IN THE NATIONAL COMPANY LAW TRIBUNAL,

COURT-V, MUMBAI BENCH

Under Section 60 of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the national Company Law Tribunal Rules, 2016

I.A No. 503 of 2022
IN
CP (IB) No: 1390 of 2020

Filed by

Beacon Trusteeship Limited

...Financial Creditor/Applicant

Versus

1. **Mr. Jayesh Sanghrajka**

..Resolution Professional/Respondent No. 1

2. **Adani Goodhomes Private Limited**

....Resolution Applicant/ Respondent No. 2

AND

I.A No. 931 of 2022
IN
CP (IB) No: 1390 of 2020

Filed by

Beacon Trusteeship Limited

...Financial Creditor/Applicant

Versus

1. **Mr. Jayesh Sanghrajka**

..Resolution Professional/Respondent No. 1

2. **Adani Goodhomes Private Limited**

....Resolution Applicant/ Respondent No. 2

AND
I.A. No. 837 of 2022
IN
CP (IB) No: 1390 of 2020

Filed by

Beacon Trusteeship Limited

… Financial Creditor/ Applicant

Versus

1. Mr. Jayesh Sanghrajka …

… Resolution Professional/Respondent No. 1

2. Adani Goodhomes Private Limited

… Resolution Applicant/Respondent No. 2

AND
I.A. No. 808 of 2022
IN
CP (IB) No: 1390 of 2020

Filed by

ICICI Prudential Venture Capital Fund Real Estate Scheme -I

(acting through its investment manager ICICI Prudential Asset Management Company Limited)

…….. Financial Creditor/ Applicant

Versus

1. Mr. Jayesh Sanghrajka

…..Resolution Professional/Respondent no.1

2. Adani Goodhomes Private Limited

……Resolution Applicant/ Respondent No. 2

IN THE MATTER BETWEEN

Beacon Trusteeship Limited

…… Financial Creditor

Versus

Radius Estates and Developers Private Limited

……..Corporate Debtor

Order Reserved on: 30.09.2022
Order Pronounced on: 02.12.2022

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearance:

For the Applicant (Beacon Trusteeship Limited):

Ld. Senior Counsel, Mr. Gaurav Joshi a/w Mr. MP Bharucha, Ms Sneha Jaisingh, Mr. Amogh Joshi, Ms Aastha Kaushal, Mr Manan Shah and Ms Anshul Singh, Advocates.

For the Applicant (ICICI Prudential Venture Capital Fund Real Estate Scheme I):

Mr. Ashish Kamat, a/w Mr. MP Bharucha, Ms Sneha Jaisingh, Mr. Amogh Joshi, Ms Aastha Kaushal, Mr Manan Shah and Ms Anshul Singh, Advocates

For the Respondent (Jayesh Sanghrajka, Resolution Professional):

Ld. Senior Counsel Mr. Mustafa Doctor a/w Mr. Nausher Kohli, Mr. Devesh Juvekar, Mr. Ashish

Parwani, Mr. Dikshat Mehra, Mr. Yash Jain and Mr. Dhrumil Sanghvi.

For the Respondent (Adani Goodhomes Private Limited, Resolution Applicant):

Ld. Senior Counsel Mr. Ravi Kadam a/w Counsel Aditya Shiralkar, Mr. Denzil Arambhan, Mr. Gaurav Gopal and Adv. Amisha Patel i/b Wadia Ghandy & Co.

For the Intervener (Housing Development Finance Corporation Limited):

Ld. Senior Counsel, Mr. Janak Dwarkadas a/w Mr. Chirag Kamdar, Mr. Ranjit Shetty, Mr. Luckyraj Indorkar, Mr. Arjun Amin, Advocates

For the Intervener/ Homebuyers (Ten BKC Flat Owners AOP Trust):

Ld. Sr Counsel Mr. Pradeep Sanchetti a/w Mr. Nimay Dave, Mr. Nitya Shah, Mr. Kinnar Shah, Ms. Aditi Bhargava, Advocates.

Per: Shri H.V. Subba Rao, Member (Judicial)

ORDER

1. The above four applications i.e. I.A No. 503 of 2022, I.A. No. 837 of 2022, I.A. No. 931 of 2022 and I.A. No. 808 of 2022 are filed by **Beacon Trusteeship Limited** and **ICICI Prudential Venture Capital Fund Real Estate Scheme I** ("herein after referred as "**Dissenting Financial Creditors**") of the Corporate Debtor i.e. Radius Estates and Developers Private Limited. They are the members of Committee of Creditors (**COC**) having voting percentage of **7.44%** and **5.71%** respectively, in the Corporate Insolvency

Resolution Process (**CIRP**) dated 30.04.2021 of the Corporate Debtor in relation to the residential project being developed under the name "Ten BKC" in Mumbai (hereinafter referred as "**Project**"). The Project was to be developed jointly by the Corporate Debtor and one MIG (Bandra) Realtors and Builders Private Limited, which is a part of DB Realty Group of Companies (Hereinafter referred to as "**DB**"). In terms of the arrangement between the DB Realty Group and the Corporate Debtor, DB Realty Group had purportedly claimed step in rights in the Project which were ultimately not invoked.

2. The Respondent No.1 is the Resolution Professional (**RP**) who is conducting the CIRP of the Corporate Debtor and was appointed by the COC and confirmed by this Hon'ble Tribunal on 25.08.2021. The Respondent No. 2 is the successful Resolution Applicant whose Resolution Plan was approved by 83.93% of the COC through e-voting on 27.12.2021("**Resolution**").

3. Since both the Petitioners raised common questions of fact and law and also relied on common citations, all the above applications are disposed of through this common Order. It is important to observe here that most of the reliefs claim by both the Petitioners in all the above applications are common.

4. Both the above dissenting financial creditors are objecting the approval of the Resolution Plan submitted by the Resolution Applicant i.e. Adani Goodhomes Private Limited broadly on the following grounds:

I. The Resolution Plan submitted by the Resolution Applicant is expressively conditional and violative of Regulation 36 of the Code;
II. The Resolution Process was hastened only for the purpose of accommodating the Resolution Applicant;

III. The valuation reports were defective.

IV. The benefit of fraudulent transactions indulged by the Corporate Debtor were given to the Resolution Applicant without changing the RFRP which is contrary to the provisions of the Code;

V. The Resolution Plan suffers from inherent unfairness of bargain.

5. Before dealing with the above contentions of the dissenting Financial Creditors it is important to mention the salient features of the project and the timeline constraints involved in the CIRP Process and also certain recent developments that have taken place in the above matter before concluding arguments by both sides.

Salient Features of The Project:

i. The Corporate Debtor entered into a joint venture as co-developer with the MIG (Bandra) Realtors and Builders Private Limited, in respect of the redevelopment of a plot of land situated at Bandra (East). This redevelopment has been defined as "**the Project**".

ii. It is pertinent to note that the aforesaid plot of land is owned by the Maharashtra Housing and Area Development Authority (**MHADA**). The said land has been leased by MHADA to Middle Income Group Co-operative Housing Society ("**the Society**").

iii. By a Development Agreement dated 31.10.2010, executed between the Society and MIG (Bandra) Realtors and Builders Private Limited ("**Development Agreement**"), the Society had granted development rights in respect of the land and structures on the said plot MIG (Bandra) Realtors and Builders Private Limited. The Development Agreement was thereafter modified from time to time. Under the terms of the Development Agreement, MIG (Bandra) Realtors and Builders

Private Limited was required to construct and provide certain premises together with amenities and common areas for the members of the Society and was entitled to sell and deal with the other flats as more particularly set out in the Development Agreement.

iv. The Corporate Debtor entered into an agreement with MIG (Bandra) Realtors and Builders Private Limited on 31.03.2016 (Hereinafter referred as "**Redevelopment Agreement**"). As per the terms of the Redevelopment Agreement, both the parties were required to contribute to the cost of the development and would also be jointly entitled to the free sale component, that would result from the development. Pursuant, to the aforesaid Redevelopment Agreement, the development commenced and was partially completed.

v. Thereafter, the Corporate Debtor and MIG (Bandra) Realtors and Builders Private Limited had begun the process of selling the flats from their respective entitlements and collecting monies from potential flat purchasers. The Corporate Debtor had sold 224 units and had a remaining 146 units available for sale at the time when the present Company Petition was admitted and the CIRP of the Corporate Debtor began on 30.04.2021. The Project was incomplete, as out of the 15 buildings, which were supposed to be constructed, only 8 buildings were constructed between ground floor to 5th floor and one building till 8th floor.

vi. Pursuant to above, the society vide letter dated 08.05.2020, terminated the Development Agreement entered between the Society and MIG (Bandra) Realtors and Builders Private Limited. Further, the MIG (Bandra) Realtors and Builders Private Limited challenged the purported termination by filing a Petition under Section 9 of the Arbitration and Conciliation Act, 1996 bearing Commercial Arbitration

Petition No. LD-VC-80/2020 ("**Arbitration Proceedings**") before the Hon'ble Bombay High Court. The Hon'ble Bombay High Court vide order dated 26.05.2020, directed the parties to maintain the status quo and referred the disputes to an Arbitrator. In furtherance to the same, the Arbitrator passed an interim order dated 05.05.2021, ("**Interim Award**") granting a stay in respect to the purported termination, subject to compliance of certain terms and conditions by MIG (Bandra) Realtors and Builders Private Limited. These terms and conditions, inter- alia, included payment of compensation to the members of the Society by MIG (Bandra) Realtors and Builders Private Limited. Thereafter, MIG (Bandra) Realtors and Builders Private Limited challenged the Interim Award by filing an appeal bearing **No. CARBPL/13972/2021** before the Hon'ble Bombay High Court.

vii. It is also pertinent to note that the Redevelopment Agreement, enabled the MIG (Bandra) Realtors and Builders Private Limited with certain rights to enforce against the Corporate Debtor in case of an event of default.

viii. From the aforementioned facts, the Corporate Debtor had no direct privity with the Society, nor does it have any entitlement to the land on which the Project is being undertaken. The Corporate Debtor emanates its right from the Redevelopment Agreement. In case of termination of the Development Agreement between the Society and MIG (Bandra) Realtors and Builders Private Limited, the Corporate Debtor will have recourse only against MIG (Bandra) Realtors and Builders Private Limited. MIG (Bandra) Realtors and Builders Private Limited had also, at the time, invoked its step-in rights. It is clear from the abovementioned facts that, the Corporate Debtor was about to lose the Project altogether, thereby resulting in the creditors of the Corporate

Debtors to lose their security, and the home buyers to lose the flats purchased by them.

ix. For the purpose of survival of the Corporate Debtor it was necessary to keep the Project going, in order to avoid the termination of the Development Agreement, by the Society and to convince the MIG (Bandra) Realtors and Builders Private Limited not to invoke its step-in rights.

x. The learned Arbitrator had passed an Interim Award with a necessary pre-condition that as it was only after the Resolution Plan was approved and the society members were satisfied, that the Project would continue, it was agreed to enter into Consent Terms with MIG (Bandra) Realtors and Builders Private Limited before the Learned Arbitrator. In pursuant to above, the absence of the availability of the redevelopment project and the right to redevelop the land, no Resolution Plan or Resolution Process is possible for the Corporate Debtor except to face liquidation.

xi. It is pertinent to note, in the context of valuation and liquidation value of the Corporate Debtor, the only asset of the Corporate Debtor was its development rights of the Project, which would have been unavailable in case of termination of the Development Agreement by the Society. In addition to this, the Corporate Debtor would have been saddled with the debt amounts due to the home buyers, from whom it had admittedly received amounts in excess of Rs. 800 crores.

xii. The dissenting Financial Creditors mainly contested on the ground that the Corporate Debtor would have been able to continue to have the benefits of the profits of the Project, even if the Corporate Debtor went to liquidation.

