NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH (COURT-I)

CP (IB) 69/CHD/HRY/2022

IN THE MATTER OF:

Automax Constructions Limited
Through its representative Jitendra Bisht
Having its registered office at:
Flat No.3, Khasra No.301/2, Ground Floor
100 Feet Road, Village Ghitorni
South west Delhi 110030 **... Applicant/Creditor**

Versus

Spaze Towers Private Limited
Having its registered office at:
Tower C, SPAZEDGE Sector-47
Gurugram-Sohna Road Gurugram-122002 **...Respondent**

Order Delivered on: 25.04.2024

SECTION: Section 7 of IBC 2016

CORAM:

SH. HARNAM SINGH THAKUR, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant **:** Adv. Ujjal Banerjee

For the Respondent **:** Adv. Sumesh Dhawan

Judgement

PER: SH. HARNAM SINGH THAKUR M(J) & SH. L. N. GUPTA, M(T)

Automax Constructions Limited (for brevity, the **"Applicant"**) has filed the present application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate the Corporate Insolvency process against Spaze Towers Private Limited (for brevity, the **"Respondent"**).

2. The Respondent namely, Spaze Towers Private Limited is a Company incorporated on 27.01.2006 under the provisions of the Companies Act, 1956 with CIN U45201HR2006PTC096709 having its registered office at Tower C, SPAZEDGE Sector-47, Gurugram-Sohna Road, Gurugram-122002, which is within the jurisdiction of this Tribunal. The Authorized Share Capital of the Respondent Company is Rs.25,00,00,000/-, and the Paid-up Share Capital is Rs.19,80,00,000/- as per the Master Data annexed with the application.

3. It is averred by the Applicant that it is the owner of the land bearing Khasra Nos. 14/4/1 (1-10-0), 15/5/1(1-11-0), Khasra nos. 14/4/2(0-2-0), 14/5/1/2 (0-8-0), total measuring 3 Bigha 11 Biswas 0 Biswasnis Pukhta (2.219 acres) of land situated in revenue estate of Tikri Tehsil and District Gurgaon (hereinafter referred to as "**the said Land**"). It is further submitted that in 2010, the Applicant and the Respondent entered into a Collaboration Agreement on 15.10.2010 (**hereinafter referred to as "Collaboration Agreement"**). The Applicant obtained License No. 220/2007 under Section 3

of the Haryana Development and Regulation of Urban Area Rules 1976 for developing a Commercial colony. Thereafter, the Respondent approached the Applicant for development of a commercial complex in the name and style of Boulevard II (**hereinafter referred to as "Project"** the said Land. As per the terms of the "Collaboration Agreement", it was mutually agreed between the Applicant and the Respondent that the Respondent will retain 35% of the super built-up constructed area as Hotel/Commercial, underneath open spaces, terraces, basement, car parking, spaces, lifts, utilities and other common spaces including revenue generating spaces etc. including proportionate rights in the land, and shall handover the remaining 65% of the super built-up constructed area, open spaces, terraces, basement, car parking, spaces, lifts, utilities and other common spaces including revenue generating spaces after the Project is complete to the Applicant.

4. The detailed particulars of the Financial Debt including the total amount of default and the date of default as claimed by the applicant in Part IV of the application reads thus:

2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF	Total amount due as : **Rs. 52,94,87,700/- (Rupees Fifty Two Crore Ninety Four Lakh Eighty Seven Thousand Seven Hundred Only).** Amount due towards delay compensation in completion of the

	DEFAULT IN TABULAR FORM)	Project from 15.01.2017 to 15.01.2022 :- **Rs. 43,95,67,800/- (Rupees Forty Three Crore Ninety Five Lakh Sixty Seven Thousand Eight Hundred Only) [Total Area (209318 sq. ft.) X (Rs. 35/-) X No. of months (60)].** Amount due towards delay compensation on basement from 15.01.2012 to 15.01.2017 :- **Rs. 8,99,19,900/- (Rupees Eight Crore Ninety Nine Lakh Nineteen Thousand and Nine Hundred Only) [Total Area of Basements (99911 sq.ft.) X (Rs. 15/-) X No. of months (60)].** **Date of default – 11.11.2021** Calculation Sheet is annexed as Annexure P-8.

5. As per Part IV of the application (ibid), the Applicant has claimed an outstanding "financial debt" of Rs. 52,94,87,700/- and relied on 11.11.2021 as the "date of default". It is further submitted that on 03.11.2021, the Applicant sent a letter to the Respondent regarding the non-completion of the project and the pending works at the project Spaze Boulevard-II.

6. To buttress its plea, the Applicant has relied on the following documents:

(i) Copy of the Collaboration Agreement dated 15.10.2010;

(ii) Copy of Supplementary Agreement to Collaboration Agreement dated 15.10.2013;

(iii) Copy of Occupation Certificate dated 27.07.2020 obtained by CD for the project;

(iv) Letter dated 03.11.2021 sent by FC to the CD (pages 112-125);

(v) Copy of form A-H filed by the CD on the website of Haryana Real Estate Regulatory Authority.

7. Based on the facts mentioned above and the documents (ibid), the Applicant has prayed for the initiation of Corporate Insolvency Resolution Process (CIRP) against the Respondent.

8. On issuance of the notice, the Respondent filed its Reply dated 19.12.2022 and Written Submissions stating mainly the following:

8.1 The Petitioner being the Land-Owner of the Project and a party to the profit sharing obtained from the sale of the Units of the Project, cannot claim to be an allottee itself before this Adjudicating Authority, only by virtue of being entitled to 65% share of the total project under the Collaboration Agreement. The contention of the Petitioner that it is an Allottee of the Project and therefore, can be classified as Financial Creditor, is liable to be dismissed.

