IN THE NATIONAL COMPANY LAW TRIBUNAL,

COURT II, MUMBAI BENCH

INTERLOCUTORY APPLICATION NO. 3088 OF 2023

IN

COMPANY PETITION (IB) NO. 532/MB/MAH/2018

Application u/s 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016.

In the matter of:

Nirmal Lifestyle Limited **…Applicant**

v/s

1. **Anish Niranjan Nanavaty,**
   Resolution Professional of V-Hotels Ltd
2. **Macrotech Developers**

…. Respondents

In the matter of

Asset Reconstruction Company (India) Ltd.

…**Financial Creditor**

v/s.

V Hotels Limited

…**Corporate Debtor**

Order pronounced on 26.04.2024.

Coram:

Shri. Kuldip Kumar Kareer : Member Judicial.

Shri. Anil Raj Chellan : Member Technical.

Appearances (in Hybrid mode):

For the Applicant: Senior Advocate Prateek Seksaria a/w Rohit Agarwal, Adv. Nishant Chothani, Adv. Ashok Paranjpe and Adv. Nidhi Desai appeared for the Applicant through VC.

For the Resolution Professional: Sr. Adv. Pradeep Sancheti a/w Adv. Pulkit Sharma, Adv. Aditya V. Singh, Adv. Shriraj Khambete, Adv. Naman Jain, Adv. Shreya Chandhok.

For the Respondent No.02: Sr. Adv. Janak Dwarkadas a/w Mr. Rohit Gupta, Ms. Gauri Joshi appeared for the Respondent No. 2.

ORDER

Per: Kuldip Kumar Kareer, Member (Judicial)

1. The present Application has been filed by the Applicant, 'Nirmal Lifestyle Ltd.', u/s 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code" for the sake of brevity) read with Rule 11 of the National Company Law Tribunal Rules, 2016 ('NCLT Rules') seeking directions for making specific disclosures in the information memorandum as described in the application in order to protect the Applicant's right, title and interest in the hotel named Tulip Star ('the said Hotel') and directions to the CoC to either consider revised resolution plan from the Respondent No.02 or resolution plans only from those prospective resolution applicants, which provide for adequate protection being

granted in favour of the Applicant's right, title and interest with respect to the said Hotel.

Case of the Applicant (in brief):

2. The Applicant states that it has a valid, binding and subsisting claim in respect of 2,50,000 sq. ft. of the hotel property which belongs to the Corporate Debtor in the name of Tulip Star Hotel (being hereinafter referred to as "the said Hotel" for the sake of brevity) situated at Juhu Tara Road, Vile Parle (West), Mumbai-400049. The Applicant states that the Applicant has an independent right absolutely in respect of 1,25,000 sq. ft. built-up area in the basement, ground and first floor of the hotel property for which the Applicant has paid a valuable consideration of Rs. 30.60 crores to the Corporate Debtor which is to the knowledge of the Financial Creditor referred to in the above-captioned petition i.e. ARCIL.

3. Corporate Insolvency Resolution Process ('CIRP') of the Corporate Debtor commenced vide Order dated 31st May, 2019 ('Admission Order') passed by NCLT, Mumbai Bench u/s 7 of the Code.

4. The Corporate Debtor 'V Hotels Ltd' acquired the erstwhile Centaur Hotel at Juhu Beach from the Hotel Corporation of India Ltd under the disinvestment programme of the Government of India having 24,706 sq. mtrs. of land along with a structure comprising of basement, ground and six floors, situate at Juhu Tara

Road, Vile Parle (West), Mumbai-400049. The Corporate Debtor has now renamed the hotel as 'The Tulip Star', Mumbai.

5. The basement, ground and the first floor are independent sections of the said Hotel, capable of segregation. This is precisely the reason why the Corporate Debtor, being in severe financial difficulty, had approached the Applicant to develop a super market and shopping mall in the basement, ground and first floor of the said Hotel. The Applicant entered into various heads of agreements on different dates which culminated into an Agreement dated 21st June, 2003 and a Supplementary Agreement dated 17th October, 2003. As per the terms of the said Agreements, the Applicant was to pay a sum of Rs. 30 crores to the Corporate Debtor; however, the Applicant paid a sum of Rs. 30.60 crores at the request of the Corporate Debtor in the period between March, 2003 to September, 2004. The Applicant submits that there is no outstanding monetary consideration to be paid by the Applicant to the Corporate Debtor in terms of the said Agreements.

6. Despite entering into the said Agreements with the Applicant, the Corporate Debtor sought to create third-party rights in respect of the said Hotel property. Therefore, the Applicant was constrained to file Arbitration Petition No. 100 of 2005 u/s 9 of the Arbitration and Conciliation Act, 1996 wherein the Hon'ble Bombay High Court was pleased to grant an injunction restraining the Corporate Debtor from creating third-party rights in respect of the said Hotel property and the disputes were referred to arbitration. In the interregnum, on or about 21st

November, 2006, the name of Corporate Debtor was changed to its present name viz. V Hotels Ltd. Vide Award dated 08th February, 2013, the Arbitrator refused to grant the relief of specific performance, but instead directed the Corporate Debtor to pay to the Applicants an amount of Rs. 19.60 crores, together with interest thereon. The said Award was subsequently challenged by the Applicant u/s 34 of the Arbitration and Conciliation Act, 1996 before the Hon'ble Bombay High Court vide Arbitration Petition No. 891/2013. The Hon'ble High Court was pleased to set aside the impugned Award vide its Order dated 27th November, 2013 and also continued ad-interim injunction. Being aggrieved by the Order dated 27.11.2013, the Corporate Debtor then preferred an appeal u/s 37 of the 1996 Act which is pending for adjudication with the Hon'ble High Court of Bombay.