Timeline Constraints of the Project:

i. The Society, sought to terminate the Development Agreement vide a letter dated 08.05.2020, to which MIG (Bandra) Realtors and Builders Private Limited had challenged the purported termination vide a letter dated 08.05.2020, to the Society denying any breach of the terms of the Development Agreement, by invoking arbitration proceedings bearing No. LD-VC80/2020, against the Society, before the Hon'ble Bombay High Court under Section 9 of the Arbitration and Conciliation Act, 9 1996 wherein an Order dated May 26, 2020, came to be passed directing status quo and an Arbitrator was appointed to adjudicate upon the dispute.

ii. Further the Arbitrator passed an Interim Award dated 05.05.2021, under Section 17 of the Arbitration and Conciliation Act, 1996 granting stay of the purported termination, subject to compliance of certain terms which included payments in transit rent, corpus, hardship compensation etc. made by MIG (Bandra) Realtors and Builders Private Limited of the Society's members within a stipulated timeline, which was required to be strictly complied with.

iii. The Interim Award discusses the difficulties being faced by MIG (Bandra) Realtors and Builders Private Limited regarding constraints to meet the timelines of the Project. The relevant paragraphs from the Interim Award are extracted for ready reference:

> *"140. On the other hand, the Respondents members have been waiting for over five years to be put in possession of their respective premises. The entire project has taken up a lot of their time as well. The Resolutions and the correspondence indicate the same. Their dues have been*

delayed on several occasions. Their normal living and schedule have been disrupted beyond what they were willing to accept. What is of crucial importance for this application is that there is nothing on record that instils confidence of the Claimant's ability to fulfil its obligations even hereafter. Mr. Andhyarujina stated that as per the Development Agreement, as extended, the Claimant was to hand over the project duly completed by 6th December, 2020. However, in view of the lockdown, the Claimant was unable to do so. The lockdown was announced on 2nd March, 2020 . On that date, the Claimant had a little more than eight months to complete the project. Hence, according to Mr. Andhyarujina , the Claimant would be entitled to a period of about eight to nine months after the lockdown is lifted to complete the project. I would also agree that the Claimant would be entitled to a further month or two to mobilize its resources after the lockdown is lifted. Cheques have not been tendered in time. Post dated cheques have not been tendered in time. Cheques have been dishonoured. Cheques to statutory authorities have been dishonoured. The timelines have admittedly not been met. The extended timelines have not been met. The Respondent has not been responsible for the slow pace of construction or the failure to meet the timelines relating to the project. I will presume, only presume and only for now that the lockdown that commenced in March 2020 was never lifted to date and that the Claimant would be entitled to about eleven months after the lockdown to fulfil its obligations under the Development Agreement. The Claimant had, in its correspondence, alleged that the slowdown in the market which was affecting it, was likely to continue for about two years.

During the hearing Mr. Andhyarujina stated that the situation is now even worse. Mr. Jain disputed this as regards the market in general but obviously agreed that adverse circumstances are being faced by the Claimant. On the Claimant's own showing, therefore, if the lockdown is lifted in the near future, there is a possibility that the Claimant would not be able to complete the project within eleven months thereafter . Added to this is the fact that Mr. Andhyarujina was unable to give an actual commitment regarding undertaking the balance work. The Claimant was not willing to have recorded or state in writing any commitments at all.

"141. The Claimant, on the other hand, would be entitled to have its rights under the Development Agreement protected, pending the final Award. As stated by Mr. Andhyarujina, it should be possible for the Claimant, if it is sincere and serious, to use the period of the lockdown for an immediate mobilization at site and recommencement of the construction activities at site. An order to this effect, however, cannot be unconditional. The least that the Respondent would be entitled to is protection in respect of the bank guarantees, liquidated damages, the amount of Rs.18 crores together with compound interest at 9°/o per annum and the hardship compensation. If the Respondent is not protected in respect of these amounts, it will suffer grave harm and irreparable injury if it finally succeeds. The possibility of the same has already been adequately established by Mr. Jain. The Respondent's apprehension is that in the event of an unconditional stay being granted and the Claimant ultimately succeeding in the Reference,

the Respondent would be left without any security whatsoever even in respect of the amounts which have fallen due and in respect of amounts which accrue to them on a day-to-day basis hereafter. Added to this is the fact that the Claimant has not even indicated any manner in which it can secure these dues. Moreover, a mere bank guarantee or other security for amounts other than those covered by the three guarantees, namely, Bank Guarantee-1, Bank Guarantee-2 and Bank Guarantee-3, would not meet the ends of justice. Granting an injunction merely on the Claimant furnishing a bank guarantee would deprive the Respondent of the hardship compensation on which they understandably depend for their shelter till they are put in possession of their homes.

"142. I considered various option that would enable the construction of the permanent alternate accommodation for the Respondents members even pending the final Award. The Respondent would undoubtedly be entitled to the same even assuming that the Claimant finally succeeds. This is for the obvious reason that if the Claimant succeeds, it would have to construct the permanent alternate accommodation for the Respondents members. However, an order of this nature would require several factors to be taken into consideration, including ensuring that the contractor, be it the Claimant or any third party, would have to be put in funds at least to the extent of the cost of construction. Alternatively, the contractor's dues would have to be safeguarded in some manner. In the absence of an application by the Respondent in this regard, it would be difficult to issue appropriate directions.

Needless to add that the Claimant would be entitled to respond to such an application, if made. This order does not preclude the Respondent from making such an application. In the event of such an application being made, it will be considered on its merits".

iv. In view of the above, the Learned arbitrator directed the parties to comply with the conditions, failing which, the stay of termination would be vacated, effectively leading MIG (Bandra) Realtors and Builders Private Limited (and consequently the Corporate Debtor) to lose its development rights under the Redevelopment Agreement. The Society is neither a member of the COC, nor is it a participant in the CIRP of the Corporate Debtor. Thus, the COC could not exercise any form of control over the Society's actions. **More importantly, the Corporate Debtor had no direct privity with the Society.**

v. The COC in its 3rd meeting, dated 13.09.2021, took note of the Interim Award. Thereafter, the Resolution Applicant was introduced to the Corporate Debtor, by MIG (Bandra) Realtors and Builders Private Limited, and the same was recorded in the minutes of the COC meeting. All the parties had only one common interest, that was to keep the Project alive. As per the information shared with the Resolution Professional, some of these conditions were required to be complied by the Corporate Debtor and on account whereof, the Corporate Debtor has made payments to the Society.

vi. Meanwhile a beneficial scheme was notified by Municipal Corporation of Greater Mumbai ("**MCGM**") that if the payments towards premium and other approvals in respect of the project were made to MCGM on or before 31.12.2021, then up to 50% of such premium costs could be saved. Failure to meet this deadline would have entailed an additional

cost of Rs. 100 crores to the Project. Therefore, it was another contributory factor which lead to the urgency of the COC, whether to approve the Resolution Plan or not.

vii. Upon the approval of the Resolution Plan by the COC, the Resolution Applicant made these payments, thereby reducing the costs of the project by over Rs.100 Crores, which was utilized for making payments to the creditors of the Corporate Debtor.

viii. The non-payment of amounts to MCGM before 31.12.2021 would have put the rights of the Corporate Debtor in the Project itself in jeopardy. The development rights in favour of the Co-promoter could be terminated and consequently, the rights of the Corporate Debtor would also be extinguished. The rights of the Corporate Debtor in the Project is the only asset of the Corporate Debtor and therefore, it was of utmost importance that the rights of the Corporate Debtor in the project be safeguarded.

ix. The Resolution Professional in its 2nd Additional Affidavit dated 25.07.2022, stated that the Resolution Applicant has lent Rs. 376,61,14,500/- to the Project as on 30.06.2022, from which:

a. An amount approximately Rs. 121,00,00,000/- has been paid to MHADA Building Cell towards premium of Fungible FSI;
b. Approximately Rs. 37,20,00,000/- has been paid towards open space deficiency, staircase premium and other approval related cost;
c. Approximately Rs. 106,00,00,000/- has been paid to the Society and
d. Approximately Rs. 112,50,00,000/- has been expended towards construction costs, working capital and project related expenses.

x. Further, the RP in its Additional Affidavit has also set out the particulars with relation to the construction status as on 30.06.2022.