8.2 The Applicant is the owner of land and obtained licence No. 220/2007 under Section 3 of the Haryana Development and Regulation of Urban Area Rules 1976 for developing a commercial complex on the said land.

8.3 As per terms of the Collaboration Agreement, Respondent was to construct the Project and handover 65% of the same to the Applicant in exchange of the land provided by Applicant-Landowner.

8.4 Since, land owner and developer are treated as promoters for the respective project, therefore, Section 7 Petition cannot be filed by either of them against any one of them. In this regard, reliance is placed on the judgement of the Hon'ble NCLAT in M/s. Vipul Limited vs. Solitaire Buildmart Pvt. Ltd., Company Appeal (AT)(INS) 550/2020.

8.5 The application for grant of the Occupancy Certificate was made by the Applicant itself on 20.03.2020 and the said Occupancy Certificate is issued by the Directorate of Town and Country Planning, Haryana in the name of the Applicant as a land owner/ promoter of the project.

8.6 The Completion Certificate for the project has been duly received by the parties on 10.10.2023. The Completion Certificate of the project has been placed at Annexure-6.

8.7 The entire 65% area of the completed project has been handed over to the Applicant by the Respondent and furthermore, 111 Units out of 181 Units pertaining to the Applicant have already been leased out to third parties.

8.8 The Applicant is not interested in taking the delivery of their units rather they are motivated to coerce the Respondent into paying assured interest on amounts invested by them along with exorbitant rate of compensation.

8.9 There has been no disbursement of funds / investment from the Applicant-Landowner to the Respondent-Developer and the only monies which have been paid by the Applicant-Landowner are towards the External Development Charges (EDC) and Internal Development Charges (IDC) to be paid to the Directorate of Town and Country Planning, Haryana (DTCP). Pertinently, similar monies have been paid by the Respondent-Developer to the DTCP, Haryana towards the EDC and IDC dues and the same is recorded in the Collaboration Agreement dated 15.10.2010.

8.10 The captioned application has been filed as a money recovery tool, which is not within the purview of the Code, 2016 and therefore, it is liable to be dismissed with costs as envisaged under section 65 of the Code.

8.11 In support of its contentions, the Respondent places reliance upon the Hon'ble NCLAT's judgements passed in the case of *Namdeo Ramchandra Patil & Anr vs Vishal Ghisulal Jain & Jain & Anr. i.e., Company Appeal (AT) (INS) No. 821 of 2021* dated 19.09.2022, and in the case of *Bodhpur Buildcon Pvt Ltd vs Mr Abhay Narayan Manudhane, RP of Housing Development and Infrastructure Limited, Company Appeal (AT) (INS) No. 589 of 2021* dated 09.09.2022.

9. In rebuttal, the Applicant has filed its Rejoinder dated 18.01.2023 to the reply filed by the Respondent and written submissions dated 04.05.2022 stating mainly the following:

9.1 The Respondent had categorically allotted a total of 181 units in the project to the Applicant. Furthermore, the Applicant has the sole right, title and interest over the said units and was and is still entitled to assign such rights to a third party on its own as evident from Clause 13 of the Collaboration Agreement. Further, as per section 2(d) of the Real Estate (Regulation and Development) Act 2016, an allottee includes a person to whom a plot, apartment, building has been allotted or sold.

9.2 In view of the said Collaboration Agreement, the Applicant had parted with a total of Rs. 4,37,15,873/- qua the development of the Project and is also recorded in clause 3 of the Collaboration Agreement. The Respondent had undertaken to develop / construct the basements by 15.01.2012 as per the Collaboration Agreement and to complete the Project by 15.01.2017 as per the Supplementary Collaboration Agreement. However, till date, the Corporate Debtor has failed to receive the Completion Certificate from the concerned authorities.

9.3 The Respondent has failed to meet the specifications mentioned and promised in Annexure C to the allottee and thereby, as per clause 19 of the Collaboration Agreement and clause 2 of the Supplementary Agreement, the Respondent is obligated to pay a total of Rs. 8,99,19,900/-. The 'claim' of the Applicant is within the purview of Section 3(6) of the Code, and in view of the default of the Respondent to honour its part of the bargain and as per the obligations undertaken by the Respondent the 'debt' as defined under the Code has arisen. It is further emphasized that the amount towards the compensation for delay in completion of the Project clearly qualifies as "commercial borrowing" and "time value of money" is categorically engrained in the transaction as the Respondent had undertaken to construct the land and allot the units in a timely manner. Moreover, it is not a disputed fact that the rate of land / unit rises exponentially with the passage of time.