7. On or about 08th December, 2013, the Applicant for the first time became aware of a public notice dated 07th December, 2013 published in Times of India newspaper inviting offers for sale of the said Hotel property. The Applicant thereafter came across a copy of bid document for the sale of the said Hotel property.

8. On the basis of the Award, which was set aside by the Bombay High Court, the Applicant had filed its claim before the Respondent No.01 on 06.12.2022 and the claim of the Applicant came to be allowed to the extent of Rs. 30.60 crores. The Applicant has learnt that a resolution plan submitted by Respondent No.02 has been approved by the Committee of Creditors ('CoC') of the Corporate Debtor and, therefore, the Applicant apprehends that the same may resultantly prejudice

the right, title and interest of the Applicant in the said hotel. The Applicant submits that it is imperative that any resolution plan submitted in the CIRP of the Corporate Debtor ought to provide for adequate protection of the right, title and interest created in favour of the Applicant. Hence this application.

Reply of the Respondent No.01:

9. The Respondent has resisted the application of the Applicant on the ground that it is not maintainable, the Applicant has no locus and that the application is presumptive in nature. The Respondent submits that no cause of action is shown to have arisen for filing this Application.

10. The Respondent opposes the maintainability of the present application on the ground that the Adjudicating Authority under the Code has no jurisdiction on any issue concerning ownership rights of property. The Corporate Debtor states that the Applicant has no vested right in the hotel property and being aggrieved by an order passed by the Hon'ble High Court u/s 34 of the Arbitration and Conciliation Act, 1996, the Corporate Debtor had preferred an appeal u/s 37 of the Code and the same is an undisputed fact.

11. The Respondent submits that the Information Memorandum contained the details of all material litigation, including all the litigation and disputes of the Corporate Debtor including the Order dated 09.10.2013 (pronounced on 27.11.2013) passed by the Hon'ble Bombay High Court in the Applicant's petition u/s 34 of the Act.

Further, a separate repository of documents was created in the form of a virtual data room containing necessary information which was made accessible to the prospective resolution applicants. Since the information memorandum and the access to virtual data room are confidential in nature, the said documents are not being enclosed with the reply.

12. The Applicant filed its updated claim with the Respondent No.01 on 13.10.2022 and a revised claim on 06.12.2022. The claims submitted by the Applicant were verified and the Applicant was classified as "other creditors" in the List of Creditors. Out of the total claim of INR 2,488,05,85,063/-, an amount of Rs. 30.60 crores were consistently shown as 'admitted' and an amount of Rs. 2359,21,99,310/- was verified at notional value of Re.1/-, subject to the dispute pending before the High Court. The verification of claim has not been challenged by the Applicant and therefore, the same has attained finality. Therefore, the present application is liable to be dismissed with exemplary costs.

Reply of the Respondent No.02:

13. The Applicant has already submitted a monetary claim of INR 2,488 crores before the Resolution Professional, of which an amount of Rs. 30.60 crores has been admitted by the Resolution Professional. The balance amount of approx. Rs. 2,457 crores have been claimed as damages. This entire claim made by the Applicant has been dealt with in the resolution plan.

14. The Order passed u/s 34 of the Arbitration and Conciliation Act, 1996 dated 27.11.2013, does not in any manner or form restrict the CIRP of the Corporate Debtor. In the present case, it is not the erstwhile promoters of the Corporate Debtor who are creating third party rights in the said Hotel, but the secured financial creditors of the Corporate Debtor and the first charge holders of the Corporate Debtor are seeking resolution of the insolvency of the Corporate Debtor through the CIRP as contemplated under the IBC. Therefore, in this regard, the Applicant's insistence that Section 34 Order altogether restricts the CoC from creating third party rights in the said Hotel, ergo approving the resolution plan in the CIRP of the Corporate Debtor is wholly inconsistent with the fundamental purpose and objects of the Code.

15. The appropriate forum for adjudication of disputes pertaining to the right, title and interest of the Applicant in the said Hotel is under the Arbitration and Conciliation Act, 1996 and not before the Adjudicating Authority under the IBC, 2016 especially at this belated stage where the resolution plan as submitted by the Respondent has been unanimously approved by the CoC and the CIRP of the Corporate Debtor is almost complete. As a consequence of the setting aside of the impugned Arbitral Award u/s 34 of the 1996 Act, it was incumbent upon the Applicant to initiate de novo arbitration proceedings before the Learned Arbitrator. However, it is a matter of record that since 2013, i.e. for a period over 10 years, the Applicant has not initiated any de novo arbitration proceedings.

16. The Applicant has already submitted its claim during the CIRP of the Corporate Debtor before the Resolution Professional and cannot now claim an interest in the assets of the Corporate Debtor.

17. The Resolution Plan submitted by this Respondent adequately accounts for the claim made by the Applicant. In the Resolution Plan, the Respondent has proposed a payment of Rs. 1.03 crores against admitted claims of the other creditors and with respect to the contingent claims, this Respondent proposes to pay a sum of Rs. 1,00,000/- (rupees one lakh only). Therefore, now at such a belated stage, the Applicant cannot be allowed to arm-twist the respondent thereby vitiating the process of CIRP of the Corporate Debtor. Hence the Respondent prays for dismissal of the present application.

