

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT VI, NEW DELHI**

CA (IB) – 702/2019

IN IB-1237/PB/2018

(Application under Section 60(5)(c) of IBC, 2016)

IN THE MATTER OF:

Edelweiss Asset Reconstruction Company Limited.

...Financial Creditor

VERSUS

M/s. Angad Infrastructure Private Limited.

...Corporate Debtors

AND IN THE MATTER OF CA 702/2019:

M/s Omkara Asset Reconstruction Private Limited

(Original Applicant - IFCI Limited)

...Applicant

VERSUS

M/s. Angad Infrastructure Private Limited

... Respondent/ Corporate Debtor

CORAM:

SHRI. MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

SHRI. RAHUL BHATNAGAR, MEMBER (TECHNICAL)

For the Applicant: Adv. Kunal Godhwani in CA/702/2023.

For the RP: Adv. Sanjay Bhatt, Adv. Apoorva Chowdhary

ORDER

PER- RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Order Pronounced on: 24.04.2024

1. The present application was filed originally by IFCI Ltd. (Original Applicant). However, subsequently IFCI Limited assigned its debt to Omkara Asset Reconstruction Pvt Ltd (hereinafter referred to as Omkara ARC) through Assignment Agreement dated 01.09.2023. Subsequently, Omkara ARC moved an application bearing IA 5258/2023 seeking amendment of memo of parties and to bring on record the Assignment Agreement. The prayer was allowed and the Assignment Agreement was taken on record vide order dated 07.11.2023. The applicant has prayed for the following reliefs:

- (a) Direct the Resolution Professional to accept the claim filed by the Applicant in capacity of a Financial Creditor; and*
- (b) Direct the Resolution Professional to include the name of the Applicant in the list of Financial Creditors and allow the Applicant to exercise all consequential rights as available to a financial creditor in the Corporate Insolvency Resolution Process of the Applicant herein; and*
- (c) Pass such further or other orders as this Hon'ble Tribunal may deem fit under the circumstances of the case and thereby render justice.*

2. The submissions of the applicant in brief are as under: -

- i. The Respondent executed a Declaration and Undertaking on 12.04.2013, in favour of IFCI, through its authorized signatory, Mr. Rakesh Kumar, and deposited with Ms. Pooja Tikku, Joint Legal Advisor, IFCI, the documents of title, pertaining to the immovable properties of the Corporate Debtor, admeasuring 4.99 acres, situated at Village Kesar, Tehsil- Bahadurgarh, Dist- Jhajjar, Haryana (hereinafter

referred to as the properties in question/Mortgaged Properties.

- ii. The said documents were deposited by the Corporate Debtor (hereinafter referred to as CD), with an intent to create security in favour of IFCI, in respect of the properties in question, on exclusive first charge basis, for the repayment, discharge and redemption of certain loans advanced by IFCI to the below-mentioned companies

A) Era Landmarks Ltd

B) Era Housing and Developers (I) Ltd &

C) Hi Point Investment and Finance Pvt Ltd.

- iii. It is pertinent to mention herein that the loans extended by IFCI to the Era Group cumulatively amounted to Rs. 380 Crores (Three hundred and eighty crores) out of which an amount aggregating to Rs 166 crores (One hundred and sixty-six crores) was outstanding, when the properties in question were mortgaged by the CD in favour of IFCI.

- iv. The abovementioned companies defaulted in repayment of loans and a cumulative amount of Rs. 316.45 Cr as on

25.10.2018 (Rs. 126.19 cr. for M/s Hi Point Investment and Finance Pvt. Ltd and Rs. 190.26 cr. for M/s Era Housing and Developing Ltd), is outstanding and payable by the Era Group of companies to IFCI. As such, the relationship between the Applicant and Respondent is that of the Mortgagee and Mortgagor respectively, with regard to the properties in question, belonging to the CD.

- v. On 22.10.2009, a Rupee Loan Agreement of a value of Rs 80 Crores was executed between M/S Era Housing and Developers (India) Ltd., as borrower and IFCI as the lender
- vi. On 15.10.2010, a Corporate Loan Agreement of a value of Rs 100 Crores, was again executed between Era Housing as borrower and IFCI, as the lender
- vii. On 15.10.2010, another Corporate Loan Agreement of a value of Rs 100 Crores was executed between M/s Hi Point Investment and Finance Pvt. Ltd, as borrower, and IFCI, as lender
- viii. A Board Resolution was passed by Angad Infrastructure Pvt Ltd (CD) on 21.03.2013. Vide this Board Resolution, one

Mr. Rakesh Kumar was to delivered and deposited the title deeds of the properties in question/Mortgaged Properties.

- ix. On 12.04.2013, the Corporate Debtor executed another document titled 'Declarations and Undertakings' dated 12.04.2013, in respect of the properties in question. Vide clause 19(vii) of the said document, the CD 'irrevocably' and 'unconditionally' agreed and undertook that: *“This undertaking-cum-indemnity shall remain in force till the entire principal amount together with interest and all other amounts payable in respect thereof shall be fully paid and discharged by us and mortgage and charge created by us in respect thereof has been duly vacated and released.”* As such vide the document titled *“Declarations and Undertakings”* dated 12.04.2013, the CD has guaranteed the payment of the principal loan amount along with all other amounts as mentioned in the said document.
- x. Subsequently, on account of default committed by Era Housing and Hi Point Investment, with regard to the repayment of principal and interest, in terms of the Loan

Agreement executed between IFCI and the said companies, IFCI recalled the loan advanced to the said companies vide communication dated 17.01.2014.