10. We heard the submissions of both parties and perused the pleadings on record, including the Written Submissions filed by both parties. The Applicant, which has signed a Collaboration Agreement dated 15.10.2010 with the Respondent Company and as per the said agreement being entitled to 65% of the project, has claimed to be an allottee/Financial Creditor. Further, it has alleged that the Respondent has failed to meet the specifications and thereby, as per clause 19 of the Collaboration Agreement and clause 2 of the Supplementary Agreement, the Respondent is obligated to pay a total of Rs. 8,99,19,900/- as compensation for delay in completion of the Project. Per Contra, the Respondent has stated that the Petitioner being the Land-Owner of the Project, signatory to the Collaboration Agreement, and being a party to the profit sharing obtained from the sale of the Units of the Project, cannot

claim itself to be an "allottee", only by virtue of being entitled to 65% share of the total project under the Collaboration Agreement. Further, the Respondent has contended that there has been no disbursement of funds / investment from the Applicant-Landowner to the Respondent-Developer and the only monies which have been paid by the Applicant-Landowner are towards the External Development Charges (EDC) and Internal Development Charges (IDC) to be paid to the Directorate of Town and Country Planning, Haryana (DTCP) and similar monies have been paid by the Respondent-Developer as well to the DTCP, Haryana towards the EDC and IDC dues. The Respondent has further submitted that even the Completion Certificate for the project has been duly received by the parties on 10.10.2023. Further, the entire 65% area of the completed project has been handed over to the Applicant and, 111 Units out of 181 Units pertaining to the Applicant have already been leased out to third parties. The Applicant is not interested in taking the delivery of their units rather they are motivated to coerce the Respondent with exorbitant rate of compensation. The Respondent has argued that the present Application has been filed as a money recovery tool, which is not within the purview of the Code, 2016 and therefore, it is liable to be dismissed.

11. The moot question which arises before this Adjudicating Authority is whether the Applicant being a party to the "Collaboration Agreement" and co-developer can claim to be an "allottee" and seek recovery of its dues through the mechanism of IBC 2016 from the other party of the "Collaboration Agreement". In this context, we refer to the "Collaboration Agreement" dated 15.10.2010 entered by and between the parties, the relevant extracts of which reads thus:

हरियाणा HARYANA F 217035

COLLABORATION AGREEMENT

This Collaboration Agreement is made on this the 15th day of October, 2010 at Gurgaon

BETWEEN

M/s.Automax Constructions Limited, a limited company , duly incorporated under the Companies Act,1956, having its Registered office at Plot No. 5,100 Feet Road, Opposite Farm House No.4, Village Ghitorini, New Delhi-110030 and its corporate office at B- 26, Sector-32, Gurgaon through its Managing Director Mr. Varinder Talwar who has been empowered to execute this agreement vide Board Resolution dated_____ (hereinafter called THE OWNERS/First Party) which expression unless repugnant or opposed to the context thereof includes its successors, representatives, nominees, Permitted assigns and all those claiming through it).

AND

M/s. Spaze Towers Pvt. Ltd. (Formerly Known as K. S. Estate Developers and Promoters Pvt. Ltd.) having its office at 18, Community Centre, Mayapuri, Phase-I, New Delhi(India)

For Automax Constructions Ltd.

Mg. Director

For Spaze Towers Private Limited

Director

and Corporate Office at Spazedge, Sector 47,Sohna Road, Gurgaon through its duly authorized person Shri J. S. Chawla, who has been empowered to execute this agreement VIDE board Resolution dated 02.04.2010 (hereinafter called the DEVELOPER/Second Party) which expression unless repugnant or opposed to the context thereof includes its successors, representatives, nominees and permitted assigns and all those claiming through it).

WHEREAS the First Party is the Owner of the land , bearing khasra nos. 14/4/1 (1-10-0), 14/5/1/1 (1-11-0) khasra nos. 14/4/2(0-2-0), 14/5/1/2 (0-8-0), measuring 3 Bigha 11 Biswas 0 Biswansis Pukhta (2.219 acres as per **Annexure A**) situated in revenue estate of Tikri Tehsil and District Gurgaon(hereinafter referred to as the "said land") which was purchased from M/s Auto max (a unit of Omax Autos Ltd) herein after called as Predecessor vide sale deed Vasika No.5115 dated 26.05.2010
AND WHEREAS Predecessor had applied for and obtained the Licence No 220/2007 under sec 3 of Haryana Development and Regulation of Urban Area Rules 1976.for developing a commercial Colony . (with an FSI of 1.44 lac sq ft approx as per **Annexure B** attached herewith),

Whereas the predecessor applied for transfer of the development rights to the first party on 04-06-09, and DTP vide its letter dated 03-08-09 granted the permission for transfer of the Licence.

Whereas the First Party/Owner has assured that the said land is free from any charge, mortgage, lien, attachment, legal dispute, acquisition proceedings and the same has a clear and a marketable title, the same has been duly verified by the second party /the Developer, to its satisfaction.

Whereas the Developer has approached to Owner for development commercial complex on the said land. The developer has informed owner that it is developing couple of other projects in the nearby vicinity, and has assured the owner that Developer possess sufficient technical and financial strength to develop this land from its own funds.

AND WHEREAS the Owner believing the assurance given by the Developer about its experience and reputation in the real estate business , the Owner has agreed to enter into present agreement on the following terms and conditions:

For Automax Constructions Ltd. **For Spaze Towers Private Limited**

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From the plain reading of the Collaboration Agreement (ibid), it is evident that both the parties, one being the "land owner" and the other being the "developer", herein have collaborated for the purpose of developing a "commercial complex" over the said land.

12. Next, we examine the Supplementary Agreement to the Collaboration Agreement, dated 15.08.2022 entered by and between the parties, the relevant extracts of which reads thus:

SUPPLEMENTARY AGREEMENT TO THE COLLABORATION AGREEMENT DATED 15.10.2010

This Supplementary Agreement to the collaboration agreement dated 15.10.2010 **("Agreement")** is made and executed at Gurgaon, Haryana on this 11th day of September, 2013.