Rejoinder of the Applicant

18. In the rejoinder, the Applicant has submitted that it is absurd on the part of the Respondent No.02 to say that the High Court had restrained only the erstwhile promoters of the Corporate Debtor from creating any third-party rights in the said Hotel Property. The Applicant submits that the Hon'ble High Court vide its Order u/s 34 had recognized in clear and unequivocal terms that the right and interest of the Applicant in the said Hotel is required to be protected. Therefore, the Applicant submits that the resolution applicant while stepping into the shoes of the erstwhile management of the Corporate Debtor and taking over its assets, would also be

precluded and prevented from doing acts which the Corporate Debtor was specifically barred or prevented from doing.

19. A right that is vested in the Applicant cannot be extinguished merely by virtue of the Code or the Resolution Plan and that too at the hands of a Resolution Applicant in the CIRP of a separate entity. The Respondent No.02 was well aware of the valid, binding and subsisting claim of the Applicant in the said Hotel and despite that, the Respondent No.02 has failed to provide necessary safeguards with respect to the existing right of the Applicant in the said Hotel property. The Respondent No.02 has attempted to bypass the subsisting right, title and interest of the Applicant in the said Hotel Property by way of the Resolution Plan only with a dishonest view to oust the Applicant and usurp the said Hotel property.

20. The CoC should have considered and voted upon only such resolution plan which provided for adequate protection being granted in favour of the Applicant's right, title and interest w.r.t the said Hotel property. If this Tribunal is not inclined to direct the Respondent No.02 or the CoC to modify or amend the resolution plan to provide for necessary safeguards with respect to the right, title and interest of the Applicant in the said Hotel property, then this Tribunal is well within its power to exercise its jurisdiction to reject the resolution plan since the same is in flagrant violation of law and of the directions contained in Section 34 Order.

21. The Resolution Plan provides for a meagre amount of Rs. 1.04 crores towards the claim of other creditors is an inadequate and inappropriate safeguard to say the

least. The right, title and interest of the Applicant in the said Hotel property cannot be monetized under the category "Other Creditors".

FINDINGS

22. We have heard the Counsel for the Applicant and the Respondent at length. We have perused the records.

23. During the course of arguments, the Ld. counsel for the applicant has argued that the Agreement dated 21st June 2003 (1st Agreement) and the Agreement dated 17th October 2003 (2nd Agreement) (collectively referred to as the said Agreements), create an interest in areas in the Tulip Star Hotel in favour of the Applicant necessitating exclusion of such area from the Resolution Plan of Respondent No. 2.

    a. The said Agreements were entered into in order to construct and/or develop a shopping mall and supermarket respectively in the Hotel.

    b. Under the 1st Agreement, an undivided interest was created for an area of 1,00,000 sq. ft. in the shopping mall area and under the 2nd Agreement, an undivided interest was created for an area of 25,000 sq. ft. in the supermarket area contemplated therein in favour of the Applicant. The creation of interest under the said Agreements is evident from the following:

i. Clause 1 of the 1st Agreement records that the Applicant has an undivided interest to the extent of 1,00,000 sq. ft. in the shopping mall area contemplated therein.

ii. Under Clause 3 of the 1st Agreement, the Applicant is required to spend monies for carrying out construction and alterations for additional construction and refurbishment in the shopping mall area.

iii. Under Clause 7(iii) of the 1st Agreement, the Applicant along with the Corporate Debtor is required to draw up plans for additional construction for submitting it to MCGM.

iv. Under Clause 8(i) of the 1st Agreement, the Applicant is entitled to lease all or any part of the area in the shopping mall in favour of third parties and mortgage/ charge the shopping mall area for obtaining loans from banks or private parties, immediately on execution of the 1st Agreement.

v. Under Clause 10 of the 1st Agreement, the Applicant is entitled to construct/ redevelop or renovate the ground and first floor of the Hotel building of the Corporate Debtor and take all other steps for the said purpose.

vi. Under Clause 13 of the 1st Agreement, the parties were required to allocate among themselves, specific portions of the shopping mall to

enable them to deal with such portions independently upon expiry of a certain period.

vii. Clause 14 of the 1st Agreement once again notes that the Applicant has an undivided interest to the extent of 1,00,000 sq. ft. in the shopping mall area.

Similarly, under the 2nd Agreement, which is identical in its terms, creates an undivided interest for an area of 25,000 sq. ft. in the supermarket area contemplated therein in favour of the Applicant.

24. According to the ld counsel for the applicant, between March 2003 to September 2004, the Applicant paid the entire consideration of Rs. 30.60 Crores to the Corporate Debtor, though it was not required to so pay in terms of the order of performance under the said Agreements. The said money was accepted by the Corporate Debtor without demur. There were arbitration proceedings between the Applicant and the Corporate Debtor under the said Agreements, whereunder the Applicant *inter alia* claimed specific performance of the said Agreements. These proceedings culminated into an award rejecting the claim of the Applicant. For the specific performance on the ground of an alleged supervening impossibility. Subsequently, when the award in the arbitration proceedings between the Applicant and the Corporate Debtor arising under the said Agreements was set aside by the Hon'ble Bombay High Court *vide* its order dated 27th November 2013, an injunction was granted against creation of third party rights of any nature in the

disputed premises by negotiation, transfer, encumbrances or otherwise or by inducting anyone in the disputed premises being the basement, ground and 1st floor of the Hotel admeasuring 2,50,000 sq. ft. or changing the façade of the Hotel. The ld counsel for the applicant has further contended that though an appeal was preferred under Section 37 of the Arbitration Act, no stay has been granted by the Hon'ble Bombay High Court against the order dated 27th November 2013 and as such, the order dated 27th November 2013 survives. Therefore, admittedly, the said Agreements are valid, subsisting and binding, and as such, have never been terminated by the Corporate Debtor and/or any other person. According to the ld counsel for the applicant, the said Agreements are enforceable in law and, therefore, any contention that the said Agreements are not concluded contracts is contrary to law and cannot be countenanced. Under said Agreements, the Applicant is entitled to lease all or any part of the area in the shopping mall and supermarket in favour of third parties and mortgage/ charge thereon for obtaining loans from banks or private parties, immediately on execution of the said Agreements:

25. Ld counsel for the applicant has further contended that once the lender, which holds a prior alleged charge on the subject property, has filed its claim and participated in the Corporate Insolvency Resolution Process of the Corporate Debtor by ceding the same to the common pool, the requirement to obtain their NOC cannot and does not survive and *ipso facto* and *ipso jure*, the Applicant is

entitled to specific performance of the said Agreements which create a right and interest in immovable property. Thus, the said Agreements create an undivided right and interest in the areas mentioned therein in favour of the Applicant, which are recognised under subsisting orders passed by the Hon'ble Bombay High Court, which are much prior to the insolvency commencement date.

26. The ld counsel for the applicant has further argued that the reliance placed on the order dated 17th March 2023 passed by the Ld. Debt Recovery Law Appellate Tribunal is wholly misconceived, untenable in law and is of no avail to the Respondents since the said order was passed after initiation of corporate insolvency resolution process (in a proceeding in which the Corporate Debtor is a party) and is, thus, a nullity in the eyes of law in the light of the law laid down in[*Sundaresh Bhatt Vs. Central Board of Indirect Taxes and Customs- (2023) 1 SCC 472*

27. The ld counsel for the applicant has further contended that Respondent No. 2 is required to carve out such area to be allotted to the Applicant in its Resolution Plan, which area cannot be considered as an asset of the Corporate Debtor and such area of 1,25,000 sq. ft. in the Hotel is required to be transferred in favour of the Applicant and the same cannot enure to the benefit of any other creditor of the Corporate Debtor

28. It has further been submitted by the ld counsel for the applicant that the Applicant is entitled in law to a copy of Respondent No. 2's Resolution Plan since, on Respondent No. 2's own admission in the Affidavit in Reply dated 31st July 2013

relying on its Resolution Plan, whereby it has sought to allege that the Applicant's claims are considered in the Resolution Plan. Respondent No. 2 is duty bound in law to produce its Resolution Plan and provide a copy thereof to the Applicant, more particularly when it seeks to affect Applicant's right and interest in immovable property as recognised in orders passed by the Hon'ble Bombay High Court. Even otherwise, rules of natural justice, which are a cornerstone of a fair trial, necessitate that any adjudication before this Hon'ble Tribunal is fair and in accordance with law.

29. The ld counsel for the applicant has further argued that the Resolution Plan of Respondent No. 2 is in contravention of law and as such,cannot pass muster under Section 31 of the Insolvency & Bankruptcy Code, 2016("IBC"). He has argued that one of the concessions or waivers in the Resolution Plan purports to terminate the said Agreements. It is settled law that valid agreements cannot be terminated without following due process of law. There is no unilateral right of termination, modification and change save and except in accordance with law. A resolution applicant, in its resolution plan cannot terminate agreements which have created legal rights in third parties and any such termination is in violation of Section 30(2)(e) of the IBC. In support of his arguments , the ld counsel for the applicant has relied upon*Standard Chartered Bank Vs. Ruchi Soya Industries Ltd- Order dated 24th July 2019 in MA No. 1721 of 2019 passed by this Hon'ble Tribunal- as well as IMICL Dighi Maritime Ltd. Vs. DBM Geotechnics and Constructions Pvt. Ltd.- Order dated 8th*

May 2019 in MA No. 529 of 2019. In the light of the law laid down in the afore cited cases, it has been urged by the counsel for the applicant that any attempt to defeat such rights and approve a Resolution Plan, which is *ex facie* in teeth of the orders passed by the Hon'ble Bombay High Court, is illegal, contrary to law, more particularly Section 30(2)(e) of the IBC and as such, cannot pass muster under Section 31 of the IBC.

30. Ld counsel for the applicant has further contended that the Hotel is a commercial establishment. The Corporate Debtor contemplated a real estate project to convert this commercial establishment into another nature of commercial establishment, being a mall which is covered under the *definitions of 'apartment' under Section 2(e) and 'real estate project' under Section 2(zn) of the Real Estate (Regulation and Development Act, 2016*]. He has further submitted that the Corporate Debtor entered into the said Agreements whereunder the Applicant was required to pay and invest a sum of Rs. 30.60 Crore, plus Rs. 5 Crore, plus Rs. 15 Crore for the purposes of improvement and development of the existing commercial establishment into a commercial mall. In return, the Corporate Debtor allotted the Applicant an area of 1,25,000 sq. ft. for the consideration stated in the said Agreements. The Corporate Debtor agreed that the Applicant would be entitled to deal with its allotted area in such manner as it deemed fit. The Applicant is also solely entitled to the income generated from such allotted area. Therefore, the Applicant is an allottee of a real estate project and the amount paid by the Applicant to the Corporate Debtor under

the said Agreements, as *advance* is squarely covered within the meaning of financial debt under Section 5(8)(f) of the IBC. The Applicant is thus a financial creditor and the rejection of Applicant's claim dated 14th November 2019 as a financial creditor *vide* the email dated 2nd November, 2022 addressed by the Respondent No. 1 is patently illegal and contrary to law. Notably, this rejection has been challenged by the Applicant by way of an I. A. bearing filing no. 2709138000132024 dated 1st January 2024, which is pending adjudication before this Hon'ble Tribunal. The Applicant is, therefore, entitled to be classified as a financial creditor to the tune of the value of the area allotted and is entitled to be recognized to the extent of value of such allotted immovable property. The ld counsel for the applicant has urged that in the light of the above contentions, the application must be allowed in toto.

