secured Obligations in full to the Debenture Holders. However, no such notice was issued to the Corporate Debtor/Mortgagor even at the time of default in repayment of Secured Obligations on maturity date of the debentures as the Applicant/Mortgagee was well aware that Corporate Debtor/Mortgagor is neither a Guarantor nor a Co-Obligor.
44. Coming now to the judicial decisions cited by the Applicant, it is observed that the judgement of Hon’ble Bombay High Court in ***Sidramaya Nilkanthayaswami Wantmurimath and Others (supra)*** has no relevance in the present case as the aforesaid judgement primarily deals with Section 68(1)(d) rather than Section 68(1)(a) of the Transfer of Property Act. The reliance of the Applicant

on aforesaid judgement thus does not help to advance its case. Similarly, the reliance placed by the Applicant on the order of the Co-ordinate Bench of this Tribunal in **State Bank of India (supra)** is of no avail because in that case, certain group companies of the corporate debtor were termed individually as 'Co-obligor' and collectively as 'Obligors' in the Term Loan Agreement itself which is not so in the instant case. As stated above, the Corporate Debtor/ Mortgagee herein has not been described as a 'Co-obligor' or 'Obligor' in either the DTD or the Supplemental IoMs. Likewise, **Zubin Barucha (supra)** was a case in which the corporate debtor had given a Corporate Guarantee as a co-obligor in respect of a residential project being developed by another group company which had raised funds for the development of said project through issuance of NCDs. It thus emerges that in both the cases cited by the Applicant in its support, the existence of the 'Co-obligor' was a given fact whereas in the present case, it is a subject matter of dispute calling for both factual and legal examination, interpretation and determination.

45. In light of aforesaid findings, we are of the considered view that the case of the Applicant that the Corporate Debtor/ Mortgagee is a 'Guarantor' or 'Co-Obligor' qua the Applicant is not made out at all and that the obligation of the Corporate Debtor/Mortgagee in terms of the IoMs is only to the extent of the property mortgaged therein. The Applicant/Mortgagee is free to exercise its rights and remedies under the DTD and the IoMs qua the mortgaged properties. Hence, this issue is decided against the Applicant.

Issue (b): Whether the Applicant can be treated as a Financial Creditor under the IBC?

46. At the outset it deserves to be taken note of that the 'Covenant to pay' cannot by any stretch of imagination be construed to be a guarantee provided by the Corporate Debtor in favor of the Applicant.
47. Thus the attempt on the part of the counsel for the Applicant to distinguish the judgement of **Hon'ble Supreme Court in VISTRA ITCL vs Dinkar Venkatasubramanian and another 2023 SCC Online SC 570**, stating that in the present case, there is specific covenant to pay, hence the finding of the Hon'ble Court in the above

stated matter holding the Appellant as not a secured financial creditor would not be applicable in the facts and circumstances of the present case. It deserves to be taken note of that the arguments being advanced by the applicant are same or similar as were being advanced before the Hon'ble Supreme court to substantiate his contention that he deserves to be treated as a 'secured financial creditor' except the absence of covenant to pay in that case. It deserves to be taken note of that before the Hon'ble Supreme Court, the Appellant Vistra was secured to the extent of pledged shares of Corporate Debtor whereas in the case in hand the Applicant is protected to the extent of properties mortgaged through the IoMs. Thus the findings given by the Hon'ble Apex court are squarely applicable to the present case as well. The mere covenant to pay in the IoM will not change the status of the Applicant as the covenant to pay cannot said to be a guarantee extended by the Corporate Debtor but was only to the extent of security so stated in the Mortgage Deeds.

48. In view of the judgement of the ***Hon'ble Supreme Court in Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited vs Axis bank Limited and Others SCC (2020) 8 SC Cases 401*** wherein the Hon'ble Apex Court has been pleased to hold as under :-

“50.....the scheme of the IBC, what is intended by the expression “financial creditor” is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the Corporate Debtor; who would engage in the reconstructing of the loan as well as in the reorganization of the Corporate Debtor’s business when there is a financial stress. In other words, the financial creditor, by its own direct involvement in a financial existence of corporate debtor, acquire unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian....