- xi. IFCI issued demand notices dated 17.09.2014 under section 13(2) of SARFAESI Act calling upon the borrowers Era Housing and High Point Investment to repay the loan amounts mentioned in the said demand notices, being 95,11,52,932.88 and Rs. 54,71,29,772.18 respectively, within 60 days from the date of receipt.
- xii. On or around 13.11.2014, Original Applications. No. 321 and 322 of 2014 were preferred by IFCI against Era Housing and Hi Point Investment for recovery of the amounts of loans advanced to the said companied by IFCI.
- xiii. On 28.11.2014, IFCI issued a possession notice informing the borrowers, being Era Housing and Hi Point Investment in particular and the public in general that on account of the failure of the borrowers to repay the loan, IFCI had taken possession of the mortgaged assets. It is pertinent to mention herein that the mortgaged assets mentioned above,

interalia, included the properties in question, mortgaged by Angad Infrastructure, in favour of IFCI.

- xiv. Vide Judgment dated 04.08.2016, the OA No. 322/2014 was allowed by the Ld. DRT, Delhi and Hi Point Investment was directed to pay a sum of Rs. 55,63,36,667/-, as on 31.10.2014, along with pendente lite and future interest at the rate of 14% p.a., failing which the said amount was directed to be recovered from the sale of properties mortgaged to secure the said loan
- xv. Edelweiss Asset Reconstruction Company Ltd. filed a Company Petition bearing CP No (IB)- 1237 (PB), 2018, under section 7 of the IB Code, 2016 for initiation of CIRP against Angad Infrastructure (CD) and the said Petition was admitted vide order dated 25.10.2018 and Mr. Darshan Singh Anand was appointed as IRP in the matter.
- xvi. IFCI submitted its claim against Angad Infrastructure before the IRP along with supporting documents with regards to the accounts of M/s Era Housing amounting to Rs. 190,26,21,815.39 by way of Form C.

- xvii. On 14.11.2018, IFCI submitted its claim and supporting documents against Angad Infrastructure, by way of Form C, with the IRP, with regard to the loan account of Hi Point Investment, amounting to Rs 126,19,83,273.68
- xviii. That IRP provisionally accepted the claim subject to verification for Rs 13.65 Crore against the claim filed by IFCI Limited for Rs. 316.46 Crore, vide List of Creditors filed under Regulation 13(2) (d) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 dated 19.11.2018.
- xix. On 04.01.2019, a letter was issued from the office of the IRP, in respect of IFCI's claim as a Financial Creditor stating that claims of IFCI had been impugned by the other Financial Creditors on the principal ground that no debt was owed by the Corporate Debtor to IFCI. The IRP further stated that in this regard, the opinion of a law firm had been sought by the IRP, which opined that third party lenders are not Financial Creditors of the Corporate Debtor. It was further opined by the said law firm that only Creditors of

the Corporate Debtor can submit their claims against the Corporate Debtor, pursuant to the public announcement by the IRP. In the afore stated background, the IRP instructed IFCI, to submit additional document or material to substantiate its claim submitted in the capacity of Financial Creditor of the Corporate Debtor

xx. The applicant elucidated and asserted that IFCI is a Financial Creditor of Angad Infrastructure on the following grounds:

A. Firstly, the act of the Corporate Debtor, whereby the Corporate Debtor mortgaged its property as security for repayment of, discharge and redemption to IFCI of the principal money advanced to Era Landmarks Ltd, Era Housing and Hi Point Investment requires due consideration. Had there been no loan/borrowing in the matter, there was no occasion for the CD to mortgage its properties in favor of IFCI on Exclusive Charge basis.

B. Secondly, since there was a mortgage by deposit of title deeds, IFCI the mortgagor has the right of payment from the mortgagee.

C. In the reply of the communication-dated 12.02.2019 it was clearly stated by the applicant that though there was no disbursement of money to the CD, the property of the CD was already mortgaged to IFCI wherein IFCI had a security interest in its favour. A natural analogy of the same indisputably leads to the conclusion that IFCI is a Financial Creditor of the CD especially in view of the fact that the Hon'ble High Court of Delhi in the matter of *State Bank of India v. Samneel Engineering Co. & Other* [1995 {35} DRJ 485] held inter alia that property is offered as security only for securing the recovery of a debt.

xxi. That the RP till date did not accept the Applicant's claim as a Financial Creditor of the CD on the erroneous ground that the third-party lenders are not Financial Creditors.

xxii. The properties of the CD were offered as security for the purpose of repayment and recovery of a debt. Additionally,

vide the document titled 'Declarations and Undertakings' dated 12.04.2013, the CD 'irrevocably' and 'unconditionally' guaranteed the repayment of the amounts corresponding to the loans advanced by the Applicant to the Era Group. Therefore, such express covenants to secure and ensure repayment, discharge and redemption of the loan advanced by IFCI clearly qualify the Applicant as a Financial Creditor of the CD under the Code.

xxiii. It is further submitted that the definition of Financial Debt under the Code, only makes a mention of the 'debt owed' and not 'debt owed to the corporate debtor only'

xxiv. The natural analogy of this arrangement indisputably leads to the conclusion that IFCI is a Financial Creditor of the CD. Furthermore, when security interest has been created by the CD on the properties in question, and the loan amounts have been guaranteed to be repaid by the CD the same cannot be negated only on the basis of non-disbursal of the debt amount, directly to the CD as there is no such prerequisite under the Code.

xxv. It is submitted that the act of the CD in mortgaging the properties in question, owned by it, as security for repayment of the loans advanced by IFCI to Era Group in itself presupposes the existence of Financial Debt. Had there been no loan/debt, the repayment of which needed to be secured by the CD, there was no occasion for the Corporate Debtor to mortgage its properties in favor of IFCI on Exclusive Charge Basis.