Recent Developments

6. It is also appropriate to mention here that, just before the completion of the arguments in the above matter before this Bench, the Resolution Applicant, in order to resolve the issue agreed to give up the amount arising out of the fraudulent transactions, which was vehemently opposed by the dissenting Financial Creditors, for which he was directed to file an affidavit to that effect and accordingly the RA filed an affidavit dated 07.10.2022 wherein it is stated as follows:

a. *"The Resolution Applicant stated that the Resolution Professional had filed an avoidance application for transactions vide I.A. bearing no. 551 of 2022 ("**IA**") read with supplement application bearing number IA 1653 of 2022 in IA 551 (Revised IA) for a sum of Rs. 843,40,63,554/-. Out of these, approximately Rs.840,00,00,000/- are a part of total value."*

b. There were no regulations set out for the proceeds of avoidable application under IBC at the time of submission of the plan. However, the NCLT, Mumbai held in DHFL Case that the proceeds from avoidance applications could be retained by the Resolution Applicant and therefore the Plan was submitted in accordance with the Order of the Tribunal.

c. The plan was submitted on 17.12.2021 (revised version on 21.12.2021) which was approved by the COC on 27.12.2021. Subsequently, in the appeal against the aforesaid NCLT Order in DHFL, the Hon'ble National Company Law Appellate

Tribunal, in 63 Moons, vide Order dated 27.01.2022, set aside the term of the DHFL resolution plan permitting the successful Resolution Applicant to appropriate recoveries from applications filed under Section 66 of the Code and remanded the matter to the COC for reconsideration only on this limited aspect. This was essentially an order of remand as the COC was called upon to reconsider the position in the light of the views expressed in the NCLAT Order.

d. The aforesaid NCLAT Order has been challenged before the Hon'ble Supreme Court of India and vide Order dated 11.04.2022, the Hon'ble Supreme Court, granted a stay on the operation of the impugned order passed by the Hon'ble National Company Law Appellate Tribunal.

e. Subsequently, on 14.06.2022, Regulation 38 (2) of the CIRP Regulations was amended to state the following:

"(2) A resolution plan shall provide: the term of the plan and its implementation schedule;

(a) the management and control of the business of the corporate debtor during its term; and

(b) adequate means for supervising its implementation.

(c) [provides for the manner in which proceedings in respect of avoidance transactions, if any, under Chapter II or fraudulent or wrongful trading under Chapter VI of Part II of the Code, will be pursued after the approval of the resolution plan and the manner in which the proceeds, if any, from such proceedings shall be distributed:

Provided that this clause shall not apply to any resolution plan that has been submitted to the Adjudicating Authority under

sub-section (6) of section 30 on or before the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process 'for Corporate Persons) (Second Amendment) Regulations, 2022.]"

f. The Plan submitted at the time when the NCLT Order dated 07.06.2021 in DHFL case, contained a clear provision that the proceeds from the realisation of the avoidance applications (PUFE transactions) would be to the benefit of the Respondent no. 2 i.e. Resolution Applicant. Such appropriation was clearly permissible under the law prevalent at the time of submission and approval of the plan in the instant case (i.e., between 17th and 27th December 2021).

g. Even on merits, the COC retains the power to assign, transfer or allocate the benefit of the recoveries of avoidance to the Resolution Applicant under the scheme of the Code, in the absence of a statutory bar, the legal question is before the Hon'ble Supreme Court in the '63 Moons-DHFL' matter.

h. The amendment to Regulation 38(2), applicable to plans submitted post-14.06.2022, suggests that the COC may permit the Resolution Applicant to appropriate the proceeds of avoidance applications.

i. In any event and without prejudice, at the time of the submission of the Plan, no application had been filed by the Resolution Professional for the avoidance of transactions or recoveries of monies from transactions considered to be fraudulent, etc. In the absence of relevant information, the

plan provided that the benefit from avoidance applications would ensure to this Respondent.

j. In the light of the aforesaid, Clause 5.1(K) be treated as deleted from the Plan Severing this part of the Plan is within the power of this Hon'ble Tribunal (as done in the 63 Moons-DHFL matter by NCLAT). Clause 5.1 (K) of the Resolution Plan reads as hereunder:

"Clause 5.1 (K) The monies or benefits may be realised on account of any orders passed under the code passed in matters pertaining to avoidance or preferential or fraudulent or undervalued or extortionate transactions entered into by the Corporate Debtor prior to the CIRP Commencement Date will go to the Resolution Applicant."

k. Taking an overall view of the matter, the Respondent shall not claim the benefit of the recoveries under the IA read with the Revised IA and forgoes the same in favour of the creditors of the Corporate Debtor in the manner to be decided by the COC under applicable law.

7. <u>Merits of the Case:</u>

In the light of the above contentions and the subsequent developments that have taken place after the commencement of the arguments in the above IA. Let us deal with the objection raised by the Petitioner one by one.

Submissions by Petitioner:

I. The Resolution Plan submitted by the Resolution Applicant is expressively conditional and violative of Regulation 36 of the Code:

i. The Dissenting Financial Creditors are aggrieved by the Resolution Plan, approved by 83.93% of the COC on 27.12.2021, as it does not reflect a fair picture, since HDFC constitutes 33.25% as financial creditor and the homebuyers constitute 33.41%.

ii. The Resolution Plan is unfair and inequitable in that it contemplates a 93% haircut on the admitted claims of the dissenting Financial Creditors, while, the homebuyers receive their flats / units upon construction in full satisfaction of their admitted claims.

iii. Therefore, the small investors and debenture holders lose 93% despite being secured Financial Creditors. If the Dissenting Financial Creditors supported the Resolution Plan they would have received an amount of Rs.10,99,16,456/- only. In case of the approval of the Resolution Plan, the Dissenting Financial Creditors would receive only 7.44% of the liquidation value of the Corporate Debtor after deduction of the CIRP costs which includes Rs. 1300 crores by way of interim finance. The saleable area of the Applicant **(i.e. Beacon)** security is 28,631 sq. ft and the construction costs for this is Rs. 18.33 crores (as per the values provided in the Sundeep HB Report). The Applicant would otherwise receive (Rs. 91.61 crores – Rs. 18.33 crores) Rs.73.28 crores**.**

iv. The Resolution Plan contains inherent conditionalities which are violative of the Code and Regulations 36A and 36B of the CIRP Regulation.

v. This is impermissible under the Code in so far as it runs counter to the provisions of Regulation 36B(5) of the CIRP Regulations. It was held in ***[Ramana Dayaram Shetty vs. International Airport Authority of India Ltd. (1979) 3 SCC]*** that Regulation 36 B (5) provides that

"any modification in the request for resolution plan or the evaluation matrix issued under sub-regulation (1), shall be deemed to be a fresh issue and shall be subject to timeline under sub-regulation (3). Provided that such modifications shall not be made more than once."

vi. The contrast between the draft RFRP provided to the Resolution Applicant and the Resolution Plan submitted is demonstrated below:

Draft RFRP	**Resolution Plan**
Clause 1.6.2: Right of the COC to reject the Resolution Plan if it is conditional in nature. Clause 1.8.4: Resolution Plan shall be unconditional, irrevocable and in accordance with the Code and the CIRP Regulations. Clause 2.1.5 (d): Resolution Plan shall be considered "*non-*	Clause 10.1H: Resolution Plan shall stand withdrawn if the additional FSI has not been obtained on or before 31 December 2021. Clause 10.2: In the event of withdrawal of the Resolution Plan, the Earnest Money Deposit and Performance

Draft RFRP	**Resolution Plan**
responsive" if it is conditional or contingent in nature Clause 2.1.1: Resolution Professional shall scrutinize every Resolution Plan to ensure that it is in accordance with the terms of the RFRP.	Security shall not be forfeited; and interim finance provided shall be repaid in priority along with interest.
Draft undertaking: Resolution Plan will not be withdrawn on account of concessions not being granted by any regulatory authority.	Executed undertaking: Resolution Plan shall not be withdrawn except for the reasons set out in the Resolution Plan.

vii. The Resolution Plan is also contrary to the undertaking provided by the Resolution Applicant in that, despite the Resolution Applicant's express undertaking submitted with the RFRP (approved by the COC) that it would not withdraw the Resolution Plan on account of failure to obtain statutory approvals, the Resolution Plan stipulates that the Plan would stand withdrawn if the statutory approvals were not met by 31.12.2021. Moreover, the Resolution Plan also provides for recoveries from avoidable transactions to the Resolution Applicant and not the COC.

II. *The Resolution Process was hastened only for the purpose of accommodating the Resolution Applicant*

i. In order to decide the issue, it is important to place on record here that, the present Resolution Professional Mr. Jayesh Sanghrajka was replaced in the place of the earlier Resolution Professional Mr. S. Gopalakrishnan vide order dated 25.08.2021 of this Tribunal. Thereafter, the RP was left with hardly 64 days i.e. till 27.10.2021 to meet the timeline of 180 days for completing the CIRP Process. The above 180 days is also interlinked to the timelines fixed by the Learned Arbitrator.

ii. The securities and financial valuation reports were obtained by the Resolution Professional in haste and were provided to the COC , in the early hours of 23.12.2021.

iii. It is pertinent to note that, the Resolution Applicant obtained these valuations on 18.12.2021 (i.e., 2 days before the Resolution Plan was to be put to vote). Further, no application was filed by the RA seeking information even after the extension of 3 months was granted for the CIRP process. Instead the Resolution Professional only filed IA No. 62/2022 for information on 06.01.2022 much after the Plan was approved and made no effort to seek this information.

iv. The first Resolution Plan, provided by the Resolution Applicant, envisaged a 96% haircut to the dissenting Financial Creditors and was provided without the Resolution Professional having procured the land valuation and Securities and Financial assets reports.

v. The Applicant received the land valuation reports and the draft Construction Management Agreement from the Resolution Professional on 18.12.2021. Thereafter, at 01:15 am on 22.12.2021,

the Applicant received a revised Resolution Plan with a mandate that if the Resolution Plan was not approved before 31.12.2021, the Resolution Applicant would withdraw the Resolution Plan. In this connection it is also relevant to note that the Resolution Applicant had undertaken that the Resolution Plan would not stand withdrawn even if statutory approvals were not met.

vi. Therefore, false urgency was created, in a mala fide manner, and the COC was made to vote under the threat of withdrawal of the Resolution Plan by the Resolution Applicant. The Resolution Professional acted arbitrarily, in undue haste and the Tribunal must draw an adverse inference from such conduct.

vii. The approval of the Resolution Plan was accelerated with undue haste solely for the benefit of the Homebuyers, HDFC, the Resolution Applicant and to the complete detriment of the other stakeholders in the CIRP.