BY AND BETWEEN

M/S AUTOMAX CONSTRUCTIONS LIMITED, a company incorporated and validly existing under the provisions of Companies Act, 1956 and having its registered office at Plot No. 5, 100 feet road, opposite farm house No. 4, Village Ghotorini, New Delhi 110030 and its corporate office at B-26, Sector 32, Gurgaon, Haryana (hereinafter referred to as the **"Land Owner"** which expression shall, unless it be repugnant to the context or meaning thereof, be deemed to include its representatives, executors, successors and permitted assigns) acting through Mr. Varinder Talwar, duly authorized vide board resolution date 11th September, 2013, being the Party of the **First Part.**

AND

M/S SPAZE TOWERS PRIVATE LIMITED, a company incorporated and validly existing under the provisions of Companies Act, 1956 and having its registered office

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For Automax Constructions Ltd.

Authorised Signatory

For Spaze Towers Private Limited

Director

at A 307, Ansals Chamber-I, 3 Bhikaji Cama Place, New Delhi 110066 and its corporate office at 'Spazedge' Sector 47, Sohna Road, Gurgaon, Haryana (hereinafter referred to as the **"Developer"** which expression shall, unless it be repugnant to the context or meaning thereof, be deemed to include its representatives, executors, successors and permitted assigns) acting through Mr. Bharat Bhushan Kumar, duly authorized vide board resolution date28th February, 2012, being the Party of the **Second Part.**

The "Land Owner" and the "Developer" are hereinafter individually referred to as **'Party'** and collectively referred to as the **'Parties'.**

WHEREAS, the Land Owner own and possess land comprised in khasra nos. 14/4/1(1-10-0), 14/5/1/1 (1-11-0),14/4/2 (0-2-0) and 14/5/1/2 (0-8-0) collectively admeasuring 3 bigha 11 biswa or 2.219 situated in the revenue estate of village Tikri, Tehsil & Dist. Gurgaon, Haryana (hereinafter referred to as the **"Project Land"**): and

ANDWHEREAS, the Land Owner and the Developer entered into a collaboration agreement dated 15.10.2010 (**"Collaboration Agreement"**): and

ANDWHEREAS, the Land Owner of the Land have further executed an irrevocable general power of Attorney duly registered as document no. 884 dated 29.11.2012, in the office of sub-registrar, Gurgaon, in favour of the Developer authorising, including through its representatives, to enter upon for construction and development on the Licensed land the Complex including rights to obtain approvals, permission, sanctions necessary for the development and construction of the Commercial Complex.

ANDWHEREAS, the Director, Town and Country Planning Department, Government of Haryana, Chandigarh, issued License No.220 of 2007 dated 09.09.2007 (**"License"**) for setting up commercial complex on land admeasuring 2.219 acres (**"Licensed Land"**) out of the Land. The building plans for the commercial complex have been approved by the DTCP vide their Memo No. ZP-319/AD(RA)/2013 dated 22.02.2013; and

ANDWHEREAS, it had been specified in the Collaboration Agreement that retail shops and /or offices shall be constructed in the project. However, the Developer and the Land Owner have mutually decided to modify/alter/vary/revise the terms of Collaboration Agreement and are hence desirous of recording the same in writing as provided hereinafter.

NOW, THE PARTIES HAVE ACCORDINGLY DECIDED TO EXECUTE THIS AGREEMENT ON THE FOLLOWING TERMS AND CONDITIONS:

1. The Parties have now agreed, that the Developer shall construct and develop on the Licensed Land a commercial complex comprising of retail space and

For Automax Constructions Ltd.

Authorised Signatory

For Spaze Towers Private Limited

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service apartment(s)/hotel suits ("**Commercial Complex/Colony**" or "**Project**"), in accordance with the building plans to be sanctioned by the competent authority. That the Developer has agreed to the same on the understanding that the entire additional cost and expenses to be incurred towards the development of the service apartment(s)/hotel suits including all civil works related to carrying out the fit-outs, erection of internal partitions and other internal alterations, additions, improvements or decorations, electrical installation, etc.("**Fit-Outs**"), to enable occupation and use of the same by prospective clients, shall be shared by the Land Owner and Developer in the ratio 65% : 35% respectively.

It is clarified that, the Land Owner shall also be a party to the negotiations and consequent finalisation of the contractor(s) entrusted with the Fit-Outs work. The Land Owner shall be under an obligation to make the payments *(i.e. 65% of the total cost and expenses)* directly to the contractor(s) in accordance with the executed contract(s) and/or the invoices raised by the contractor(s), as the case may be.

Provided that, in respect to the units allocated to the Land Owner in terms of the Collaboration Agreement, in respect thereof the Land Owner shall be entitled to carry out the Fit-Outs through its own contractors, at its own cost and risk. However, in such an eventuality the Land Owner agrees and undertakes that such fit-outs work carried by its contractors shall conform to the quality, design and specification of the fit-outs jointly agreed along with the Developer and shall not change or in any manner affect the aesthetics of the project.

Further, in the event of any delay in completion of the fit-outs work or any damage caused to the building in the project caused by the contractor of the Land Owner, then the land owner shall be solely responsible for any implication thereof.

The specification and the design of the service apartments/hotel suits shall be jointly approved by both the Parties. That the time line for completion of project will be 39 (thirty nine) months starting from 15.10.2013 ("**Completion Period**"). Further, if at any stage the building/layout plans are agreed to be revised by the Parties hereto than the Completion Period shall commence from the date(s) on which such revised building plan(s) are approved by the Competent Authority.

It is agreed between the Parties that, the Developer shall not be under an liability to perform its obligation to complete the Commercial Complex by the

For Spaze Towers Private Limi

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r Automax Constructions Ltd.