3. The submissions of RP are as under: -

I. The Applicant submitted its claim for Rs. 190,26,21,815.39 as financial Creditor under FORM-C and thereafter, the Applicant additionally submitted its claim of Rs. 126,19,83,273.68 on 14.11.2018 as Financial Creditor under FORM-C against the CD with regard to certain financial assistance given by it to the three Group Companies namely, Era Landmarks Limited, Era Housing & Developers Limited Investment and Hi Point Investment and Finance Pvt. Ltd

- II. That initially, the Respondent had provisionally admitted the claim of the Applicant and after constitution of the Committee of Creditors ("COC") convened the first meeting of the COC on 26.11.2018, wherein, the provisional admission of claims of the Applicant as Financial Creditor was objected to by other COC members on the ground that no financial assistance/loan was advanced by the Applicant to the Corporate Debtor and the Corporate Debtor had merely allegedly provided collateral security by way of mortgage of its land parcels in favour of the Applicant and thus the Applicant cannot be treated as a Financial Creditor for the CD under the Code.
- III. That pursuant to the objections raised by the members of the COC and detailed deliberations and suggestions, it was decided by the members of the COC that the foregoing issue pertaining to the claims of the Applicant as Financial Creditor be referred to an independent legal counsel for opinion. Acting upon the suggestions of the COC, the

Respondent sought legal advice from his legal advisors on 04.01.2019.

- IV. That based on the legal advice as received that the third party lenders do not fall within the meaning of the definition of "Financial Debt" and "Financial Creditor" under the provisions of the Code and thus cannot be treated as Financial Creditors of the Corporate Debtor, the Respondent inter alia issued a letter dated 04.01.2019 to the Applicant to submit any additional document to substantiate its claims as Financial Creditor of the Corporate Debtor within 5 days failing which the provisional admission of its claim as Financial Creditor shall be rescinded.
- V. That in response to the said letter dated 04.01.2019, the Applicant while disputing the findings of the Respondent, provided copy of the final order and Recovery Certificate issued by Ld- Debt Recovery Tribunal-I inter alia against the Corporate Debtor. On examination and verification of the additional documents, the same was not found acceptable

and therefore the Respondent vide letter dated 12.02.2019, rejected the claim of the Applicant as Financial Creditor.

VI. That no Financial Assistance or loan of any kind was disbursed by the Applicant to the Corporate Debtor. Further, admittedly the Applicant had provided financial assistance/loan to Hi Point and as security for which the Corporate Debtor had allegedly created security by way of mortgage of its lands parcels ad measuring 9.21 acres (3 plots of land of 1.575 Acres, 3.088 Acres and 4.556 Acres) located at Village Kasar, Tehsil Bahadurgarh, District-Jhajjar, Haryana) owned by it in favour of the Applicant. Thus, examination of Form C submitted by the Applicant shows that no "debt has been disbursed against the consideration for the time value of money by the Applicant to the Corporate Debtor nor any guarantee or indemnity is stated to have been executed by the Corporate Debtor in favour of the Applicant. Thus, the claim in Form C submitted by the Applicant as Financial Creditor is not admissible within the meaning of the provisions of the Code.

VII. Further admittedly, the Applicant has failed to prove that its debt has time value of money in the claim Form which is primary requirement of any claim to be considered as financial debt under section 5(8) of the Code. The Corporate Debtor is only liable to the extent of the value of property mortgaged in favour of the Applicant thus the Applicant cannot be treated as Financial Creditor of the Corporate Debtor

VIII. The RP had further advised the Applicant to file its claim in FORM F under the category of "other creditors", however the Applicant has failed to do so. Thus, in view of the submissions and assertions made hereinabove the claim of the Applicant cannot be treated as Financial Creditor of the Corporate Debtor by any stretch of imagination and thus the present Application deserves to be dismissed.

4. We have gone through the rejoinder and documents placed on record by both the parties and also, we have heard the submissions made by counsels for both the parties. The present Application has been filed by the Applicants to admit the claim of

the applicant in the capacity of Financial Creditor. The primary issue is whether the CD, who mortgaged its property to secure a loan for a third party, qualifies as a Financial Creditor of the CD, given that there was no direct disbursement of debt into the CD's account.

5. The said issue is no longer res integra and has already been settled by the Hon'ble Supreme Court in the case of *Anuj Jain vs. Axis Bank Limited*, 2020 SCC OnLine SC 237, vide order dated 26.02.2020, Hon'ble Supreme Court has unequivocally held that a person having only security interest over the assets of Corporate Debtor, 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 and held as under

47.1. Keeping the objectives 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 a 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 a 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. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution.

47.2. 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 subsections (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.

The respondent mortgagees are not the financial creditors of corporate debtor JIL

48. Indisputably, the debts in question are in the form of third party security; said to have been given by the corporate debtor JIL so as to secure the loans/advances/facilities obtained by JAL from the

respondent-lenders. Such a 'debt' is not and cannot be a 'financial debt' within the meaning of Section 5(8) of the Code; and hence, the respondent-lenders, the mortgagees, are not the 'financial creditors' of the corporate debtor JIL.

57. For what has been discussed hereinabove, on the issue as to whether lenders of JAL could be treated as financial creditors, we hold that such lenders of JAL, on the strength of the mortgages in question, may fall in the category of secured creditors, but such mortgages being neither towards any loan, facility or advance to the corporate debtor nor towards protecting any facility or security of the corporate debtor, it cannot be said that the corporate debtor owes them any financial debt within the meaning of Section 5(8) of the Code; and hence, such lenders of JAL do not fall in the category of the financial creditors of the corporate debtor JIL.