III. Valuation reports suffers from material irregularities

1. The Valuation Reports for land, securities, and financial assets as well as the transaction audit report procured by the Resolution Professional suffers from material irregularities. The name of the valuers along with their category of valuation are as follows:

Name of the Valuer	**Category of Valuer**
M/s. Sundeep H.B. & Co.	Land & Building and Plant & Machinery

M/s. TrueVal Advisors	Land & Building and Plant & Machinery
Mr. Shrenik Doshi, CA	Securities or Financial Assets
Mr. Manish Jaju, CA	Securities or Financial Assets
M/s. G. M. Kapadia & Co.	Transaction Audit Report

A. Securities and financial assets valuation reports

a. The Securities and Financial valuation reports were admittedly prepared on the basis of incomplete information. Resultantly, these reports attribute NIL value to various financial assets as no data or documents have been forthcoming from the erstwhile Board of Directors of the Corporate Debtor.

b. The Manish Jaju Report ascribes a NIL value / non-ascertainable value to the following assets of the Corporate Debtor:

i. **Investments in 2 Partnership Firms / LPP - Rs. 224 Cr:**
Note of the Valuer
"*Based on discussion with Resolution Professional it is given to our understanding that the Resolution Professional is not provided with any partnership agreement or loan arrangement and hence in the absence of required agreements and terms it is not possible to ascertain the value of the assets.*"

ii. **Loans and Advances given to 7 related parties – Rs. 75 Cr:**
Note of the Valuer

"Based on discussion with Resolution Professional it is given to our understanding that the Resolution Professional is not provided with any partnership agreement or loan arrangement and hence in the absence of required agreements and terms it is not possible to ascertain the value of the assets."

iii. <u>Loan and Advances given to 8 unrelated parties – Rs. 86.5 Cr.</u>

iv. In the Manish Jaju Report the 'Statement of Other Receivables' demonstrates receivables amounting to Rs. 85.43 crores to be due and outstanding to the Corporate Debtor out of which Rs. 81.31 crores are owed by DB The Manish Jaju Report simply notes it is not possible to ascertain the value of these assets.

"Further, based on discussion with Resolution Professional it is given to our understanding that the Resolution Professional is not provided with any agreement or arrangement and hence in the absence of required agreements and terms it is not possible to ascertain the value of the assets The receivables from DB can certainly be adjusted from DB's area share. This amount must be included in the valuations and by failing to do so, the COC has been deprived of a benefit of Rs. 81.31 cores, which should have been adjusted from DBs share. Instead, DB's obligations have been given a complete go-by and DB is being

allowed to enjoy and reap benefits of the newly constructed Project without such amounts being earmarked for the beneficial interests of any stakeholder."

c. The Shrenik Doshi Report also ascribes a NIL value / non-ascertainable value to the following assets of the Corporate Debtor:

5. Short Term Loans and Advances :

(Rs in Crores)

Sr no	Particulars	Annex. No	Book Value*	Fair value	Liquidation Value
1	Advance to Suppliers	VII	82.62	Nil	Nil
2	Balance with Statutory Authorities	VIII	38.60	Nil	Nil
3	Loan given to others	IX	86.52	1.74	Nil
4	Loan Given to related parties	X	75.21	Nil	Nil
5	Advance to staff	XI	0.06	Nil	Nil
	Total		**283.03**	**1.74**	**Nil**

i. **Advances to suppliers –**

Note of the Valuer

"Advance to Suppliers are considered to valued as Nil both under Fair value and Liquidation as per discussion with the Resolution Professional. We understand that it will be very difficult to recall the advances considering the contracts entered into with different companies to provide various goods/ services to the company as per the understanding based on various terms of engagement. We have not received any contracts or any engagements from the company which they have entered into within this suppliers to determine the validity of the contracts entered into and thereby it ***becomes immaterial to consider value of the same****."*

Loans and advances to related parties

ii. Corporate Debtor has given an unsecured loan for which we were not provided with any details, which inter alia includes rate of interest repayment schedule, purpose of such loan on such transaction. Based on discussion with Resolution Professional it is given to our understanding that the Resolution Professional is not provided with any agreement or loan arrangement and hence in the absence of required agreements and terms it is not possible to ascertain the value of the assets.

iii. By taking these receivables as "NIL" on the basis that no information was available, the Valuers have deflated the Fair Value and Liquidation Value of the Corporate Debtor.

iv. More importantly, the Resolution Applicant obtained these valuations in undue haste on 18 December 2021 (i.e., 2 days before the Resolution Plan was to be put to vote).

B. Land valuation reports

i. Pursuant to the amendments to the Code, the homebuyers are now by way of a legal fiction treated as financial creditors under the Code and sit as creditors in the list of claimants against all the assets of the Corporate Debtor.

ii. The sole and primary asset of the Corporate Debtor is the development Project.

iii. As a secured financial creditor, the Applicant's burden on the said asset, i.e., the property is only the financial debt

amounting to Rs. 156 crores. However, the homebuyers' burden on the property is two-fold – (i) the amount advanced by the homebuyers is considered as a financial debt; and (ii) the homebuyers' burden is over the flats to be constructed in the Project.

2. It is well settled that a Valuer must take into consideration various practicalities to arrive at a fair value of the asset **[*Periasamy Palani Gounder v. Radhakrishnan Dharmarajan, 2022 SCC OnLine NCLAT 86 @ pr. 178.*]**. The object of valuations under the Code is to maximise the value of assets. However, the valuers have failed to take these peculiarities and situations into consideration while preparing the Valuation Reports. Instead, the TrueVal Report and the Sundeep H. B. Report blindly follow the IVS Standards without any application of mind.

3. The fact that the Project is grossly undervalued as the Valuers have ascribed a fair value of Rs. 3.24 Cr and Rs.6.31 Cr and liquidation value of Rs.2.74 Cr and Rs.4.81 Cr. However, the total saleable area of the Project is approximately 3,29,209 sq. ft. and the Project stands at Rs. 752.06 Cr as Work-In-Progress & Inventory in the Balance Sheet of the Corporate Debtor as on 31.03.2020.

4. In terms of the TrueVal Report, the construction cost was around Rs. 819 crores. The absurdity and contrast between the values prescribed by the Sundeep H. B. Report and the TruVal is discerned when the Sundeep H. B. Report itself recorded that the Corporate Debtor provided a deposit of Rs. 325 crores to DB in terms of their joint development agreement for the Project.

5. As a result, due to such defective valuation report the dissenting Financial Creditors has to suffer a 93% haircut and have been deprived of the benefit and protection of the liquidation value.

6. It is also important to note that the COC has failed to consider that if the Corporate Debtor was to be liquidated, the realizable value would be the value of the development rights in the land together with the value of the Project as work-in-progress which would be Rs. 752.06 crores.

IV. The benefit of transactions indulged by the Corporate Debtor were given to the Resolution Applicant without changing the RFRP which is contrary to the provisions of the Code:

(i) The Resolution Plan contemplates that the monies recoverable from the avoidable transactions, estimated at Rs. 802 crores, are to accrue to the benefit of the Resolution Applicant, which is a unilateral modification to the terms of the RFRP, as assured by the Resolution Professional and approved by the COC and is also contrary to the provisions of the Code.

(ii) In terms of the RFRP, the monies receivable from the avoidable transactions, was consciously kept outside the purview of the Resolution Applicant or the Corporate Debtor insofar as any monies recovered were to flow to the COC. This decision was for the benefit of the COC and in terms with the Delhi High Court's judgment in *Venus Recruiters India Pvt. Ltd. vs. Union of India (2021) 276 DLT 530*

(iii) The Resolution Applicant also seeks to benefit from any and all receivables arising out of transactions between the Corporate

Debtor and unrelated parties which are currently valued "nil" due to a purported lack of material information.

Further, irrespective of the approval or disapproval of this Hon'ble Tribunal, the COC has ensured that the underlying asset in the Project is in the hands of the Resolution Applicant. By doing so, the Resolution Professional and Resolution Applicant have both given a complete go by to the procedure contemplated under the Code which is impermissible in law.

V. *The Resolution Plan suffers from inherent unfairness of bargain:*

i. The homebuyers are unsecured Financial Creditors while the Applicants are secured financial creditor.

ii. The order of priority of payment that has been prescribed by the "Code" under Section 53, read with Section 30, places the Applicant above all other classes of creditors and at par with the dues payable to the Corporate Debtor's workmen. In fact, the Code mandates fair and equitable treatment of all creditors in a class or as per the waterfall mechanism as envisaged in Section 53 of the "Code".

iii. The Resolution Plan also reveals that while on one hand the Resolution Applicant will construct and provide 224 free sale components to the homebuyers, on the other hand the Applicant's security by way of the 15 mortgaged flats stands completely vitiated. This is completely contrary to Section 30(2)(b) of the Code.

iv. While Secured Financial Creditors receive a 93% haircut, other Unsecured Financial Creditors receive a 99.9% haircut, and the Operational Creditors receive a 100% haircut. However, the homebuyers receive their flats / units upon construction, without having to bear even a minor escalation cost.

v. HDFC benefits not only as a Financial Creditor, but also through other hats (i) as secured financial creditor sitting on the COC with a voting share of 33.25% (ii) as homebuyer with 5.4% out of the 33.41% homebuyer share and (iii) it has an exposure of Rs. 1100 Cr to DB as confirmed from DB's financial statements. Therefore, HDFC benefits, while purportedly accepting a 93% haircut, but is compensated through its share as homebuyer, pertinently, HDFC is a homebuyer not through flat purchase agreements but mortgage on flats on account of leveraging overdue interest payments. HDFC therefore has collateral purposes and is safeguarding its interest, since the Project will now be completed.

vi. The homebuyers and the Applicants are on the same footing, in that even the Applicants represent 167 individual investors who have invested their earnings in the Project, the average investment of such investor being INR 25 lakhs. In ***Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416***, the Supreme Court in fact equated homebuyers to the status of debenture holders and fixed deposit holders who are individual financial investors in a Project.

vii. In terms of Section 5(8) of the Code, by way of a legal fiction, the homebuyers are deemed to be treated as financial creditors and the monies advanced by them are financial debts. It is therefore ex facie unequitable and unfair that while the homebuyers will obtain their flats, the Applicant's security stands vitiated. In this connection is also relevant to note that contrary to the Supreme Court's directions in ***Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Ltd, 2021 SCC OnLine SC 253*,** the Resolution Professional has failed to obtain an independent valuation of the Applicant's mortgaged flats.

viii. The object of the Code is to maximise the value of assets and to balance interest of all stakeholders. The Supreme Court in ***Pratap Technocrats (P) Ltd. & Ors. v. Monitoring Committee of Reliance Infratel Limited & Anr., (2021) 10 SCC 623*** has held that equitable treatment of creditors means equal treatment of creditors in the same class, i.e., in the Applicant's submission the homebuyers and investors who the Applicant represents.

ix. As per the judgement of the Supreme Court in ***Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta (2020) 8 SCC 531*,** *"the decision of such Committee of Creditors must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operation creditors….If the Adjudicating Authority finds that on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the*

Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters."