50.1. Keeping the objective of the Code in view, the position and role of a person having only security interest over the assets of the corporate debtor could easily be contrasted with the role of financial creditor because the former shall

have only the interest of realising the value of its security (there being no other stakes involved and least any stake in the corporate debtor's growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in rejuvenation, revival and growth of the corporate debtor. Thus understood, it is clear that if the former i.e. a person having only security interest over the assets of the corporate debtor is also included as financial creditor and thereby allowed to have its say in the processes contemplated by Part II of the code, the growth and revival of the corporate debtor may be the casualty....

50.2. Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third-party securities), even if falling within the description of "secured creditor" by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of "financial creditors" as per the definitions contained in sub-sections (7) and (8) of Section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of "debt" under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a "financial debt" within the meaning of Section 5(8) of the Code."

49. In view of the observations of the Hon'ble Supreme Court, it deserves to be appreciated that when the Corporate Debtor creates the Mortgage to secure payment obligation of third party without any disbursement of debt to itself, the mortgagee even if becoming a Secured Creditor because of creation of mortgage could only be described as indirect secured creditor and not as a secured Financial Creditor. The Hon'ble Supreme Court further held that if a person having only security interest over the assets of the Corporate Debtor is also included as a Financial Creditor, it would defeat the very object and purpose of IBC.

50. Relying upon the above said judgement of **Anuj Jain**, the Hon'ble Supreme Court in **New Okhla Industrial Development Authority vs Anand Sonbhadra** held that disbursement is an indispensable requirement to constitute financial debt and since there was no disbursement of any debt or any sum to the Corporate Debtor by the Applicant, the Applicant/Creditor could not be termed as a Financial Creditor within the ambit of Section 5(8) of IBC.
51. To further appreciate the claim of the Applicant to be treated as a secured Financial Creditor, it is necessary to consider the definition of "Financial Creditor" under Section 5(7) of IBC and of "Financial Debt" in term of Section 5 (8) of IBC.

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

"Section 5(8) –

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

(a) money borrowed against the payment of interest;

(b) ...

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

(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;".

The essential requirement to attract Section 5(8) of the IBC is that there must be debt along with interest, if any, which is disbursed against consideration for the time value of money. Thus, the "disbursement" is an indispensable requirement to constitute a

‘Financial Debt’ within the meaning of Section 5 (8) of IBC and that such disbursement must be from the Creditor to the Debtor.

52. After having appreciated the submission of both the Ld. Counsels and also after the appreciation of relevant provisions of DTD, IoMs we deem it appropriate to take notice that: -
- a) No amount was disbursed by the Applicant to the Corporate Debtor
 - b) In the facts and circumstances of the present case, the Applicant does not fall under Section 5(7) of the IBC and is not a Financial Creditor qua Corporate Debtor.
 - c) Corporate Debtor is neither the corporate guarantor nor a Co-obligor, hence not liable.
 - d) the interest of the Applicant is protected to the extent of the properties mortgaged (in terms of IoMs).

The perusal of the documents executed by the Applicant with the Corporate Debtor i.e. IoMs do not show any disbursement by the Applicant to the Respondent /Corporate Debtor. There is not even an iota of doubt that the Applicant being a mortgagee has no interest in the revival or rehabilitation of the Corporate Debtor. Being a Debenture Trustee-cum-mortgagee, it will only be interested in furthering and protecting the interest of the Debenture Holders.