6. In the present case, the applicant disbursed a loan to a third party, for which the Corporate Debtor mortgaged its property to the applicant as security. In the matter of *M/s Vistara ITCL (India) Ltd & Ors v. Mr. Dinkar Venkatasubramanian & Anr. Civil Appeal No.3606 of 2020* decided by the Hon'ble Supreme Court on 04.05.2023, the Hon'ble Apex Court has categorically affirmed and held that the rights and interest of a third party secured creditor (who is not part of the CoC) cannot be unilaterally

extinguished. Relevant extract of the aforesaid judgement is reproduced as under: -

9. Thus, we are presented with a difficult situation, wherein, Appellant No. 1 - Vistra, a secured creditor, is being denied the rights Under Section 52 as well as Section 53 of the Code in respect of the pledged shares, whereas, the intent of the amended Section 30(2) read with Section 31 of the Code is too contrary, as it recognises and protects the interests of other creditors who are outside the purview of the CoC. To our mind, the answer to this tricky problem is two-fold. First is to treat the secured creditor as a financial creditor of the Corporate Debtor to the extent of the estimated value of the pledged share on the date of commencement of the CIRP. This would make it a member of the CoC and give it voting rights, equivalent to the estimated value of the pledged shares. However, this may require re-consideration of the dictum and ratio of Anuj Jain (supra) and Phoenix ARC (supra), which would entail reference to a larger bench. In the context of the present case, the said solution may not be viable as the resolution plan has already been approved by the CoC without Appellant No. 1 - Vistra being a member of the CoC. Therefore, we would opt for the second option.

9.1 The second option is to treat the Appellant No. 1 - Vistra as a secured creditor in terms of Section 52 read with Section 53 of the Code. In other words, we give the option to the successful resolution applicant - DVI (Deccan Value Investors) to treat the Appellant No. 1 - Vistra as a secured creditor, who will be entitled to retain the security interest in the pledged shares, and in terms

thereof, would be entitled to retain the security proceeds on the sale of the said pledged shares Under Section 52 of the Code read with Rule 21-A of the Liquidation Process Regulations. The second recourse available, would be almost equivalent in monetary terms for the Appellant No. 1 - Vistra, who is treated it as a secured creditor and is held entitled to all rights and obligations as applicable to a secured creditor Under Section 52 and 53 of the Code. This to our mind would be a fair and just solution to the legal conundrum and issue highlighted before us.

7. In the aforementioned judgment, the Hon'ble Apex Court upheld the rights of the applicant who had pledged its shares to secure a loan for a third party. Similarly, in the matter of *Anuj Jain v. Axis Bank Limited*, the Hon'ble Supreme Court recognized that the applicant may be a secured creditor but not a financial creditor by virtue of the collateral security extended by the Corporate Debtor. Hence, we are of the considered view that the applicant should be categorized under the category of "Secured Creditor," as it is an undisputed fact that the land of the corporate debtor was mortgaged to the applicant.
9. The Hon'ble Supreme Court recently in the matter of *Greater Noida Industrial Development Authority v. Prabhjit Singh Soni & Anr Civil*

Appeal Nos.7590-7591 of 2023 (12.02.2024) held that the claim cannot be rejected/overlooked merely on the fact that the claim submitted appears to be in a different form other than the form in which the claim needs to be submitted. The relevant extract of the judgement is reproduced as under: -

54. In our view the resolution plan did not meet the requirements of Section 30(2) of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016 for the following reasons:

*a. The resolution plan disclosed that the appellant did not submit its claim, when the un rebutted case of the appellant had been that it had submitted its claim with proof on 30.01.2020 for a sum of Rs.43,40,31,951/- **No doubt, the record indicates that the appellant was advised to submit its claim in Form B (meant for operational creditor) in place of Form C (meant of financial creditor). But, assuming the appellant did not heed the advice, once the claim was submitted with proof, it could not have been overlooked merely because it was in a different Form. As already discussed above, in our view the Form in which a claim is to be submitted is directory. What is necessary is that the claim must have support from proof.***

10. Thus, based on the facts and circumstances of the present case and the judgments referred above, we are of the view that the Resolution Professional has erred in rejecting the applicant's claim.

Therefore, the Resolution Professional is directed to re-verify the applicant's claim and on the basis of its security treat the applicant as 'Secured Creditor'.

11. Accordingly, CA 702/2019 stands disposed of in terms of the above.

Let a copy of this order be served to the parties concerned.

SD/-
(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

SD/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL

COURT VI, NEW DELHI

MA (IB) – 702/2019

IN IB-1237/PB/2018

(Application under Section 60(5)(c) of IBC, 2016)

IN THE MATTER OF:

Edelweiss Asset Reconstruction Company Limited.

...Financial Creditor

VERSUS

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...Corporate Debtors

AND IN THE MATTER OF MA 702/2019:

M/s SICOM Limited

...Applicant

VERSUS

Mr. Darshan Singh Anand

... Respondent/ Resolution Professional

CORAM:

SHRI. MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

SHRI. RAHUL BHATNAGAR, MEMBER (TECHNICAL)

For the Applicant: Adv. Prabhat Chaurasia for Applicant/SICOM Ltd. in MA/702/2019

For the RP: Adv. Sanjay Bhatt, Adv. Apoorva Chowdhary

ORDER

PER- MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

Order Pronounced on: 24.04.2024

1. The present application was filed by SICOM LIMITED (formerly known as State Industrial and Investment Corporation of Maharashtra Limited). The applicant has prayed for the following reliefs:

(a) Direct the Respondent to allow the Applicant's entire claim dated 13.11.2018 made in Form-C before the Respondent RP;

(b) Direct the Respondent RP to allow the Applicant financial creditor to participate in the meeting of the Committee of Creditors of the Corporate Debtor in accordance with the Insolvency and Bankruptcy Code, 2016;

(c) Allow costs in favour of the Applicant financial creditor; and

(d) such other(s) or further order(s) be passed under the facts and circumstances of the case as this Hon'ble Tribunal may deem fit and proper.