x. The above facts demonstrate that the Resolution Plan is nothing but a colourable transaction to defeat the provisions of the Code. ***Commissioner of Customs v. Aafloat Textiles India Pvt. Ltd & Ors. (2009) 11 SCC 18.***

Reply of the Respondents is as follows:

In response to the above mentioned objections of the Dissenting Financial Creditors, the Respondents' reply is summarized hereunder:

I. The Resolution Plan was expressively conditional and violatiove of Regulation 35A and 36B(5) of the Code

i. As per clause 1.6.1 of RFRP, the COC has retained the right to use its discretion to accept or reject a plan, if such a plan is not in compliance with the RFRP. The COC, therefore, has the discretion to ascertain for itself, in its commercial wisdom, whether a plan is in compliance with the RFRP and to accept or reject such a plan if it feels that the plan is grossly non-compliant with terms of the RFRP.

ii. Further, it has been argued by the Objectors that the Resolution Plan at paragraph no. 10.1 (H) gives a right to the Resolution Applicant to withdraw the Plan if certain conditions are not met. The dissenting Financial Creditors i.e ICICI and Beacon, failed to bring to the Tribunals attention that the approvals were required to be obtained and was a key to the resolution of the Corporate Debtor. In any event, the conditions set out at Section 10.1 of the

Plan have been fulfilled and the Resolution Applicant is not withdrawing the Plan and therefore this argument is academic in nature.

iii. The time-lines in Regulation 35A of CIRP Regulations 2016, relied upon by ICICI, in support of their contention on 'RP's delay in filing the avoidance application', have been categorically held to be directory as opposed to mandatory. ICICI's contention that delay offends statutory prescription is, thus, legally untenable.

iv. ICICI's contention regarding violation of Regulation 36B(5) of CIRP Regulations 2016, is ex facie erroneous. COC did not modify the RFRP at any stage in the present case, and, hence, the sub-regulation was never attracted in the first place. In any event, there being no competing Resolution Applicant, the entire issue becomes purely academic.

II. *No undue haste: time lines dictated by emergent circumstances*

i. The CIRP has been conducted in accordance with IBC 2016 and CIRP Regulations 2016. The only significant allegation raised by Beacon and ICICI is that the Committee of Creditors acted in haste, particularly after mid-December 2021.

ii. The Resolution Plan had to be approved well before 31st December 2021, to enable the Corporate Debtor to raise interim finance to enable payment towards overdue rent and other charges to the Society and towards available benefits as per MCGM Notification for governmental/statutory authorities to keep the project

viable.

iii. Failure to comply with the 31st December 2021 deadline would have meant the following :

a. The Society had already terminated the redevelopment contract once before (the termination being the subject of the conditional stay as explained above), the participants in the resolution could not afford to run the risk of drawing the ire of the society; and;

b. Failure to pay the premia to the governmental/statutory authorities would have meant an additional burden on the project cost to the tune of approximately Rs.100,00,00,000/- making the project financially unviable, translating into a liquidation scenario. The Resolution Applicant could not afford the project suffering this loss. This loss would make the project unviable. The Resolution Applicant may not have continued with the Resolution Plan, if this payment was not being made prior to 31.12.2021.

c. The entire Committee of Creditors, including Beacon and ICICI, were conscious of the 31.12.2021 deadline, since at least the 7th Meeting of the Committee held on 20.10.2021

iv. Equally, there was an imminent need to resume construction on site, which was at a standstill since January 2020, in view of the Consent Terms executed on

27.12.2021 wherein the clause 7 mandated that the construction shall resume within 90 days from the execution i.e on or before 26.03.2022, failure to comply have resulted in breach of Consent Terms and would've lead to the termination of the Rights of the DB and consequently of Corporate Debtor.

v. Since, none of the members of the Committee of Creditors were inclined to infuse any funds for the same and the only way out was to arrange for finance from other sources. It is important to note that the Resolution Applicant has provided interim finance at 8.25% p.a. rate of interest for the project, which is far below the rates at which ICICI and Beacon provided finance to the Corporate Debtor.

III. *Valuation Reports Were Defective*

A. It appears from the record that the Committee of Creditors (**"COC"**), which included Beacon and ICICI, was duly informed about the appointment of the valuers by the Resolution Professional and these valuers, along with their fees, were duly approved by the COC (including Beacon and ICICI). Beacon or ICICI had not challenged the said appointments, granting approval to engage valuers: M/s. Sundeep H.B. & Co., M/s. TrueVal Advisors, Mr. Shrenik Doshi, CA, Mr. Manish Jaju, CA and M/s. G. M. Kapadia & Co.

B. The record of the Resolution Process reveals that the valuation reports were submitted by two independent Registered Valuers.

(a) As a matter of both principle and judicial policy, Courts / Tribunals do not second-guess or sit in appeal over an expert determination conducted by experienced and independent valuers. The settled position of law on this

issue is clear from the following rulings:

- ***Hindustan Lever Employees' Union* v. *Hindustan Lever Ltd.*, *1995 Supp (1) SCC 499, Page No. 876 of the Compilation of Judgements***

"***3.*** *… A company court does not exercise an appellate jurisdiction. It exercises a jurisdiction founded on fairness. It is not required to interfere only because the figure arrived at by the valuer was not as better as it would have been if another method would have been adopted. What is imperative is that such determination should not have been contrary to law and that it was not unfair to the shareholders of the company which was being merged. The Court's obligation is to be satisfied that valuation was in accordance with law and it was carried out by an independent body. The High Court appears to be correct in its approach that this test was satisfied as even though the chartered accountant who performed this function was a Director of TOMCO but he did so as a member of a renowned firm of chartered accountants. His determination was further got checked and approved by two other independent bodies at the instance of shareholders of TOMCO by the High Court and it has been found that the determination did not suffer from any infirmity. The company court, therefore, did not commit any error in refusing to interfere with it. May be as argued by the learned counsel for the petitioner that if some other method would have been adopted probably the*

determination of valuation could have been a bit more in favour of the shareholders. But since admittedly more than 95% of the shareholders who are the best judges of their interest and are better conversant with market trend agreed to the valuation determined it could not be interfered by courts …"

- ***Bhule Ram v. Union of India***, **(2014) 11 SCC 307, Page No. 903 of the Compilation of Judgements**

*"**8.** … Valuation of immovable property is not an exact science, nor can it be determined like an algebraic problem, as it abounds in uncertainties and no straitjacket formula can be laid down for arriving at exact market value of the land. There is always a room for conjecture, and thus the court must act reluctantly to venture too far in this direction.…"*

C. The attempt of the challengers i.e. Beacon and ICICI, to somehow link the Plan and the pay-outs thereunder, to the liquidation value of the project, is misconceived and contrary to settled law. The Supreme Court, in ***Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh, (2020) 11 SCC 467***, has categorically held that the Resolution Plan bears no relation to the liquidation value, in that, the pay-out under Plan need not exceed liquidation value. This is because revival of the corporate debtor as a going concern is an economic good by itself, even though the same is not capable of ready estimation/valuation.

D. The availability of a different approach or method of valuation cannot be a ground to question the valuation report, particularly after the Committee of Creditors has applied their mind to the issue. This has been settled law since the days of the Companies Act, 1956.

E. It is pertinent to note that the two valuers appointed by Beacon and ICICI, viz. iVAS and Saha, did not find any fault with the valuation of book debts, PUFE transactions and other matters, on merits. Their sole concern was 'double accounting', which issue has been adequately dealt with, by the Resolution Professional and HDFC (COC). The arguments of Beacon and ICICI on these points of valuation across the Bench cannot be countenanced in the absence of pleadings, particularly when the same are not even supported by their own valuers. Moreover, neither Beacon nor ICICI criticized the valuation on the aforestated grounds during the COC Meetings at any time. The arguments are, thus, in the nature of afterthoughts**.**

> It was mentioned to the Bench by the Learned Counsel of the Resolution Applicant that the Resolution Applicant understands that valuation reports ("**Valuation Reports**") were prepared by Mr. Shrenik M. Doshi and Mr. Manish Jaju to value the financial assets of the Corporate Debtor. The Valuation Reports were not shared with the Resolution Applicant and the Resolution Applicant has no idea of the contents and/or value of these financial assets. From the hearings and filings made before this Hon'ble Tribunal, the Resolution Applicant understands that the Valuation Reports attempted to value financial assets

of around Rs.1217,78,00,000/- (Rupees One Thousand Two Hundred and Seventeen Crore Seventh Eight Lakh) ("**Total Value**")

I. *The Benefit of fraudulent transactons were given to the RA without changing the RFRP which is contrary to the code*

Further, it was argued that the Resolution Plan is bad in law, because it deviated from the RFRP, to the extent, that the RFRP required the benefit of the avoidance applications to go to the COC but the plan provided that it would go to the Resolution Applicant It was further argued that the Resolution Applicant was given an undue advantage and there was no 'level playing field'. These arguments have been stated to be rejected and are contrary to the documents and facts on record. First of all, the Plan itself provides that the COC may accept deviations/conditions. Neither ICICI nor Beacon ever challenged the Plan. Secondly, the Resolution Applicant was the only prospective Resolution Applicant who qualified to receive a copy of the RFRP (which for the first time set out the manner in which the avoidance transactions were to be dealt with) – the argument of unfair advantage or absence of a 'level playing field' is therefore completely misplaced.

II. *The Resolution plan suffers from inherent unfairness of bargain*

i. The first objection under this head is that the priority under the waterfall mechanism under Section 53 of IBC has not been respected under the Plan. The objection is legally untenable for the following reasons:

a. Section 53 of IBC applies in a liquidation scenario and not during resolution. A resolution plan need not adhere to the priority under Section 53, as expressly held in ***Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531***

"128. When it comes to the validity of the substitution of Section 30(2)(b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors. Ms Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the case

of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2). Ms Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder.