31. On the other hand, the ld counsel for the SRA (Respondent no. 2) has argued that the Secured Financial Creditors had granted a loan of Rs. 129 Crores to the Corporate Debtor and as security, a mortgage was created in their favour over the assets of the Corporate Debtor. The HOA, SHOA and the NLL Agreement (collectively, the "said Agreements") were entered into for development of 2,00,000 sq. ft. as shopping mall on the Ground and First floors of the said Hotel (the "Shopping Mall") and development of 50,000 sq ft. as a supermarket in the Basement of the said Hotel (the "Supermarket"). By virtue of the said Agreements, the Applicant merely acquired right to develop the Basement, Ground and First floors of the said Hotel - that too subject to certain conditions - and has not acquired

any ownership rights nor any title in the said Hotel or its property. The said Agreements specifically record that the Applicant's rights therein are subject to fulfilling certain obligations on the part of the Corporate Debtor, especially obtaining a No-Objection Certificate ("NOC") from the Consortium. Moreover, the Applicant consciously entered into the said Agreements knowing fully well that the said Hotel was mortgaged to the Consortium even before entering into the said Agreements. According to the ld counsel for SRA, the Applicant was conscious of the fact that the NOC will not be issued by the Consortium unless their dues are fully discharged by the Corporate Debtor. The Applicant has admitted and acknowledged that the Corporate Debtor never obtained the NOC from the Consortium, which was a pre-requisite under the terms of the said Agreements for exercise of any rights by the Applicant under the said Agreements. It is submitted that the claims raised by the Applicant are, at best actionable claims, and therefore, the Applicant does not have any right, title or interest in the said Hotel.

32. The ld counsel for the SRA has further argued that it is the Applicant's case that by an order dated 27th November 2013, the Hon'ble Bombay High Court restrained the Corporate Debtor from creating any third-party rights in the said Hotel. He has submitted that the High Court Order was only an interim order, based *prima facie* findings in a Section 9 petition under the Arbitration and Conciliation Act, 1996 ("Arbitration Act"). Pursuant thereto, the Applicant has failed and/ or neglected to institute *de novo* arbitration proceedings and/ or any legal proceedings for a

period of 10 years in relation to its alleged ownership, right, title and interest in the said Hotel. Therefore, the applicant cannot take any advantage on the basis of the said order to claim any ownership right in the property of the corporate debtor.

33. The ld counsel for the SRA has further argued that the Applicant has deliberately concealed from this Tribunal, information regarding its Securitization Application *(being S. A. No. 1 of 2014)* ("Securitization Application") under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") filed before the DRT. The Securitization Application, *inter alia,* challenged the measures initiated by ARCIL against the Corporate Debtor before the DRT, for enforcement of ARCIL's security interest in the said Hotel. In the Securitization Application, the Applicant asserted that it possessed a valid right, title, ownership and interest in the said Hotel in view of the said Agreements. The Applicant accordingly opposed the enforcement of ARCIL's security over the said Hotel. The DRT *vide* its reasoned Order dated 28th January 2016 ("DRT Order") dismissed the Securitization Application *inter alia* holding that the Applicant does not have any ownership, right, title or interest in the said Hotel. The ld counsel for the SRA has further pointed out that aggrieved by the reasoned order of the DRT, the Applicant contested the DRT Order by filing Appeal No. 128 of 2016 ("DRAT Appeal") before the Hon'ble Debts Recovery Appellate Tribunal at Mumbai ("DRAT"). The Hon'ble DRAT dismissed the appeal vide order dated 17th March 2023

("DRAT Order"), holding that there were no infirmities in the DRT Order. The Hon'ble DRAT, reiterating the DRT Order's findings, emphasized that ARCIL, the Secured Financial Creditor of the Corporate Debtor, was not a party to the said Agreements and thus not bound by them. Moreover, the Corporate Debtor, as per the said Agreement, failed to secure the NOC from the Consortium and further that the said Agreements, characterized as development agreements, do not confer any proprietary rights on the Applicant over the said Hotel. It has been submitted that the instant IA is nothing but a second bite at the cherry by seeking to obtain reliefs from this Hon'ble Tribunal, which the Hon'ble DRT and DRAT previously refused to grant.

34. The ld counsel for the SRA has further argued that the Applicant cannot seek specific performance of the agreements as it has chosen to make a monetary claim in relation to its claims in the arbitration proceedings against the Corporate Debtor. The Applicant filed a claim form as a Financial Creditor on 13th October 2022. Vide email dated 2nd November 2022, the Resolution Professional stated that the Applicant's claim was not a 'financial debt' under the Code and it was asked to file its claim in the appropriate form. The Applicant did not object or contest/ challenge the rejection of its claim as a Financial Creditor and/or the constitution of the COC till January 2024. Thereafter, the Applicant *vide* Claim Form-F dated 6th December 2022, *suo motu* filed its claim under the category of 'Other Creditor'. In its Claim Form-F, NLL also claimed damages in lieu of specific performance to

the tune of Rs. 2,359,21,99,310/-. The Applicant's Claim Form F subsequently came to be admitted only partially by the Resolution Professional to the extent of Rs. 30,60,00,000/-. The claim for damages in lieu of specific performance was allowed for a notional and contingent amount of Re. 1 which was not challenged by the Applicant at all.