Authorised Signatory

It is agreed between the Parties that, the Developer shall not be under an liability to perform its obligation to complete the Commercial Complex by the Completion Period, if such delay in completion is due to damage by fire; earthquake; tempest; flood; lightning; atmospheric disturbance; or any other act of God; riots; terrorism; violence of any army or mob or enemies of the country or by any other irresistible force; or the orders of any statutory authority (collectively referred to as **"Force Majeure"**). Further, upon the happening of a *Force Majeure* event the Completion Period shall be deemed to be extended by the period for which such *Force Majeure* period is continuing or in force or its effects are in force.

It is abundantly clarified that, in the event the Land owner delays/demurs/defaults in the performance/discharge of its obligations, liabilities, responsibilities, warranties, etc., under this Agreement or the Collaboration Agreement, then the Completion Period shall be deemed to be extended by the period which the Land Owner delays/demure/defaults in the performance/discharge of its obligations, liabilities, responsibilities, warranties, etc., under this Agreement or the Collaboration Agreement.

3. Developer shall endeavour to segregate the contracts for construction of the Commercial Complex and the Agreements for Fit-Outs, and provide the details of the same to the Land Owner. The Land Owner shall be under an obligation to make the payments *(i.e. 65% of the total cost and expenses)* directly to the contractors in accordance with the executed contracts and/or the invoices raised by the contractors, as the case may be. Wherever both the Parties agree that particular contract/service/supply cannot be segregated, than in that case, Land Owner will pay their share of 65% of aggregate cost of such contract/service/supply to Developer directly with applicable taxes.

It is agreed between the Parties that, from the date hereof license renewal fees shall be borne by the Land Owner and Developer in the ratio 35% : 65% respectively, instead of 65% : 35%.

5. It is agreed between the Parties that, each party shall prepare and maintain records with respect to their respective allocation in the Commercial Complex.

It is clarified that, Parties hereto will carry out the transfer of Unit of their respective allocation by themselves and will also be collecting transfer charges for their respective share of allocation.

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For Automax Constructions Ltd.

Authorised Signatory

For Spaze Towers Private L

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From the bare reading of the Supplementary Agreement (ibid) to the Collaboration Agreement, it is clear that both the parties, one being the land owner and the other being the developer, herein have collaborated jointly for the purpose of developing "a commercial complex" over the land in question on the basis of joint sharing of cost and constructed units of the project in the ratio of 65% and 35% respectively.

13. Further, as pointed out by the Ld. Counsel for Respondent during the course of hearing that the "Occupation Certificate" and the "License No. 220 of 2007 dated 09.09.2007" are in the name of the Applicant herein. Hence, we refer to the Occupation Certificate dated 27.07.2020 issued by Directorate of Town and Country Planning Department, of Government of Haryana as placed on record, which reads thus:

REGD.

FORM BR-VII
(See Code 4.10(2), (4) and (5))
Form of Occupation Certificate

From

Director,
Town & Country Planning Department,
Nagar Yojana Bhavan, Plot No. 3, Block-A,
Sector-18-A, Madhya Marg, Chandigarh.
Tele-Fax: 0172-2548475; Tel.: 0172-2549851,
E-mail: tcpharyana7@gmail.com, Website www.tcpharyana.gov.in

To

Automax Construction Ltd.
C/o Spaze Towers Pvt. Ltd.,
Spazedge, Sector-47, Sohna Road,
Gurugram.

Memo No. ZP-319/JD(AS)/2020/ 13131 Dated: - 27-07-2020

Whereas Automax Construction Ltd. C/o Spaze Towers Pvt. Ltd. has applied for the issue of an occupation certificate on 20.03.2020 in respect of the building described below: -

DESCRIPTION OF BUILDING

City: Gurugram: -

- Licence No. 220 of 2007 dated 09.09.2007.
- Total area of the Commercial Colony measuring 2.219 acres.
- Village- Tikri, Sector-47, Gurugram.
- Indicating description of building, covered area, towers, nature of building etc.

Tower/ Block No.	No. of Floors	FAR Sanctioned		FAR Achieved	
Commercial Block	Ground Floor to 12th Floor	Area in Sqm.	%	Area in Sqm.	%
		13375.311	174.99	13237.503	173.19

Non-FAR Area in Sqm.		
	Sanctioned	Achieved
Service Floor (2nd Floor)	289.21	270.001
Basement1	2766.78	2766.78
Basement 2	3328.67	3328.67
Basement 3	3186.40	3186.40
Terrace Floor (Mumty/Machine Room)	131.494	131.494
Metre Room	--	11.50
Guard Room	--	8.00
HT Breaker Room	--	13.85

I hereby grant permission for the occupation of the said buildings, after considering NOC from fire safety issued by Director General, Fire Service, Haryana, Panchkula, Environment Clearance issued by Ministry of Environment & Forests, Government of India, Structure Stability Certificate given by Sh. M.M. Quadri, M.Sc. (Structure Engineer), Public Health Functional reports received from Chief Engineer-I, HSVP, Panchkula & Certificate of Registration of lift issued by Inspector of Lifts-cum-

xxxx xxxx xxxx xxxx

It is observed from the aforesaid document (ibid) that the Occupation Certificate is in the name of the Applicant. We also notice that as per the Form A-H (Part B) filed by the Respondent on the website of Haryana Real Estate Regulatory Authority (HRERA) and placed on record, the Licensee 1 is "Automax Constructions Limited", the Applicant herein. The said Form A-H (Part B) reads thus:

FORM REP-I

Part - B

Information relating to the project land and license:

1. Land area of the project		**2.219 (Acre)**
2. Permissible FAR		**13375.749**
3. FAR proposed to be utilized in the project		**1.75**
4. Total licensed area, if the land area of the present project is a part thereof		**2.219 (Acre)**
5. License number granted by the Town & Country Planning Department for the project/Allotted By Municipal Corporation/Permission by Local Bodies **(Annex copy in folder B)**		**220 OF 2007**
6. Is the applicant owner-licensee of the land for which the registration is being sought.		**No**
Licensee 1:	Name **AUTOMAX CONSTRUCTIONS LTD. AND AUTOMAX [UNIT OF OMAX]**	Address **C/O SPAZE TOWERS PVT. LTD. SPAZEDGE TOWER C SECTOR 47 GURUGRAM**

14. We further notice that in terms of the Collaboration Agreement dated 15.10.2010, the Applicant herein is a Collaborator for the "Project", for which both the License as well as the Occupation Certificate are in the name of the Applicant itself. In this backdrop, we refer to the judgement in the matter of **M/s Vipul Limited vs. Solitaire Buildmart Pvt. Ltd., Company Appeal (AT)(Ins) 550/2020,** the relevant extract of which reads thus:

> *"26. To reiterate, the Applicant had issued notice to the Respondent under Section 8, terming it as an 'Operational debt. Be that as it may, this Application seeking initiation of CIRP by one partner of JDA against the*

other, only jeopardizes the interests of the allottees. Apart from the fact that ***the Joint Development Agreement entered into, is a contract of reciprocal rights and obligations, both parties are admittedly Joint Development Partners, who entered into a consortium of sorts for developing an Integrated Township and for any breach of terms of conduct, Section 7 Application is not maintainable as the amount cannot be construed as 'Financial Debt' as defined under Section 5(8) of the Code****. Therefore, we are of the considered view that the Appellant cannot be termed to be a 'Financial Creditor' as envisaged under Section 5(7) of the IBC, 2016."*

(Emphasis placed)

At this stage we also refer to another judgement of the Hon'ble NCLAT passed in the matter of ***Namdeo Ramchandra Patil & Anr vs Vishal Ghisulal Jain & Jain & Anr. i.e., Company Appeal (AT) (INS) No. 821 of 2021*** dated 19.09.2022, the relevant excerpts of which reads thus:

"13. When we look into the provision of Section 5(8)(f) Explanation (i) and (ii), it is clear that pre-condition for a debt being a Financial Debt is disbursement against the time value of money and when any amount is raised from an allotment under real estate such transaction is also covered under Section 5(8)(f). The pre-condition for application of Explanation (i) of Section 5(8)(f) is raising of an amount from allottee. The present is not a case where an amount has been raised from the Appellants – the Landowners. The submission of the Appellant that they are allottees within the meaning of Section 2(d) of RERA Act does not make their transaction as a Financial Debt within the meaning of Section 5(8)(f). It is

relevant to notice that RERA Act itself has noticed the definition of 'Promoter' under Section 2(zk). ***When we look in the real nature of the transaction entered between the Corporate Debtor and the Appellants – Landowners, the landowners were entitled to share the constructed area in the ratio of 45:55 and allotment of flats and commercial units in lieu of their entitlement under the Development Agreement does not make the transaction of allotment a Financial Debt within the meaning of Section 5(8)(f)....”***

(Emphasis Supplied)

Thus, we find that the facts of the present case are akin to the findings of the judgements (supra). In the present case too, the nature of the transaction entered between the Corporate Debtor and the Applicant-Landowner is similar wherein the Applicant-landowner, in terms of the collaboration agreement, is entitled to share the constructed area in the ratio of 65:35 and allotment of units in lieu of its entitlement under the Collaboration Agreement does not make the transaction of allotment of units to the Applicant a Financial Debt within the meaning of Section 5(8)(f).

15. Now, we examine the next contention of the Applicant that the Respondent has failed to meet the specifications as per clause 19 of the Collaboration Agreement and clause 2 of the Supplementary Agreement, and therefore, Respondent is obligated to pay a total sum of Rs. 8,99,19,900/- as compensation for delay in completion of the Project. Basically, what the Applicant has been asking is compensation for delay or damages for violation

of terms of "Collaboration Agreement" and "Supplementary Agreement" entered by and between the parties herein. It is a settled law that for violation of terms of contract, a party cannot resort to Section 7 proceedings. In this context, we consider it worthwhile to refer to the judgement passed by the Hon'ble NCLAT in the case of ***Mukesh N. Desai vs Piyush Patel and Anr, Company Appeal (AT) (INS). 780 of 2020*** dated 09.09.2022, the relevant excerpts of which are reproduced below:

> *"14. In the instant case, on mutual Agreement, the 'Corporate Debtor' and other parties decided to transfer 25% of the land to the Appellant herein on a price decided jointly. As per Clause 4 of the MoU, the Appellant shall fund the cost of construction to the 'Corporate Debtor'/developer, till the sample flat is ready. It was correlatively decided that 'both parties have rights to book flats with mutual consent'. Clause 6 stipulates that 'whatever income is earned from the sale of flats, the Appellant is entitled to 25% of the Net Profit'.*
>
> *15. The MoU entered into is an Agreement of reciprocal rights and obligations.* ***We are of the earnest view that both parties being 'Joint Development Partners' who entered into a consortium of sorts for developing the subject land and for any breach of terms of the contract, Section 7 Application filed under the Code would not be maintainable as the amount cannot be construed as 'Financial Debt' as there is no sum(s) i.e., owed, assigned or transferred to in compliance of the provisions of Section 5(8) of the Code.*** *To reiterate, being a profit*

share owner, who in the event of the success of the Project would receive the residual gain, ***the amount invested in the land cannot be said to be a 'Financial Debt' as defined under Section 5(8) of the Code.*** *Hence, the ratio of the Judgements relied upon by the Learned Counsel for the Appellant are not applicable to the facts of this case."*

(Emphasis Supplied)

Thus, it is observed that in terms of the judgement (supra), neither a violation of the terms of the Collaboration Agreement / contract entitles the Applicant to file a Section 7 proceedings, nor the amount invested in the "land" can be said to be a 'Financial Debt' as defined under Section 5(8) of the IBC, 2016.