131. The challenge to sub-clause (b) of Section 6 of the Amending Act of 2019, again goes to the flexibility that the Code gives to the Committee of Creditors to approve or not to approve a resolution plan and which may take into account different classes of creditors as is mentioned in Section 53,

and different priorities and values of security interests of a secured creditor. This flexibility is referred to in the BLRC Report, 2015 (see para 56 of this judgment). Also, the discretion given to the Committee of Creditors by the word "may" again makes it clear that this is only a guideline which is set out by this sub-section which may be applied by the Committee of Creditors in arriving at a business decision as to acceptance or rejection of a resolution plan. For all these reasons, therefore, it is difficult to hold that any of these provisions is constitutionally infirm."

b. Section 30(4) of IBC is non prescriptive and is only a guideline. This can be made out from the following words of Section 30(4) "***...which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53***".

ii. The second contention is that homebuyers have been equated to debenture-holders, fixed deposit holders etc. by the Supreme Court in Paragraph 43 of ***Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416***, and thus, the preference accorded to them in pay-outs under the resolution plan is inequitable. The objection is untenable for the following reasons:

- The reliance on Para 43 of ***Pioneer Urban*** is utterly misplaced and the contention is based on a misreading of the judgment. Firstly, the Hon'ble Court was not dealing with the question of payouts under Resolution Plan. Secondly, the Hon'ble Court did not declare that

homebuyers and debenture holders/deposit holders are the same sub-class within Financial Creditors, it only held that homebuyers can validly be classified as Financial Creditors, along with fixed deposit holders/ debenture holders, and that such inclusion would not violate the mandate of Article 14 of the Constitution of India.

- The position of homebuyers in a resolution scenario has been detailed by the Supreme Court and other courts in more specific circumstances as explained hereunder:

> Homebuyers are a separate sub-class within the financial creditors and are accorded a unique treatment under IBC. This position has been recognized by the Hon'ble National Company Law Appellate Tribunal (**"NCLAT"**) in ***Flat Buyers Association v. Umang Realtech, 2020 SCC OnLine NCLAT 1199 at Page No. 587 and 588 of the Compilation of Judgements***. NCLAT has recognised the primacy of the homebuyers and that they are entitled to priority given their relationship with the Corporate Debtor. Such primacy is not contrary to statue and is as per the guidelines prescribed under the Code:
>
> > "***11.*** *The Infrastructure which is constructed for the allottees by Corporate Debtor (Infrastructure Company) is an asset of the Corporate Debtor. The assets of the Corporate Debtor as per the Code cannot be distributed, which are secured for 'Secured Creditors'. On the contrary, allottees (Homebuyers) who are 'Unsecured Creditors', the assets of the Corporate Debtor which is the*

Infrastructure, is to be transferred in their favour ('Unsecured Creditors') and not to the 'Secured Creditors' such as Financial Institutions/Banks/NBFCs.

13. *In most cases, the Committee of Creditors take 'haircut'. The Resolution Applicants satisfy them most of the time with lesser amount than the amount as determined. In the case of allottees (Financial Creditors), there cannot be a haircut of assets/flats/apartment. …*

27. *Further, a 'Secured Creditor' such as 'financial institutions/banks', cannot be provided with the asset (flat/apartment) by preference over the allottees (Unsecured Financial Creditors) for whom the project has been approved. Their claims are to be satisfied by providing the flat/apartment. …"*

The position that homebuyers are a class unto themselves has been accepted by Beacon and ICICI, as apparent from their Notes of Arguments at Paragraph no. 72 of Beacons Note is reproduced below:

"***72.*** *In fact, this Hon'ble Tribunal has previously also approved plans contemplating a price escalation for homebuyers and this case is a fit case for such escalation in that it not only balances the interests of all stakeholders but also maximises value for all since if the homebuyers paid Rs. 2000 more per sq. ft., the haircut would only amount to 6.25%.*"

FINDINGS:

Heard the submissions of Mr. Gaurav Joshi and Mr. Ashish Kamat, Senior Counsels appearing for the dissenting Financial Creditors/Petitioners in the above Interlocutory Applications and Mustafa Doctor, Senior Counsel appearing for the Resolution Professional and Mr. Janak Dwarkadas, Senior Counsel appearing for the HDFC and Mr. Pradeep Sancheti, Senior Counsel appearing for the Home Buyers and Mr. Ravi Kadam, Senior Counsel appearing for the Resolution Applicant M/s Adani Good Homes Pvt. Ltd. and perused the material available on record.

1. The main common grievance of both the counsels Mr. Gaurav Joshi and Mr. Ashish Kamat, appearing for the dissenting Financial Creditors, is that the Resolution Plan submitted by the Resolution Applicant is expressly conditional and violative of regulation 36 of the Code. In order to buttress their argument, they have invited the attention of this bench to the following conditions mentioned at page 60 of Volume-I of convenience compilation.

Section 10: Approvals and implementation of the resolution plan

*10.1 The implementation, consummation, completion and effectiveness of the resolution plan shall be contingent upon (i) the fulfilment of actions specified in Section 2.2 (Q) above, and (ii) the obtainment of the approvals and fulfilment of actions specified in sub-Sections A to F below, all of which to the satisfaction of resolution applicant (hereinafter, collectively referred to as the "**said requirements**")*

A *Approval of this resolution plan by the COC by 25th December 2021 or such extended date as the COC and the resolution applicant may mutually agree*

B *DB taking the requisites and steps and executing the requisite documents as set out in the DB undertaking before the interim finance is disbursed and before the submission of the resolution plan to the NCLT for its approvals*

C *Given the dispute that is pending between the society and DB, immediately after the COC approval date (after the resolution referred to in Sub-Sections D and E below have been passed and before the disbursement of the interim finance as specified in sub-Section D below, and before the commencement of construction as specified in sub-Section E below) and prior to submissions of the resolution plan for NCLT's approval, the society and DB shall execute consent terms in the format annexed here to marked as annexure "L", and any modifications to the format annexed here to and marked as annexure "L", shall be subject to the prior approval of the resolution applicant ("**consent terms")** and both shall file the same with the Arbitrator and the society must issue a no objection certificate to the resolution applicant in the format annexed hereto and marked as annexure "M" ("**society NOC")***

D *The COC passing resolution for raising interim finance of Rs. 725,00,00,000/- (Rs. Seven hundred twenty-five crores) by 25th December 2021 (or such extended date as the COC and the resolution applicant may mutually agree) and out of the interim finance a sum of Rs. 300,00,00,000/- (Rs. Three hundred Crores) being disbursed to the Corporate Debtor by 28th December 2021 (or such extended date as the resolution applicant may mutually agree) These actions are important because payment of premium to the concerned government authorities has to be made on or before 31st December 2021 to enable the project to qualify*

for certain rebates/discounts and for making payments to the society, which if not made available, will make the project unviable. These steps will have to be completed before the resolution plan is submitted to the NCLT for approval. This is stated in detail in Section 2.2 (Q) above.

E *The COC passing a resolution for approving the commencement of construction and raising of funds for this purpose by 25th December 2021 (or such extended date as the COC and the resolution applicant may mutually agree) and executing the requisite agreements and taking steps towards this by 27th December 2021 (or such extended date as the COC and the resolution applicant may mutually agree). These actions are important because delay in commencement of construction will result in delays in handing over the units to the society consequently resulting in increased rent to the members of the society, which will affect the financial viability of the projects. This step will have to be completed before the resolution plan is submitted to the NCLT for approval.*

F *An order of the NCLT approving this resolution plan ("NCLT approval") pursuant to the Code, and receipt of a certified copy of the order of the NCLT sanctioning this resolution plan in accordance with the terms hereof.*

G ***INTENTIONALLY LEFT BLANK***

H *If any of the required approval or steps to be undertaken as stated in section 10.1 are not obtained or taken in timely manner and on account thereof, the resolution applicant is of the view that the relevant approvals for the project will not be obtained from the competent authority on or before 31st December 2021 such that the project would not be entitle to benefits as stated in the Government Policy, the resolution plan stands withdrawn notwithstanding that the resolution may have been approved by the COC and/or that the resolution plan has been submitted to the NCLT for its approval or otherwise howsoever, and the consequences set forth in section 10.2 below shall apply.*

10.2 ***Consequences of non-fulfilment of the said requirements***

In the event the any of the actions set forth in section 10.1 (A) to (F) above are not completed in the manners specified therein, then (i) The resolution plan shall stands withdrawn, the resolution applicant shall not be bound by any of its obligations and commitments thereunder, and no other action shall be taken against the resolution applicant or its affiliates, (ii) the Earnest Money Deposit shall not be liable to be forfeited and shall be returned to the resolution applicant within one day from the date on which the resolution plan stands withdrawn, (iii) the Performance Security, if furnished, shall not be liable to be invoked and shall be returned to the resolution applicant, within one day from the date on which if the resolution plan stands withdrawn, and (iv) if any Interim Finance is provided by the resolution applicant then such the Interim Finance together with interest and all other applicable dues thereon shall be repaid in priority to the resolution applicant, without prejudice to the rights of the resolution applicant to recover the Interim Finance together with interest and all other applicable dues thereon, including by enforcement of the security in its favour.

Countering the above argument Mustafa Doctor, Senior Counsel appearing for the Resolution Professional, submits that the feasibility and viability of a successful resolution, necessitated certain conditions be present in the Resolution Plan. Absent such conditions, the resolution plan could be a non-starter. Such a situation was not in anyone's interest. On a perusal of the above conditions in the plan, the above conditions are the key factors to the viability of the project. Without these conditions being fulfilled, resolution of the Corporate Debtor is impossible. He further submits that all the above conditions are already part of Clause 1.6.2 of the RFRP and the COC after thorough discussions and deliberations and after applying its mind voted the plan by exercising their commercial wisdom. It is pertinent to observe here that some of the above conditions imposed by the Resolution Applicant have

been already acted upon and complied and therefore, the above contention of the Petitioners remains as an academic issue. Even otherwise the above conditions imposed by the Resolution Applicant were accepted by required voting of COC and this Tribunal has no power to question such commercial decisions sitting as a Court of appeal. Hence, the above argument of the Petitioners is liable to be rejected in this regard.

2. The next contention of both the counsels is with regard to their sacrifice of security interest and the percentage of haircut. In this regard it is the grievance of both the dissenting Financial Creditors, that both of them besides losing their security interest, are not even getting minimum liquidation value in the plan. Countering the above argument, the counsel for the Resolution Professional as well as the counsels appearing for the assenting Financial Creditors and home buyers submits that the only asset of the Corporate Debtor in this case is a mere joint development agreement with DB Reality for redevelopment of flats of society which was partly built on the land owned by MHADA and it is the MHADA who is the ultimate owner of the land and therefore the question of having any security interest by the dissenting Financial Creditors on the flats does not arise, till the flats were completely built for which the project requires huge working capital. It is also an admitted fact that all the Financial Creditors, including the Petitioners, raised their hands to contribute any further amounts to keep the Corporate Debtor as a going concern. The above contention of the Petitioners is governed by the ruling of the Hon'ble Apex Court in *Civil Appeal No. 1700 of 2021 in the matter of INDIA RESURGENCE ARC PVT LTD vs. M/S AMIT METALIKS LIMITED AND ANR* wherein the Apex Court after analyzing the entire law relating to the supremacy of the commercial wisdom of the COC, held that what amount is to be paid to different classes or sub-classes of creditors, in accordance with the provisions of the Code and the related regulations,

is essentially the commercial wisdom of the Committee of Creditors and the dissenting secured creditors cannot suggest a higher amount to be paid to it with reference to the value of the security interest. Section 53 of IBC applies in a Liquidation scenario and not during Resolution. A Resolution Plan need not adhere to the priority under Section 53, as expressly held in ***Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531***

"128. When it comes to the validity of the substitution of Section 30(2)(b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors. Ms Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2). Ms Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of

Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder.