35. It has been further argued by the ld counsel for the SRA that the contention raised on behalf of the Applicant that the resolution plan cannot seek to terminate agreements that have created legal rights in third parties without adhering to due process of law is also fallacious. In this regard, it has been submitted that it is an admitted fact that the Corporate Debtor never obtained the NOC from the Consortium, which was a mandatory condition precedent to the said Agreements. Further, no steps were taken by the Applicant for over 10 years to claim any rights under the said Agreements by initiating *de novo* arbitration. Besides, the Applicant has consciously elected to pursue a monetary claim, encompassing damages as an alternative to specific performance of the said Agreements, in the CIRP of the Corporate Debtor.

36. Ld Counsel for the CoC has argued that the Applicant *does not have any right, title or interest in the said Hotel and has wrongly sought directions against the COC* It appears that the Applicant's IA is limited to certain reliefs primarily seeking directions against the COC to not accept any resolution plan which does not adequately protect NLL's purported rights, title, and interest in the said Hotel. However, NLL

has chosen to not make COC a party to the NLL IA. Therefore, such a request is unfounded and goes against established legal principles in India. Even otherwise the approval of a resolution plan for the revival of the Corporate Debtor is the sole and exclusive prerogative and domain of the COC and cannot be interfered with by the exercise of any powers by this Tribunal. The Adjudicating Authority's responsibility is limited to ensuring that the resolution plan aligns with the provisions of Section 30 of the IBC.

37. We have considered the aforesaid contentions raised by the Counsel for the parties and have also carefully gone through the records.

38. Primarily by way of this Application, the Applicant is seeking to issue directions against the Respondents to the effect that the Applicant has a subsisting right, title and interest in the Hotel property of the Corporate Debtor to the extent of 2,50,000 sq. feet and in this regard, the Hon'ble High Court of Bombay has also granted an injunction order dated 27.11.2013 against creation of any third party rights in the said property. The Applicant further seeks directions against the Respondent no. 2 (SRA) to suitably amend/revise its Resolution Plan acknowledging the Applicants right, title and interest in the said Hotel. The Applicant has further claimed that in case the title of the Applicant is not acknowledged by the SRA, in that event the Resolution Plan of the SRA is liable to be rejected on this ground alone. The Applicant has further sought a direction against the RP to supply him a copy of the Resolution Plan.

39. The claim of the Applicant is that vide Heads of agreement dated 29.03.2003, supplementary Heads of agreement dated 31.03.2003 and a Memorandum of Understanding dated 11.06.2003, which culminated into agreement dated 21.06.2003 and a supplementary agreement dated 17.10.2003, it was agreed between the parties that a development of 200000 sq. feet Municipal built up area as a shopping mall would be carried out on the ground and first floor of the Hotel and development of 50,000 sq. feet of built up area as super market would be carried out in the basement of the hotel. As per the terms of the agreement, the Applicant was to pay sum of Rs. 30 crores to the Corporate Debtor and out of 2,50,000 sq. feet the Applicant would be entitled to 1,25,000 sq. feet of the built-up area in the shopping mall and the super market. It is also not disputed that the Applicant paid Rs. 30.60 crores between March 2003 and September 2004. As per the terms and condition of the agreement, the Corporate Debtor was to obtain an NoC from the banks who had extended loans to the Corporate Debtor. The Corporate Debtor was further required to obtain approval of the building plans from the Municipal Corporation.

40. However, the Corporate Debtor failed to obtain the NoC from the banks and also the approvals from the Municipal Corporation. As a result, the Applicant filed an Arbitration Petition no. 100 of 2005 u/s 9 with the Hon'ble High Court of Bombay whereby an injunction order was passed restraining the Corporate Debtor from creating any third-party rights in the Hotel property and vide order dated

27.09.2005 the dispute was referred to Arbitration whereby the Applicant, inter alia, had sought the specific performance of the Agreements. Subsequently, the Arbitrator passed the award dated 08.02.2013 whereby the relief of specific performance of the agreement was declined and instead, the Corporate Debtor was directed to pay a sum of Rs. 19.60 crores to the Applicant together with interest.

41. The award was challenged by the Applicant by filing Arbitration Petition no. 891 of 2013 u/s 34 of the Arbitration and Reconciliation Act, 1996 and the Hon'ble Single Judge of the Hon'ble High Court of Bombay was pleased to set aside the award dated 08.02.2013 vide order dated 27.11.2013 whereby the interim injunction was also continued.

42. Against the backdrop of above referred facts, it has to be seen as to whether the reliefs sought by the Applicant in the IA can be granted or not.

43. It is pertinent to mention that after the passing of the order dated 08.02.2013 by the Hon'ble High Court of Bombay, whereby the award was set aside, the Applicant has not initiated any fresh Arbitration proceedings even after a lapse of more than ten years. A perusal of the order dated 08.02.2013 of the Hon'ble High Court of Bombay reveals that the award was set aside in toto. Initially, the Arbitrator had declined the reliefs of specific performance of the agreement and had granted the relief of refund of the amount of 19.60 crores with interest. In proceedings u/s 34 of the Arbitration and Reconciliation Act, 1996, though the Hon'ble High Court of Bombay set aside the findings with regard to non-grant of