2. The submissions of the applicant in brief are as under: -

- i. The Applicant is a mortgagee in possession of the assets of the Corporate Debtor (M/s Angad Infrastructure Private Limited), who is a mortgagor for the financial assistance availed by borrower " Hi Point Investment and Finance Pvt Ltd.
- ii. That pursuant to passing of CIRP order dated 25.10.2018, public announcement under Form A was made in newspapers by the Respondent i.e., IRP on 27.10.2018 and the Applicant, SICOM Ltd., filed its Claim under Form C dated 12.11.2018 under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016.
- iii. The RP vide letter dated 04.01.2019 had intimated the Applicant that the claim of the Applicant is likely to be rejected and sought additional documents, materials to

substantiate the claims filed by the Applicant in Form C. Thereafter, the Applicant disputed the findings of the Respondent RP and further provided judgments and Recovery Certificates passed by Ld. Debts Recovery Tribunal-1, Delhi in favour of the Applicant inter-alia against the Corporate Debtor to substantiate its claim. However, the Respondent RP vide its another letter dated 12.02.2019 has rejected the claim of the Applicant as Financial Creditor and has further unlawfully advised the Applicant to file its claim in Form F as 'other creditor'.

iv. The reason why the applicant should be treated as Financial Creditor are as under:-

A. The applicant on the request of the borrower (Hi point Investment and Finance Pvt. Ltd.) had sanctioned and disbursed the Revolving Medium-Term Loan (RMTL) of Rs. 50 crores to Hi Point Investment and Finance Pvt Limited vide sanction letter dated 18.04.2011. The second cycle was rolled over vide sanction letter dated 19.06. 2012. That the Applicant had also sanctioned and

disbursed a Short-Term loan (STL) of Rs. 10 crores to the Corporate Debtor under the Promoter funding scheme against the pledge of shares of M/s Era Infra Engineering Limited (parent company) vide sanction letter dated 20.04.2012. That the above loan facilities of Rs. 50 crores and Rs. 10 crores were secured by way of following security:

1. Pledge of equity shares of Era Infra Engineering Limited
2. Personal guarantee of Mr. H.S. Bharana, CMD-Era Group
3. First Exclusive Charge by way of equitable mortgage on 3rd party securities:

- I. Land admeasuring 9.21 acres owned by M/s Angad Infrastructure Pvt. Ltd. (3 plots of land of 1.575 Acres, 3.088 Acres and 4.556 Acres) located at Village -Kasar, Tehsil-Bahadurgarh, District- Jhajjar, Haryana.

- II. Land admeasuring 9.21 acres owned by M/s Angad Infrastructure Pvt. Ltd. (3 plots of land of 1.575 Acres, 3.088 Acres and 4.556 Acres) located at Village -Kasar, Tehsil- Bahadurgarh, District- Jhajjaar, Haryana .
- III. Land admeasuring 1.613 Acres owned by M/s Bigben developers Pvt. Ltd.- located at Arazi Plot no 76, khata no. 102 min Village - Sanhkol, Tehsil - Bahadurgarh, District- Jhajjar, Haryana .
- IV. Land admeasuring 3.770 Acres owned by M/s Superlative Infrastructure Pvt. Ltd. - located at Arazi . Plot no 3, Village -Sanhkol, Tehsil - Bahadurgarh, District- Jhajjar, Haryana
- V. First Pari passu charge on securities owned by 3rct party: Land bearing Khewatj Khata No. 74/90, 77/93, 78/94, 108/126, 125/144 and 210/240 belonging to M/s Jam want Estate Pvt. Ltd., total admeasuring 17.22

acres alongwith building structure constructed/to be constructed thereon located at Village-Alapur, Tehsil Palwal, Distt-Faridabad, Haryana.

B. In order to secure the repayment of the above said RMTL and STL loan of Rs. 50.00 Crores and Rs. 10 Crs respectively, together with interest costs, charges and expenses, the borrower and the mortgagor executed below mentioned documents to secure the abovesaid RMTL and STL. Accordingly, in terms of the said documents, the Financial Creditor disbursed a sum of Rs. 50 crores and Rs. 10 crores to the Corporate Debtor. Documents executed w.r.t. RMTL of Rs. 50 Crores are as follows:

- I. Sanction Letter dated 18.04.2011.
- II. Loan Agreement dated 25.04.2011
- III. Guarantee Agreement dated 25.04.2011
- IV. Memorandum of Entry, Power of Attorney and Declaration all dated 25.04.2011.

- V. Comfort letter/ Letter of Undertaking dated 25.04.2011 by M/ s Era Infra Engineering Ltd. (Parent Company).
- VI. Letter of Undertaking dated 25.04.2011 inter-alia by Mr. Hem Singh Bharana.
- VII. Form-8 filed with Registrar of Companies, signed and submitted by group companies including M/ s Angad Infrastructure Private Ltd. etc.
- VIII. Modification and Interest reset Letter for 2nd cycle dated 19.06.2012.

Documents executed w.r.t. STL of Rs. 10 Crores are as follows:

- (i) Sanction Letter dated 20.04.2012
- (ii) Letter dated 21.04.2012 issued by M/s Era Landmarks Ltd. (now M/s Adel Landmarks Ltd.) to SICOM Ltd.
- (iii) Loan Agreement dated 23.04.2012.
- (iv) Deed of Guarantee dated 23.04.2012.
- (v) Demand Promissory Note dated 23.04.2012.
- (vi) Accepted Letter of Modification dated 09.10.2013.
- (vii) Memorandum of Entry, Declaration and Power of Attorney all dated 15.10.2013 etc.