The attempt of the challengers i.e. Beacon and ICICI, to somehow link the Plan and the pay-outs thereunder, to the liquidation value of the project, is misconceived and contrary to settled law. The Supreme Court, in ***Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh, (2020) 11 SCC 467***, has categorically held that the Resolution Plan bears no relation to the liquidation value, in that, the pay-out under Plan need not exceed liquidation value. This is because revival of the Corporate Debtor as a going concern is an economic good by itself, even though the same is not capable of ready estimation/valuation.

Therefore, the above contention of the Petitioners is also liable to be rejected, in view of the above law laid down by the Supreme Court.

3. The third contention is with regard to the benefit of fraudulent transactions indulged by the Corporate Debtor. It is the grievance of the dissenting Financial Creditors that the benefits of the fraudulent transactions done by the Corporate Debtor were given to the Resolution Applicant without changing the RFRP which is contrary to the Regulations and the law laid down by the Hon'ble NCLAT in the judgment of ***63 Moons Technologies Limited vs. DHFL & Ors (Company Appeal No. (AT) (Ins) No. 454,455 and 750 of 2021).*** In this context it is appropriate to observe here, that neither the Code nor the Regulations, set out the proceeds of avoidable applications has to be dealt with and the Hon'ble Apex Court vide its order dated 11.04.2022 granted a stay on the operation of the impugned order passed by the Hon'ble NCLAT. Even otherwise, it is appropriate to mention here that the Resolution Applicant, after conclusion of the arguments by the Petitioners, filed an Additional Affidavit dated 07.10.2022 agreeing to give up the benefits of fraudulent transactions approximately of an amount of Rs. 843,40,63,554/-

(Rupees Eight Hundred and Forty-Three Crore Forty Lakhs Sixty-Three Thousand Five Hundred and Fifty-Four Only) arising out of I.A. 551/2022, I.A. 1653/2022 filed by Resolution Professional for the alleged fraudulent transactions done by the Corporate Debtor and therefore the above contention raised by the Petitioners remains as an academic issue. In addition, the Resolution Applicant also agreed to forego the benefit of an amount of Rs. 212,62,00,000/- (Rupees Two Hundred and Twelve Crore and Sixty-Two Lakhs only) (being the Total Value minus the Avoidance Applications, the Customer Dues, the Alleged Recovery from MIG and the GST Input Credit to the benefit of the COC) and thus a sum of around Rs. 1,052,62,00,000/- (Rupees One Thousand and Fifty-Two Crore Sixty-Two Lakhs Only) being around 86.44% of the amount mentioned in the Valuation Reports is marked for the COC and should address the concerns raised by the objectors (i.e. ICICI and Beacon).

When this bench made a query to both the Senior Counsels Mr. Ashish Kamat and Mr. Gaurav Joshi, after filing the affidavit by Resolution Applicant as to why can't their clients withdraw the above Interlocutory Applications since their main grievance, with regard to the benefits of the fraudulent transactions, was given up by the Resolution Applicant, for which Mr. Gaurav Joshi replied that he can do so if the Resolution Applicant agrees to forego an amount of Rs. 81,31,00,000/- (Rupees Eighty-One Crore Thirty-One Lakhs Only) being the receivables of Corporate Debtor from the Joint Developer of the project i.e. DB Reality. As rightly submitted by Mustafa Doctor, it is very clear from the conduct of both the dissenting Financial Creditors that they are fixing a price to their contest in order to improve their recovery, forgetting that IBC is not a recovery process and is a mere resolution, in which it is practically impossible to completely satisfy all the stakeholders. Hence, the above argument clearly exposes the conduct of the Petitioners herein.

Therefore, this bench did not find any valid reasons for pursuing the above applications by the Petitioners herein, more so after giving up the

benefits of fraudulent transactions and an amount of Rs. 212,62,00,000/- being the customer dues, the alleged recovery from MIG and the GST Input Credit by filing an affidavit. In fact, Mr. Joshi and Mr. Kamat initially devoted so many hearings in harping on this issue, prior to filing affidavit by Resolution Applicant.

4. The next contention is that the resolution plan suffers from inherent unfairness of bargain. It is the main grievance of the Petitioners that the flat buyers who have booked their flats way back in 2016 are getting flats worth more than four times the agreement value, without any payment of additional costs or burden. Mr. Pradeep Sancheti, Senior Counsel appearing for the home buyers, as well as Mustafa Doctor, appearing for the Resolution Professional, argued that the home buyers are a separate class within the Financial Creditors and are accorded a unique treatment under IBC. In support of their arguments they have relied on the order of the Hon'ble NCLAT in ***Flat Buyers Association vs. Umang Realtech, 2020 SCC OnLine NCLAT 1199*** and the judgment of the Hon'ble Apex Court in ***Pioneer Urban Land And Infrastructure Ltd Vs. Union Of India*** in which the Hon'ble Supreme Court while upholding the amendment of classification of home buyers discussed in detail the unique classification of home buyers. As rightly submitted by Mr. Ravi Kadam, the interest of debenture holders of Beacon and ICICI who are speculative investors, who invested money in an unlisted company like Corporate Debtor, cannot be equated with that of a genuine small home buyers.

5. The next contention is with regard to the valuation reports and hastening of the process of CIRP by Resolution Professional and also the conduct of Resolution Professional. It is the grievance of both the Petitioners that the Resolution Professional has concluded the CIRP process with lot of haste so as to benefit the Resolution Applicant, to save an amount of Rs. 100,00,00,000/- (Rupees Hundred Crores Only) payable to BMC on or before 31.12.2021, in view of an ongoing scheme launched by the BMC granting

certain benefits to the developers who are ready and willing to pay the FSI charges payable to the BMC on or before 31.12.2021. They have also contended that the Resolution Professional did not give them enough time even to look into the valuation reports submitted by the valuers. They further allege that the Resolution Professional furnished the copies of valuation reports just 2 days before the date of voting for approving the resolution plan without giving enough time to them to look into the reports.

In this context it is appropriate to mention here that the Petitioners raised the above grievance through filing an Interlocutory Application bearing I.A. 2957/2021 before this Bench and accordingly this bench after considering the time constraints extended the voting time from 25.12.2021 to 27.12.2021 till 10 AM and the extension order attained finality. Nothing prevented the Petitioners to approach this Tribunal once again for extension of time beyond 27.12.2021 if at all they are not in a position to get complete clarity on the valuation reports and the plan. Therefore, the Petitioners are estopped from raising the same issue again.

In addition to the above, it is important to mention here that the present RP Jayesh Sanghrajaka, was replaced on 25.08.2021 and the 180 days period for completing the CIRP process is getting over on 27.10.2021 and the benefit of the ongoing scheme launched by the BMC is getting over on 31.12.2021. It is an admitted fact, that delay in payment of amounts payable to the BMC under the scheme beyond 31.12.2021 would cost an additional financial burden on the project. Therefore, the present Resolution Professional was left with a limited time of 63 days to successfully complete the CIRP process in order to meet the object of Code. In addition to this, the completion of the CIRP process by the Resolution Applicant in this case is very unique and complicated being a real estate project and also in view of the various conditions including fixing up of time for completion of project by Resolution Applicant imposed by the sole arbitrator Hon'ble Justice Vazifdar while granting interim order restraining the society from revoking the development

rights of the DB Reality. The present Resolution Professional cannot be held responsible for the inactions if any on the part of the earlier RP. The present Resolution Professional cannot be find fault for not having required financial information of the Corporate Debtor, as it was not available to him due to non-furnishing of the same by the ex-promoters of the Corporate Debtor who are languishing in jail which is a genuine difficulty in view of various time deadlines in this case. The present Resolution Professional as per the regulations obtained valuation reports from five valuers namely M/s Sundeep H.B. & Co., M/s TrueVal Advisors, Mr. Shrenik Doshi, CA, Mr. Mahish Jaju, CA and M/s G. M. Kapadia & Co. The independent valuers who have given separate valuation report did not find fault with the earlier valuers in so far as the method of valuation adopted by the earlier valuers is concerned. The TrueVal Report showed the fair value of the Project to be Rs. 3.24 crores and the liquidation value of the Project to be a mere Rs. 2.47 Crores whereas the Sundeep H.B. Report showed the fair value of the Project to be Rs. 6.31 Crores and the liquidation value of the Project to be Rs. 4.81 Crores which is not so disproportionate.

Valuation always depends upon numerous factors like the quality and nature of asset, prevailing market conditions and whether the asset is free from all encumbrances and litigations etc. and also on the reputation of the owner at times. The limited role of the Tribunal is to see whether the Resolution Professional has obtained the valuation certificates from registered valuers as per the provisions of the Code or not? Deciding the correctness or genuineness of valuation reports is not the job of this Tribunal as this Tribunal does not possess the required technical expertise and it is beyond the scope of judicial review and exclusively falls within the domain of COC. Calculation and recovery of pie to pie of each stakeholder is neither possible nor legally permissible under the Code nor is the job of this Tribunal. Even otherwise as rightly submitted by Mr. Kadam, a sum of Rs. 1052,62,00,000/-being around 86.44% of the amount mentioned in the valuation report is marked for the

COC and therefore the correctness of valuation reports also remains an academic issue The record of the Resolution Process reveals that the valuation reports were submitted by two independent Registered Valuers. As a matter of both principle and judicial policy, Courts / Tribunals do not second-guess or sit in appeal over an expert determination conducted by experienced and independent valuers. The settled position of law on this issue is clear from the following rulings viz. ***Hindustan Lever Employees' Union* v. *Hindustan Lever Ltd.***, ***1995 Supp (1) SCC 499,***Also as laid down in the observations by the Hon'ble Apex Court laid down in ***Bhule Ram v. Union of India***, **(2014) 11 SCC 307**

*"**8.** … Valuation of immovable property is not an exact science, nor can it be determined like an algebraic problem, as it abounds in uncertainties and no straitjacket formula can be laid down for arriving at exact market value of the land. There is always a room for conjecture, and thus the court must act reluctantly to venture too far in this direction.…"*

Now coming to the conduct of Resolution Professional and the other assenting Financial Creditors. It is the contention of the Petitioners that the Resolution Professional in prior connivance with HDFC purposefully hastened the process of CIRP in order to bring the Resolution Applicant into the picture and see that the plan is duly approved. In fact, both the counsels appearing for the Petitioners argued in extenso to convince this bench as if there is a big game plan between the Resolution Professional, Resolution Applicant and the Assenting Financial Creditors.