relief of specific performance but at the same time, the said relief was also not specifically granted. The Award with regard to repayment of money was also set aside. Therefore, the necessary implication of the order dated 27.11.2013 was that a fresh Arbitration was to be initiated and in the meanwhile, no third-party interest was to be created in the property in question. However, surprisingly, the Applicant did not take any steps to re-initiate the Arbitration proceedings to get the dispute adjudicated afresh through arbitration and kept sitting on the injunction order passed by the Hon'ble High Court of Bombay. The said injunction order was meant and intended to protect the rights of the Applicant, if any, in the property in question only till such time the rights of the parties were decided finally. The Applicant itself has not filed any appeal against the order dated 27.11.2013 though an appeal has been preferred by the Corporate Debtor, which is stated to be pending for adjudication. No stay order is shown to have been issued by the Hon'ble High Court of Bombay in the appeal filed u/s 37 of the Arbitration and Reconciliation Act, 1996 filed by the Corporate Debtor. Therefore, it was always open to the Applicant to have re-initiated the Arbitration proceedings without waiting for the outcome of the Appeal u/s 37 of the Arbitration and Reconciliation Act, 1996. That being so, in our considered view, an adverse inference has to be drawn against the Applicant for not taking steps to get the matter adjudicated afresh from the Arbitrator and against this backdrop the injunction order issued by the Hon'ble High Court of Bombay against creation of third party interest in the

property in question cannot be treated as a perennial order to remain in vogue for all times to come.

44. Admittedly, the Applicant has already filed a claim with the RP which has since been admitted to the tune of Rs. 30.60 crores after the Corporate Debtor went into CIRP. As rightly pointed out by the Counsel for the RP, the Applicant lodged a monetary claim of INR 24,88,05,85,063/- out of which the RP verified and admitted an amount of INR 30.60 crores and the remaining amount of INR 23,59,21,99,310/- claimed as damages, has been admitted at a notional value of Rs. 1, being a contingent claim as currently the dispute is pending before the Hon'ble High Court. It has also been pointed out that the Applicant did not challenge the verification of the claim till the approval of the Resolution Plan by the CoC. Therefore, it has been rightly pointed out by the Counsel for the Respondent nos. 1 and 2, once the claim for payment of outstanding dues of 30.60 crores and for damages was filed by the Applicant with the RP, which has been admitted also, the Applicant cannot be heard harping that the property of the Corporate Debtor cannot be dealt with in any manner in the Resolution Plan or that no third party rights can be created in the said property in the light of the so called agreements in favour of the Applicant. Here one cannot be oblivious of the fact that the CIRP was initiated by the Financial Creditor to resolve its outstanding financial debts under the IBC. Since the Financial Creditor was not a party to the Agreements between the Applicant and the Corporate Debtor, it cannot be said to

be bound by the terms of the Agreement or by the outcome of the litigation which took place between the applicant and the Corporate Debtor.

45. The Applicant is alleging title over an area of 1,25,000 sq. feet on the basis of the agreements executed with the Corporate Debtor. However, it is not disputed that in the agreements itself, there was a specific condition that the Applicant's rights would be subject to certain obligations on the part of the Corporate Debtor which was required to obtain a NoC from the Consortium of its lenders. The Applicant was conscious and cognizant while entering into the agreements with the Corporate Debtor that the Hotel stood mortgaged to the Consortium and further that the consortium would not issue any NoC unless and until its dues were discharged by the Corporate Debtor. As the NoC was not issued by the Consortium of lenders, the agreements never fructified. Therefore, the Applicant having been fully conscious of the charge of the Consortium over the properties of the Hotel cannot now claim a clear title over the property in question in utter disregard of the rights of the Consortium of Lenders nor the rights of the secured Financial Creditors to resolve the debt can in any way be curtailed by the pending litigation between the Applicant and the Corporate Debtor.

46. It has also been argued on behalf of the Applicant that the Resolution Plan of Respondent no. 2 would not pass muster u/s 31 of the IB Code, 2016 if it will have the effect of terminating/obliterating the agreements in favour of the Applicant. According to the Counsel for the Applicant, valid agreements executed between

the parties cannot be terminated by way of the Resolution Plan by creating third party rights in the property. In support of this contention, the Ld. Counsel for the Applicant has relied upon ***Standard Charter Bank vs. Ruchi Soya Industry Limited (Supra)*** whereby it has been held that the Resolution Applicant cannot have any right of unilaterally modifying/changing or terminating any contract and further that the Resolution Applicant may do so only as per the process of law. The Counsel for the Applicant has further relied upon ***IMICL Dighi Maritime Limited vs. DBM Geotechnics and Constructions Private Limited*** whereby also it was held that approval of plan cannot have the effect of extinguishing or curtailing the rights of third parties.

47. Having thoughtfully considered the aforesaid contentions, we are of the considered view that by way of the proposed Resolution Plan, the agreements in favour of the Applicant are neither being modified nor extinguished. In this context, it is worthwhile mention that on the basis of the agreements in question, legally speaking, no title stands created in favour of the Applicant. The relief of specific performance, which was claimed by the Applicant in the arbitration proceedings stands declined and only relief of recovery of money was granted by way of the award which has since been set aside by the Hon'ble High Court of Bombay. The Applicant has not preferred any appeal nor has initiated any fresh arbitral proceedings till date even after a period of ten years when the claim for specific performance was rejected. In addition to this, the Applicant voluntarily filed a

claim with the RP vide claim Form-F dated 06.12.2022 in the capacity of other creditor as the claim earlier filed by the applicant in the capacity of a Financial Creditor was not allowed by the RP and the said decision of the RP was not contested or challenged by the Applicant at all. As stated above, the claim of the Applicant has been admitted partially to the extent of Rs. 30.60 Crores while the remaining part of the claim has also been admitted notionally for a tentative amount of Rs. 1/- being a contingent claim in respect of the damages claimed by the Applicant. Against the backdrop these facts, it emerges that having filed a claim for the refund of the advance amount and also for damages and compensation in respect of the alleged non-performance of the contract by the Corporate Debtor, the Applicant cannot be envisaged to have been left with any claim of seeking specific performance of the agreements in question which by themselves do not confer any title in favour of the Applicant in the Hotel property which was already subject to a charge and mortgage created in favour of the Financial Creditors of the Corporate Debtor who admittedly never issued the NoC to the Corporate Debtor to go ahead and implement the terms and conditions of the agreement in favourt of the Applicant. Since the claims lodged by the Applicant on the basis of the agreement with the RP are being dealt with appropriately in the Resolution Plan, in the given situation, it cannot be said by any stretch of imagination that the agreements in favour of the Applicant are being terminated or extinguished by way of the Resolution Plan in violation of the provisions of Section 31 of the IB Code,