16. In this context, we also refer to the judgement passed by Hon'ble NCLAT in the matter of ***Bodhpur Buildcon Pvt Ltd vs. Mr Abhay Narayan Manudhane, RP of Housing Development and Infrastructure Limited, Company Appeal (AT) (INS) No. 589 of 2021*** dated 09.09.2022, the relevant excerpts of which read thus:

"m. All the above citations reflect one thing categorically and clearly that ***there must be a disbursal of fund by the Creditor to the Debtor purely in the form of release of fund as a "borrowing" and must have a "time value of money****". The method may be different but the nature must be borrowing and in extended terminology even the liability in respect of guarantee is also covered. There must be a "Financial Debt" which is owed by the other side i.e. the Debtor. It should be amply clear that the CD*

owe the "Financial Debt" to the Creditor. ***There is a difference between the levy of liquidated damages or penal interest for default and the financial debt per se****. Hence, we cannot borrow unrelated concept from unrelated judgments to prove that wherever a word "interest" is there it means corresponding to a "Financial Debt" and we accordingly confirm that "Financial Debt" will always carry an interest towards time value of money.* ***However, interest per se in any business contract cannot be termed to make the "debt" as a "Financial Debt", if it is in the nature of liquidated damages or in the nature of penal interest, which is a result of compensation for breach of contract which is stipulated for penalty.*** *Hence, while examining the case, whether the Appellant is a Financial Creditor or not we are now arriving at a conclusion based on above said discussions both on law & on facts and the citations produced by the parties, some of which have been explicitly cited as above reveals that the Appellant is not a "Financial Creditor" and hence, we are upholding the order of the Adjudicating Authority."*

(Emphasis Supplied)

17. Thus, from the judgement (supra), we find that the Applicant cannot seek recovery of compensation for delay or damages, if any, for violation of terms of "Collaboration Agreement" and "Supplementary Agreement" entered between the parties under Section 7 of IBC, 2016. Also, we are sanguine of the fact that the IBC provisions cannot be used as mechanism for recovery.

18. The Respondent has also submitted that the project has already received Completion Certificate and 111 Units out of 181 Units pertaining to the Applicant have already been leased out to third parties, which has not been rebutted by the Applicant. Here, we refer to the "Completion Certificate" issued by the Directorate of Town and Country Planning, Haryana placed at Annexure-6 of the Written Submissions. The same is reproduced thus:

ANNEXURE - 6

Directorate of Town & Country Planning, Haryana
Nagar Yojana Bhavan, Plot no. 3, Sector-18 A, Madhya Marg, Chandigarh
Web site tcpharyana.gov.in - e-mail: tcpharyana7@gmail.com

Regd.

(LC-IX)
[{See Rule 16(2)}]

To

Spaze Towers Pvt. Ltd.,
Spazedge, Sector-47, Sohna Road,
Gurugram.

Memo No. LC-1127-Vol-II/Asstt(RK)/2023/ 33694 Dated: 10-10-23

Subject: **Request for grant of Completion Certificate in respect of License no. 220 of 2007 dated 09.09.2007 granted for setting up of Commercial Colony over an area measuring 2.219 in Sector-47, District Gurugram being developed by Spaze Towers Pvt. Ltd.**

Refer to your application received on 20.09.2022 to grant of Completion Certificate in respect of License no. 220 of 2007 dated 09.09.2007 granted for setting up of Commercial Colony over an area measuring 2.219 in Sector-47, District Gurugram.

2. Chief Engineer-I, HSVP, Panchkula vide his memo no. CE-I/SE(HQ)/SDE(W-1)/SDE(W-2)/2023/86125 dated 25.04.2023 informed that the services with respect to Commercial Colony over an area measuring 2.219 in Sector-47, District Gurugram falling under Licence No. 220 of 2007 dated 09.09.2007 have been got checked and reported laid at site and are operational/functional.

Senior Town Planner, Gurugram vide his memo no. 2640 dated 17.04.2023 confirmed about laying of the colony as per approved layout plans.

Director General & Country Planning Haryana, Chandigarh

Superintending Engineer/Planning, HVPNL-Panchkula vide memo CH-04/SE/PLG/File No. 34/DH/329 dated 06.04.2023 in reference to report of CE/Commercial DHBVN, Hisar vide memo no. Ch-513/OLNC-HT/BPAC-NOC/GGN-II/SOL-1000/Vol-V dated 03.04.2023 has informed that the instant commercial project is developed by M/s Spaze Towers Pvt. Ltd. by installing 2000 KVA capacity of T/F as internal electrical infrastructure along with erection of 11 KV independent feeder against its sanctioned ultimate load of 1434 KW/1593 KVA which is sufficient to cater the load of project as per sanction memo no. Ch-40/SE/R-APDRP/OLNC-HT/GGM-II/SOL-768. Therefore, it is recommended to issue completion certificate.