53. Therefore, from the perusal of the documents executed by the Applicant with the Corporate Debtor, it is evident that there has been no disbursement by the Applicant to the Corporate Debtor and these documents protect and secure the interest of the Applicant to the extent of properties mortgaged and so stipulated in the IoMs. Thus any default or breach on the part of Corporate Debtor towards the terms and conditions of IoMs which are nothing but contractual obligation between the parties, shall give rise to the cause of action for the breach of contract only to the Applicant, which the Applicant is duly entitled to proceed with. Therefore, in view of the above stated facts and circumstances and in terms of provisions of law and also the law laid down by the Hon’ble Supreme Court in **Anuj jain (Supra)** specifically holding that non disbursement of any money on the part of the Applicant cannot make him a ‘secured financial creditor’. Therefore, in our considered opinion, this issue is also decided against the Applicant.

Issue (c):- Whether the decision of the Respondent/RP in treating the Applicant as ‘Other Secured Creditor’ is correct?

54. As regards the allegation of non-application of mind/ non-adherence to principles of natural justice on part of the Resolution Professional in not considering the Applicant as a Financial Creditor, we find that the Applicant’s challenge on this account is misplaced. As held by the Hon’ble Apex Court in ***Swiss Ribbons v. Union of India (2019) 4 SCC 17***, it is clear from reading of the Code as well as the IBBI (Resolution Process for Corporate Persons) Regulations, 2016 that the interim Resolution Professional has no adjudicatory powers and that he has been given administrative powers only. In view of Section 18 of the Code read with Regulations 13 and 14, the Resolution Professional is required to verify and collate the claims submitted before him and in the process of verifying, he is justified in categorizing the claims on the strength of documents submitted before him.
55. At this juncture, one cannot lose sight of the requirements of onus of proof placed on various persons making claims before the resolution professional pursuant to public announcement under the Code as well as the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. For instance, Regulation 8 mandates that a person claiming to be a financial creditor “*shall submit **claim with proof** to the interim resolution professional in electronic form in Form C of the Schedule*”. Regulation 8(2) contains list of certain relevant documents on the basis of which the existence of debt to the financial creditor may be proved. Regulation 10 dealing with “substantiation of claims” provides that the interim resolution professional may call for such other evidence or clarification as he deem fit from a creditor for substantiating the whole or part of its claim. On perusal of Form-C dated 02.12.2021 furnished by the Applicant to the Respondent/RP for submitting its claim, it is noticed that the Applicant has made the claim against the Corporate Debtor/Mortgagor as a “Guarantor” based on the “Covenant to Pay” clause contained in the IoMs. However, it is a matter of record that no Corporate Guarantee was ever executed by the Corporate Debtor in favor of the Applicant. Moreover, after analyzing the above “Covenant to Pay” clause, we have already arrived at a finding that the said clause does not tantamount to a guarantee and

consequently, the Corporate Debtor/Mortgagor cannot in law be treated as a “Guarantor” qua the Applicant.

56. Thus, it can by no means be claimed that the decision of the resolution professional suffers from non-application of mind or that it is in violation of principles of natural justice. The fact of the matter is that it was the Applicant who failed to substantiate its claim of being a financial creditor to the Corporate Debtor before the resolution professional with sufficient and credible documentary evidence. As the Applicant’s claim as ‘financial creditor’ based on ‘covenant to pay’ clause in the IoMs was not prima facie borne out from the record and instead involved process of detailed analysis and legal interpretation of terms and conditions of the DTD and the IoMs, we find that the resolution professional was justified in refusing to treat it as a ‘financial debt’ within the meaning of the Code. The resolution professional is seen to have given reasons for arriving at his decision. We do not find any error or infirmity in his action in asking the Applicant to file its claim in the capacity of ‘Other Secured Creditor’ in the prescribed Form – F in accordance with CIRP Regulations.
57. Thus, in view of the foregoing discussion and findings, **the IA is dismissed** and the Applicant is directed to file its claim with the Respondent/RP as **‘Other Secured Creditor’**.

SD/-

Sanjiv Dutt
Member (Technical)
/Abhay/

SD/-

Reeta Kohli
Member (Judicial)