- C. That the borrower also created pari-passu charge on the land parcels located at Haryana in respect of the loan facilities granted by the Applicant, SICOM Ltd, to other group companies viz. M/s Adel landmarks Limited (Erstwhile known as M/s Era Landmarks Limited), M/s Era Housing and Developers Limited, M/s Hi Point Investment and Finance Pvt. Limited and M/s Era Infra Engineering Ltd.
- D. That the borrower failed to pay the overdues and installments of principal and interest on the due date and the account of borrower was classified as Non-Performing Asset on 25.10.2013 as per the guidelines of Reserve Bank of India.
- E. That the borrower had also issued several post dated cheques in favour of the Applicant for the repayment of the above said Loan amount towards Principal and Interest, with assurances that the said cheques will be honoured as and when due. However, when the said cheques were deposited by the Financial Creditor, the

same were dishonored. The Financial Creditor has initiated criminal proceedings under section 138 of the Negotiable Instruments Act, 1881.

F. The applicant also issued Demand/Recall Notices, Notices invoking personal guarantee of Mr. Hem Singh Bharana, Publications of Notices, Winding Up Notices, Notices under Section 13(2) and Section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) to the borrower and also to mortgagor companies including M/ s Angad Infrastructure Ltd. However, despite receiving the notices, the borrower failed and neglected to comply with the notices issued by the Applicant.

G. The Applicant preferred Original Applications (OAs) inter-alia against M/ s Hi-Point Investment & Finance Pvt. Ltd. and M/s Angad Infrastructure Pvt. Ltd., seeking recovery of its outstanding dues under abovesaid RMTL and STL before the Ld. Debts Recovery Tribunal -1, Delhi

(Ld. DRT) being OA No. 263 of 2015 and OA No. 146 of 2016.

H. That vide separate judgments dated 12.10.2018, the DRT was pleased to allow the above OA No. 263 of 2015 and OA No. 146 of 2016 and this regard Recovery Certificate No. 448 of 2018 and Recovery Certificate No. 460 of 2018 has also been issued in favour of the Applicant and inter-alia against M/s Hi-Point Investment & Finance Pvt. Ltd. and M/s Angad Infrastructure Pvt. Ltd

I. That the liability under the abovesaid Recovery Certificate No. 448 of 2018 and Recovery Certificate No. 460 of 2018 of M/ s Hi-Point Investment & Finance Pvt. Ltd. and M/ s Angad Infrastructure Pvt. Ltd. are joint and several

J. The Applicant had also preferred an Application under Section 14 of SARFAESI Act before the District Magistrate, Jhajjar seeking assistance in taking possession of land parcels mortgaged by Angad Infrastructure Private Limited, Superlative

Infrastructure Pvt. Ltd., Big Ben Developers Pvt. Limited and Trifalagur Infrastructure Pvt. Ltd. situated at Village Kasar and Sankhol at Jhajjar, Bahadurgarh, Haryana. the Ld. District Magistrate vide order dated 27.05.2015 allowed the Application of SICOM Ltd., and permitted to take possession of the lands mortgaged in favour of SICOM Ltd.

K. Pursuant to above order dated 27.05.2015, the applicant issued Possession Notices dated 12.10.2015 and 15.10.2015 and took physical possession of the land parcels situated at Village Kasar and Sankhol at Jhajjar, Bahadurgarh, Haryana.

Background of initiation of Corporate Insolvency Resolution process of Angad Infrastructure Pvt. Ltd

v. M/s ECL Finance Limited (lender) had sanctioned and disbursed a loan facility aggregating to Rs. 170 crores to M/s Era landmarks Ltd. (Now known as M/s Adel Landmarks Ltd.) against the security of pledge of shares of M/s Era Infra Engg. Limited and 2nd charge on the land

mortgaged by M/s Angad Infrastructure Pvt. Ltd. (mortgagor) located at Kasar, Bahadurgarh, Jhajjar. The mortgagor M/s Angad Infrastructure Pvt Ltd. had also provided a Corporate Guarantee to the extent of Rs. 170 Crs plus further interest @ about 20.00% per annum for the loan facilities of Adel Landmarks Limited.

- vi. Further, M/s ECL Finance Pvt. Ltd. assigned the entire loan facility of M/s Adel Landmarks Ltd. to M/s Edelweiss Asset Reconstruction Company Ltd. by executing a assignment agreement.
- vii. In view of the defaults committed by M/s Adel Landmarks Ltd., M/ s Edlelweiss ARC Ltd invoked Corporate Guarantee on 28.07.2018 and filed application for initiation of CIRP against the CD.
- viii. It is relevant to mention here that. SICOM Limited has an exclusive first charge on the land owned by M/s Angad Infrastructure Pvt. Ltd. (Mortgagor) located at Kasar, Bahadurgarh, Jhajjar, Haryana which is mortgaged as a

security for the loan facility of Hi Point Investment and Finance Pvt. Ltd

- ix. In the 1st Committee of creditors meeting held on Monday 26th November, 2018 at 3.00 pm, the IRP informed the details of the claims received from all the Financial Creditors. During the COC meeting, the IRP had informed that the claim of SICOM was not entirely accepted and was restricted to the value of the mortgaged property.
- x. That despite submitting all relevant documents and records to substantiate the claim of the Applicant financial creditor, the Respondent RP failed and neglected to consider the entire claim of the Applicant as Financial Creditor and therefore, the Applicant, SICOM Ltd., is compelled to file the present Application.
- xi. The sole purpose of creating mortgage in favour of the Applicant by the Corporate Debtor is to repay the entire loan along with its interest and costs to the Applicant in the event of the borrower failing to repay the dues of the Applicant.

xii. That the rejection of the Applicant's claim is malafide, arbitrary and without application of mind and the decision is required to be set aside on the following grounds: -

(a) That the Respondent RP failed to appreciate that after analyzing all the facts and circumstances of the outstanding dues of the Applicant financial creditor, the Ld. DRT has passed judgments and also issued Recovery Certificates in favour of the Applicant financial creditor wherein, M/ s Angad Infrastructure Pvt. Ltd, who is the mortgagor and the corporate debtor in this case is also liable to pay the entire dues of the Applicant financial creditor.