3. In view of these reports, it is hereby certified that the required development works in the said Commercial Colony over an area measuring 2.219 acres as indicated on the enclosed layout plan duly signed by me read in conjunction with the following terms and conditions have been completed to my satisfaction. The development works are water supply, sewerage, storm water,

drainage, roads, horticulture etc. The completion certificate is granted on the following terms and conditions: -

a) The services will be laid by the colonizer upto alignment of proposed external services of the town and connection with the HSVP system will be done with the prior approval of the competent authority. In case pumping is required, the same will be done by the colonizer at its own cost. The services will be provided as per provision in the EDC of Gurugram.

b) That the colonizer will be solely responsible for making arrangement of water supply and disposal of sewage and storm water of their colony as per requirement/guidelines of HSPCB/Environment Department till such time, the external services are provided by HSVP /State Government as per their scheme.

c) Level/Extent of the services to be provided by HSVP i.e. water supply sewerage, SWD, roads etc. will be proportionate of EDC provisions.

d) That you shall maintain a roof top rain water harvesting system properly and shall keep it operational all the time.

e) That in case some additional structures are required to be constructed and decided by HSVP at a later stage, the same will be binding upon you. Flow control valves will be installed, preferably of automatic type on water supply connection with HSVP water supply line.'

f) That the NSL formation level of roads have been verified and are correct. The applicant company shall be responsible in case of any mistake in levels etc.

g) That you shall be fully responsible for operation, upkeep and maintenance of all roads, open spaces, public parks and public health services like water supply, sewerage and drainage etc. for a period as approved in the service plan estimates of your colony from the date of issuance of final completion certificate or earlier relieved of said responsibility and thereupon transfer all such roads open spaces, public parks and public health services like water supply, sewerage and drainage etc. free of cost to the Government or the Local Authority as directed.

h) That you shall neither erect nor allow the erection of any communication and transmission Tower with in colony without prior approval of competent authority.

i) That you shall use LED fittings for street lighting in the licenced colony.

j) That you shall comply with the conditions of Service Plan/Estimates approved by the Department vide memo dated 08.05.2020 and the conditions imposed by CEO-GMDA, Gurugram in the letter annexed as Annexure A-1.

k) That you shall abide by all prevailing norms/rules and regulations as fixed by HSVP.

l) That the bank guarantee equivalent to 1/5 amount thereof shall be kept un- realised to ensure un-keep and maintenance of the colony for a period of five years from the date of issue of the completion certificate under rule-16 of the Haryana Development and Regulation of Urban Areas Rules, 1976 or earlier in case the owner is relieved of the responsibility in this behalf by the Government.

m) That you shall execute the development works as per Environmental Clearance and comply with the provisions of Environment Protection Act, 1986, Air (Prevention and Control of Pollution of Act, 1981) and Water (Prevention and Control of Pollution of 1974). In case of any violation of the provisions of said statutes, you shall be liable for penal action by Haryana State Pollution Control Board or any other Authority Administering the said Acts.

Note: It may also be made clear to the colonizer that he shall also comply with the orders passed by NGT:-

i) The directions given by National Green Tribunal dated 26.11.2014, 04.12.2014 and 19.01.2015 in original Application no. 21 of 2014 in the matter of Vardhman Kaushik V/S Union of India and Ors. Shall be implemented by colonizer.

ii) Implementation of instructions issued by Hon'ble NGT during hearing held on 28.04.2015 in OA no. 21 of 2014 and OA no. 95 of 2014 in the matter of Vardhman Kaushik V/s Union of India & Ors, shall be complied with by the colonizer.

iii) NGT orders in application no. 45 of 2015 & M.A. no. 126 of 15 titled as Haryana Welfare Association V/S State of Haryana Gurugram.

iv) Ground water shall not be used for the purpose of construction of building in terms of orders of the Hon'ble High Court dated 16.07.2012 in CWP's no. 20032 of 2008, 13594 of 2009 and 807 of 2012.

This completion certificate shall be void-ab-initio, if any of the conditions mentioned above are not complied with and this approval will not provide any immunity from any other Act/Rules/Regulations applicable to the land in question.

DA/As above.

(T.L. Satyaprakash, IAS)
Director General,
Town and Country Planning,
Haryana, Chandigarh.

Thus, it is seen that the Authority (Director General) of Town and Country Planning, Haryana has granted the Completion Certificate (ibid) for the project, and therefore, and we find no merit in the contentions of the Applicant.

19. In nutshell, in terms of the aforesaid analysis and the judgements (supra), we conclude that (a) in terms of the License No. 220/2007, Occupancy Certificate issued by the Directorate of Town and Country Planning Haryana read with Collaboration Agreement dated 15.10.2010, the Applicant herein is a Collaborator and, in that sense, a co-promoter of the project under reference and therefore, could not have resorted to filing of Section 7 Application against the other party, i.e., developer; (b) the Applicant does not qualify as a "Financial Creditor" as the contribution in terms of "land" in a Collaborative Project does not amount to a 'Financial Debt'; (c) there is no "disbursal of fund" by the Applicant to the Respondent in the form of direct release of fund and there is no "time value of money" involved; (d) the entitlement of the Applicant-Landowner vis-a-vis Respondent to share the constructed area in the ratio of 65:35 does not make the transaction of allotment of units to the Applicant a "Financial Debt" within the meaning of Section 5(8)(f); and (e) IBC provisions cannot be used as mechanism of recovery for compensation for delay or damages, if any, in violation of terms of a Collaboration Agreement.

20. In sequel to the above, **we find that the present application is not maintainable and hence, dismissed**.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(HARNAM SINGH THAKUR)
MEMBER (J)