In this context it is appropriate to mention here the following minutes of the 3rd COC meeting dated 13.09.2021, 5th COC meeting dated 21.09.2021, 10th COC meeting dated 07.12.2021 and 12th COC meeting dated 21.12.2021.

(1) 3rd COC meeting dated 13.09.2021:

Item No. 7

To take note and discuss the letter received on September 04, 2021 from MIG (Bandra) Realtors & Builders Pvt Limited ("MIG"):

The Chairman informed the COC that the letter dated September 04, 2021 received from MIG inter alia proposing appointment of Adani Infrastructure and Developers Private Limited ("Adani") as development manager had been forwarded to the COC alongwith notice of the meeting He further informed that representatives of MIG and Adani are available to join the meeting if so required by the COC.

With the permission of the COC, the Chairman then invited the representatives of MIG and Adani to address the queries of the COC.

Mr. Pankaj from MIG briefed the COC that they have proposed to restart the project 'Ten BKC by appointing Adani as Development Manager subject compliance under applicable Laws and for which presentations have been made to the homebuyers and the society.

Upon query raised by the RP as to the business plan, representative of Adani informed that they are working on the same and would be able to present to the COC by September 17, 2021. On further query raised by the RP, representative of MIG stated that they have received information/ data pertaining the project from employees of the CD prior to the CIRP The Chairman then invited to the COC for discussion.

Mr. Rajesh Sheth representative of homebuyers requested MIG to share presentation given to homebuyers and the society and the same was accepted by the representative of MIG.

Mr. Sunil Munot from ICICI stated that they require details of complete business plan in order to arrive at any decision and further, the structure/plan proposed by MIG and Adani should not affect the CIRP and

rights of the secured creditors of the CD. Concurring with the view of ICICI, Mr. Vinayak representative of HDFC further added that:

a) *It is important that the Adani present its credentials in the real estate industry.*
b) *clarity on rights and obligations of the society and*
c) *the business plan should clearly provide timelines of project completion, cost involved, means of financing, projected cash flows, selling plans etc.*

The Chairman informed the COC that structure proposed by MIG and Adani is also required to be legally evaluated in view of the ongoing CIRP. The COC took note of the same.

Representative of Beacon and AR of Homebuyers requested to provide business plan at least one day prior to the meeting, which the representatives of MIG and Adani stated that they will try.

Representatives of MIG and Adani then left the meeting with the permission of the Chair.

Representative of Yes bank wanted to know whether step in rights invoked by MIG are legitimate or not as apprehended by them in previous COC Meetings, to which the Chairman stated that as he has taken over charge very recently, he requires some time to go through the same and take legal advice.

Query was also raised by representative of Beacon as to whether proposal made by MIG and Adani would constitute as a resolution plan. The Chairman replied that the same will be the nature of the proposal will have to be ascertained after receiving it and once it has been vetted by the legal advisors, he will be able to respond to the same.

(2) 5th COC meeting dated 21.09.2021:

RESOLVED THAT *the Committee of Creditors hereby authorizes the RP and Representative of HDFC, jointly or severally, to do all such acts, deeds and*

things to negotiate, discuss, finalize the terms and conditions of appointments of Adani Infrastructure and Developers Private Limited ("Adani") by MIG (Bandra) Realtors & Builders Pvt. Ltd. ("DB") as a Development Manager for undertaking the construction, management and supervision including the sales and marketing of the Project "Ten BKC" (RERA No. P51800004889), situated at Kalanagar, opp. MHADA, Bandra East, Mumbai – 400051 ("Project")

RESOLVED FURTHER THAT *the documents finalized by the RP and HDFC acting jointly with the RP, containing terms and conditions of appointment of Adani as Development Manager shall be placed before the COC for its consideration and approval.*

(3) 10th COC meeting dated 07.12.2021:

EXTENSION OF TIMELINE TO SUBMIT RESOLUTION PLAN BY RA

The Homebuyers were of the unanimous view to extend further time sought by PRA of one week to submit the Resolution Plan. *The HB also requested to put before the COC proposal to reduce the timeline of e-voting and expedite the circulation of minutes to meet timelines as per provisions of IBC.*

As the deadline of 31st December, 2021 is approaching and we are required to pay the MHADA and other premium, it must be our best efforts to approve the resolution plan so the necessary funds can be arranged by RA.

The home buyer's major concern is to restart the construction at the earliest possible date. Home buyers including X BKC owners association have expressed their concern with ***early receipt of resolution plan from RA, payment of MHADA premium before 31.12.21 to save additional burden of around Rs 300 crs., to reduce adverse impact on viability of the project.***

(4) 12th COC meeting dated 21.12.2021 a detailed discussion took place to discuss the resolution plan and decide the way forward. The Resolution Professional brought to the notice of the COC about the strict time lines for approvals stipulated by the Resolution Applicant in the plan due to *the Chairman then brought to the notice of the COC following strict timelines for approvals stipulated by the RA in the Resolution Plan due to complexities of the Project, society issue and impending deadline to pay FSI premium on or prior to 31.12.2021 failure to pay premium by 31.12.2021 will result in increase in the amount of premium by approximately Rs.300 Crores making the project unviable under the present terms of the Plan and the RA will have to reconsider the proposal*

Event	***Timelines***
COC Approval	*21.12.2021*
Society Approval	*22.12.2021*
Interim Finance	*24.12.2021*
Payment of government dues	*24.12.2021*
Receipt of approvals	*31.12.2021*
Constitution Starts	*Jan 2022*

The Chairman further informed that since the entire viability of the sole project of the Corporate Debtor is dependent on the litigation with the society being settled and payment of FSI Premiums prior to 31-12-2021, hence he had to convene the urgent meeting to decide on the Resolution Plan as early as possible in order to protect the interest of all the stakeholders.

Representative of HDFC stated that in order to protect the viability of the project, it is imperative to pay the FSI premiums before 31.12.2021 and obtain consent from the Society.

Therefore, it is very clear from the minutes of the above meetings of the COC that the Resolution Applicant is the choice of MIG (Bandra) i.e. DB Realty

and the request to the Resolution Professional to hasten the process has come not only from the Resolution Applicant but also from all the stakeholders more so from the home buyers, in view of the stringent time lines involved in completion of the CIRP process as well as to keep the company as a going concern and to save the overhead charges running into hundreds of crores. Similarly, the necessity to hasten the process also arisen for appointing the Resolution Applicant as a Construction Manager. Therefore, the entire argument of the Petitioners regarding the alleged hidden agenda between the Resolution Professional and the assenting Financial Creditors including home buyers is not at all factually correct and is liable to be rejected in view of the nature of the project. Suspicion howsoever strong is not a substitution for proof. Nothing prevented the Petitioners from objecting the introduction of Resolution Applicant in the beginning itself.

In fact, it is the Petitioners who have authorized the Resolution Professional and the HDFC to jointly or severally to do all acts, deeds negotiate and finalize the terms and conditions for appointment of Resolution Applicant as a development manager for undertaking the construction, management and supervision including sales and marketing of the project. Apart from the Resolution Applicant, another company by name Ashdan Properties Pvt Ltd jointly with Ashdan Developers Pvt. Ltd. (collectively referred to as ('Ashdan') also submitted their EOI and subsequently withdrew it which is not the fault of anybody. The Petitioner did not even file an application before this Bench, for restraining the Resolution Applicant, from proceeding with the construction, after approval of plan by COC, if at all they were not inclined to appoint the Resolution Applicant as Construction Manager because they were consciously aware, that if construction is not started immediately, the Corporate Debtor will slip into liquidation.

Both the counsels appearing for the Petitioners strenuously tried to convince this Bench either to return back the plan to the COC for restarting the process afresh or reject the same. Let us discuss the consequences in

resending Plan to COC. In this context it is appropriate to observe that the Resolution Applicant was already appointed as a Construction Manager on account of the inaction of the Petitioners in lawfully restraining the majority of COC members in doing so and the Resolution Applicant started construction by infusing huge funds and the construction is in progress. Therefore, it is very clear that the Resolution Applicant has already acquired all legal rights, including obtaining the physical possession of the project which is an immovable property under a construction agreement, that contains an arbitration clause. Therefore, resending the plan back to the COC would only lead to opening another round of litigation either by the Petitioners or by the Resolution Applicant or any other stakeholders which may ultimately lead to destruction and not construction of the project which is certainly not the aim and object of the Code. Whether entering into such construction agreement without approval of plan by Adjudicating Authority is correct or not? is not within the power of this Bench more so without any application filed to that effect either by the Petitioners or any other aggrieved stakeholders. This Bench is not inclined to comment anything about rejection of the Plan as it is subjudice before this Bench on account of pending of another 20 pending applications filed by Operational Creditors, Home Buyers etc. challenging rejection of their claims by Resolution Professional either partially or totally. At the request of both sides, the present Applications are disposed of in the first instance. Thus, viewing from any angle, this Bench did not see any valid reason to resend the Plan back to the COC as it would lead to opening "PANDORA'S BOX".

Before parting with the Order this Bench hereby observes that it is high time for the authorities to prescribe a Code of Conduct among the members of the Committee of Creditors either by prescribing minimum percentage of voting for challenging a resolution plan duly approved by more than 75% of the Creditors or circumscribe specific grounds on which an objection application can be filed by dissenting members of Committee of Creditors and till then

filing of applications of this nature contrary to the commercial wisdom cannot be averted.

For the aforesaid reasons this Bench is of the considered opinion that there is no merit in the above applications both on the question of fact, law and conduct and are liable to be dismissed.

Accordingly, all the above four applications are dismissed however without any costs. In fact, this is a fit case to impose heavy cost. However, this bench is refraining from imposing costs keeping in mind the financial burden which the Petitioners are already incurring by way of haircut.

SD/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

SD/-
H.V. SUBBA RAO
MEMBER (JUDICIAL)

/Abhay/Renuka/Amey/Shubham/