(b) That the Respondent RP failed to comprehend the purpose of creating mortgage in favour of the Applicant financial Creditor by M/ s Angad Infrastructure Pvt. Ltd. It is settled position that mortgage created by the mortgagor is with intention and assurance to repay the entire dues to the lender/ creditor.

(c) That the Respondent RP erred in accepting the opinion of a third party law firm, M/ s Kesar Das as stated in its letter dated 04.01.2019 without any reason or basis.

(d) That the Respondent RP has committed a grave error in its letter dated 12.02.2019 by suggesting the Applicant financial creditor to file Form F in the category of other creditor and in this regard, the Respondent RP has acted beyond its jurisdiction .

xiii. It is also just and necessary to direct the Respondent RP to allow the Applicant to participate in the meeting of the Committee of Creditors of the Angad Infrastructure Private Limited and admit the entire claim of the financial creditor as the mortgagor is joint and severally liable to make payment in case of default, which is in accordance with the Insolvency and Bankruptcy Act, 2016.

3. The submissions of RP are as under: -

I. The Applicant submitted its claim for Rs. 119,66,88,072 as Financial Creditor under FORM-C against the Corporate

Debtor with regard to certain financial assistance given by it to M/s. Hi Point Investment and Finance Pvt. Limited.

- II. The Respondent provisionally admitted the claims of the Applicant and after constitution of the Committee of Creditors ("CoC") convened the first meeting of the CoC on 26.11.2018, wherein, the provisional admission of claims of the Applicant as Financial Creditor was objected to by other COC members on the ground that no financial assistance/loan was advanced by the Applicant to the Corporate Debtor and the Corporate Debtor had merely allegedly provided collateral security by way of mortgage of its land parcels in favour of the Applicant and thus the Applicant cannot be treated as a financial creditor for the Corporate Debtor under the Insolvency and Bankruptcy Code, 2016 (hereinafter "IBC").
- III. That pursuant to the objections raised by the members of the COC and detailed deliberations and suggestions, it was decided by the members of the COC that the foregoing issue pertaining to the claims of the Applicant as Financial

Creditor be referred to an independent legal counsel for opinion. Acting upon the suggestions of the COC, the Respondent sought legal advice from his legal advisors on 04.01.2019.

- IV. That based on the legal advice as received that the third party lenders do not fall within the meaning of the definition of "financial debt" and "financial creditor" under the provisions of the IBC and thus cannot be treated as financial creditors of the Corporate Debtor, the Respondent inter alia issued a letter dated 04.01.2019 to the Applicant to submit any additional document to substantiate its claims as financial creditor of the Corporate Debtor within 5 days failing which the provisional admission of its claim as financial creditor shall be rescinded
- V. That in response to the said letter dated 04.01.2019, the Applicant while disputing the findings of the Respondent, provided copy of the final order and Recovery Certificate issued by Ld. Debt Recovery Tribunal-I inter alia against the Corporate Debtor. On examination and verification of the

additional documents, the same was not found acceptable and therefore the Respondent vide letter dated 12.02.2019, rejected the claim of the Applicant as Financial Creditor.

- VI. That the basic ingredient for a debt to be a Financial Debt within the meaning of Section 5(8) of the IBC is disbursement of debt against consideration for the time value of money which inter alia may include money borrowed against payment of interest
- VII. In the case of the Applicant, admittedly no financial assistance or loan of any kind was disbursed by the Applicant to the Corporate Debtor. Further, admittedly the Applicant had provided financial assistance/loan to Hi Point and as security for which the Corporate Debtor had allegedly created security by way of mortgage of its lands parcels ad measuring 9.21 acres (3 plots of land of 1.575 Acres, 3.088 Acres and 4.556 Acres) located at Village Kasar, Tehsil Bahadurgarh, District-Jhajjar, Haryana) owned by it in favour of the Applicant.. Thus examination of Form C submitted by the Applicant shows that no "debt has been

disbursed against the consideration for the time value of money " by the Applicant to the Corporate Debtor nor any guarantee or indemnity is stated to have been executed by the Corporate Debtor in favour of the Applicant. Thus, the claim in Form C submitted by the Applicant as Financial Creditor is not admissible within the meaning of the provisions of the IBC.

VIII. It is a settled position of law that the mortgage is not in the nature of guarantee and indemnity. The word mortgage cannot be inserted in the definitions of financial debt by reading it as a "guarantee" or "indemnity

IX. The resolution professional had further advised the Applicant to file its claim in FORM F under the category of "other creditors", however the Applicant has failed to do so. Thus in view of the submissions the claim of the Applicant cannot be treated as financial creditor of the Corporate Debtor.

4. We have gone through the rejoinder and documents placed on record by both the parties and also, we have heard the

submissions made by counsels for both the parties. The present Application has been filed by the Applicants to admit the claim of the applicant in the capacity of Financial Creditor. The Applicant alleged that since the CD had mortgaged its property and there is a decree of DRT in favor of Applicant, hence the applicant should be considered as Financial Creditor of the Corporate Debtor.

5. As far as the issue with respect to mortgaged property is concerned. The Hon'ble Apex Court in the matter of *Anuj Jain vs. Axis Bank Limited*, 2020 SCC OnLine SC 237 it was held that a person having only security interest over the assets of Corporate Debtor, 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 and held as under

47.1. Keeping the objectives 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 a 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 a 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. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution.

47.2. 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 subsections (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.

The respondent mortgagees are not the financial creditors of corporate debtor JIL

48. Indisputably, the debts in question are in the form of third party security; said to have been given by the corporate debtor JIL so as to secure the loans/advances/facilities obtained by JAL from the respondent-lenders. Such a 'debt' is not and cannot be a 'financial debt' within the meaning of Section 5(8) of the Code; and hence, the respondent-lenders, the mortgagees, are not the 'financial creditors' of the corporate debtor JIL.

57. For what has been discussed hereinabove, on the issue as to whether lenders of JAL could be treated as financial creditors, **we hold that such lenders of JAL, on the strength of the mortgages in question, may fall in the category of secured creditors, but such mortgages being neither towards any loan, facility or advance to the corporate debtor nor towards protecting any facility or security of the corporate debtor, it cannot be said that the corporate debtor owes them any financial debt within the meaning of Section 5(8) of the Code; and hence, such lenders of JAL do not fall in the category of the financial creditors of the corporate debtor JIL.**

6. However, as far as decree of DRT is concerned, the Hon'ble Supreme Court in the matter of *Kotak Mahindra Bank Limited Vs. A. Balakrishnan and Ors. Civil Appeal No. 689 of 2021 (2022) 9 SCC 186* held that a liability in respect of a claim arising out of a Recovery Certificate would be a "financial debt" within the meaning

of Clause (8) of Section 5 of the IBC. Consequently, the holder of the Recovery Certificate would be a financial creditor within the meaning of Clause (7) of Section 5 of the IBC. The relevant extract of the aforesaid judgement is reproduced as under: -

69. We have already hereinabove, done the exercise of considering the relevant provisions of the IBC afresh and come to a conclusion that a liability in respect of a claim arising out of a Recovery Certificate would be a "financial debt" within the meaning of Clause (8) of Section 5 of the IBC and a holder of the Recovery Certificate would be a "financial creditor" within the meaning of Clause (7) of Section 5 of the IBC. We have also held that a person would be entitled to initiate CIRP within a period of three years from the date on which the Recovery Certificate is issued.

*77. From the plain and simple interpretation of the words used in Sub-section (22A) of Section 19 of the Debt Recovery Act, it would be amply clear that the Legislature provided that for the purposes of winding-up proceedings against a Company, etc., a Recovery Certificate issued by the Presiding Officer Under Sub-section (22) of Section 19 of the Debt Recovery Act shall be deemed to be a decree or order of the Court. **It is thus clear that once a Recovery Certificate is issued by the Presiding Officer Under Sub-section (22) of Section 19 of the Debt Recovery Act, in view of Sub-section (22A) of Section 19 of the Debt Recovery Act it will be deemed to be a decree or order of the Court for the purposes of initiation of winding-up proceedings of a Company, etc. However, there is nothing in Sub-section (22A) of Section***

19 of the Debt Recovery Act to imply that the Legislature intended to restrict the use of the Recovery Certificate limited for the purpose of winding-up proceedings. The contention of the Respondents, if accepted, would be to provide something which is not there in Sub-section (22A) of Section 19 of the Debt Recovery Act.

84. To conclude, we hold that a liability in respect of a claim arising out of a Recovery Certificate would be a "financial debt" within the meaning of Clause (8) of Section 5 of the IBC. Consequently, the holder of the Recovery Certificate would be a financial creditor within the meaning of Clause (7) of Section 5 of the IBC. As such, the holder of such certificate would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the Recovery Certificate.

7. From the judgement of Hon'ble Supreme Court, it is very clear that a holder of a decree of DRT would fall under the category of "Financial Creditor". In the present case, it is not only the mortgaged property of the CD on the basis of which the claim was filed but there was also Decree of DRT & Recovery Certificate on the basis of which the claim was filed before the RP.
8. It is undisputed fact that the applicant had filed its claim along with the decree of DRT however the RP rejected the claim of the applicant and further advised the applicant to file its claim as

“Other Creditor”. We are of the considered view that even if the RP was of the view that the applicant’s claim should be categorized as 'Other Creditor,' the RP should have admitted the claim under that category instead of rejecting it. The Hon’ble Supreme Court recently in the matter of *Greater Noida Industrial Development Authority v. Prabhjit Singh Soni & Anr Civil Appeal Nos.7590-7591 of 2023 (12.02.2024)* held that the claim cannot be rejected/overlooked merely on the fact that the claim submitted appears to be in a different form other than the form in which the claim needs to be submitted. The relevant extract of the judgement is reproduced as under: -

54. In our view the resolution plan did not meet the requirements of Section 30(2) of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016 for the following reasons:

*a. The resolution plan disclosed that the appellant did not submit its claim, when the unrebutted case of the appellant had been that it had submitted its claim with proof on 30.01.2020 for a sum of Rs.43,40,31,951/- **No doubt, the record indicates that the appellant was advised to submit its claim in Form B (meant for operational creditor) in place of Form C (meant of financial creditor). But, assuming the appellant did not heed the advice, once the claim was submitted with proof, it could not have been overlooked merely because it was***

in a different Form. As already discussed above, in our view the Form in which a claim is to be submitted is directory. What is necessary is that the claim must have support from proof.

9. Thus, based on the facts and circumstances of the present case and the aforementioned judgments, we are of the view that the Resolution Professional has erred in rejecting the applicant's claim. Therefore, the Resolution Professional is directed to re-verify the applicant's claim in light of the Recovery Certificate(s) issued by the DRT and on the basis of that claim treat the applicant as 'Financial Creditor'.
10. Accordingly, MA 702/2019 stands **allowed**. Let a copy of this order be served to the parties concerned.

SD/-
(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

SD/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)