2016. In the light of the peculiar facts and circumstances of this case, the afore cited case law relied upon the Ld. Counsel for the Applicant can also not be applied to the facts and circumstances of the case.

48. The Counsel for the Applicant has further argued that the Applicant is a Financial Creditor having advanced an amount of Rs. 30.60 crores to the Corporate Debtor which was to be utilized for repayment of dues to the Consortium of lenders of the Corporate Debtor. It has also been argued that the Corporate Debtor is a commercial establishment and by virtue of the agreements in favour of the Applicant, the Corporate Debtor intended to convert the commercial establishment into a Real Estate project and a shopping mall and, therefore, the Applicant is liable to be treated as an allottee u/s 2(d) of the Real Estate (Regulation and Development) Act, 2016. The Counsel for the Applicant has further contended that being an allottee, the Applicant is also squarely covered under the definition of the Financial Creditor as per 5(8)(f) of the IBC, 2016.

49. We have considered the aforesaid contentions raised by the Counsel for the Applicant but find it arduous to concur with the same. Section 2(d) of RERA defines an allottee to be a person to whom a plot, apartment or building has been allotted/sold or otherwise transferred by the promoter and also includes the person who subsequently acquires the said allotment through sale, transfer or otherwise. In our considered view, no part of the properties of the Hotel was ever transferred, sold or allotted to the Applicant. Therefore, on the basis of the agreements in

question the Applicant cannot either be treated as an allottee or a homebuyer nor a Financial Creditor. Here one cannot be oblivious of the fact that the agreements in favour of the Applicant were subject to and issuance of an NoC by the lenders of the Corporate Debtor which admittedly was never issued. Besides, it is clearly recorded in the agreement itself that the rights of the Applicant shall be in the nature of a lease, or such other form as may be acceptable to the Applicant subject to the approval of Consortium to the bank which was never granted. Therefore, the Applicant cannot be considered to be an allottee in terms of Section 2(d) of RERA nor can it be treated as a Financial Creditor in terms of Section 5(8)(f) of the IB Code, 2016.

50. It has also been vehemently argued by the Counsel for the Applicant that the Applicant is entitled to be supplied with a copy of the Resolution Plan. More so when in the affidavit in reply dated 31.07.2013 filed by Respondent no. 2 (SRA), it is specifically stated that the copy of the Resolution Plan is annexed whereas in the copy of the reply supplied to the Applicant, no copy of the Resolution Plan was found attached. The Counsel for the Applicant has further argued that even otherwise the Applicant is required to be supplied with all the documents on the basis of principles of natural justice and fair play. The Counsel for the Applicant has relied upon ***Reliance Industries vs. SEBI (2022) 10 SCC 181*** whereby it has been held that for a fair trial, there should not be any opaqueness and all parties should be kept abreast of all information.

51. Even the aforesaid contentions raised by the Counsel for the Applicant does not appear to be tenable. In ***State Bank of India vs. Jet Airways Limited 2021 SCC Online NCLT 50*** it has been held that the statutory mandate requires that Resolution Plan can be presented to the CoC for their approval and further that the Code or the Regulations thereunder do not contemplate presentation or supply of the Resolution Plan or a copy thereof to any other body or entity. Therefore, the Applicant cannot be held entitled to a copy of the Resolution Plan when he is neither a Financial Creditor nor a Member of the CoC.

52. It has been rightly pointed by the Counsel for the Respondent that during the course of proceedings u/s 17 of the SARFAESI Act, 2002 initiated by the Applicant before DRT challenging the measures initiated by ARCIL against the Corporate Debtor, it was asserted by the Applicant that it possessed right, title and interest in the Hotel on the basis of the agreement in question and on that ground the Applicant opposed the enforcement of ARCIL's security interest over the property of the Corporate Debtor. However, the DRT vide its order dated 28.01.2016 dismissed the Application filed by the Applicant holding that it does not have any ownership rights in the said Hotel on the premise that the agreements were subject to fulfilment of mandatory obligation on the part of the Corporate Debtor in obtaining NoC from the Consortium which was never given and further that the Applicant entered into the agreements knowing fully well that the properties were mortgaged to several banks and financial institutions and further

that any findings recorded in the arbitration proceedings were not binding upon the ARCIL nor on that ground the security interest of ARCIL can be diluted at the instance of the Applicant. It has also been pointed out that the Applicant challenged the order of DRT by filing an appeal with DRAT Mumbai which was also dismissed vide order dated 17.03.2023. Even the Hon'ble DRAT held that no charge was ever created over the Hotel properties of the Corporate Debtor in favour of the Applicant under the agreements in question and, therefore, the Applicant cannot stand in the way of the Secured Financial Creditors in recovering the outstanding dues from the Corporate Debtor. It is worth mentioning that while filing the Application under consideration, the Applicant has not disclosed anything about the orders of DRT and DRAT deliberately and on this ground also, an adverse inference ought to be drawn against the Applicant.

53. No other points have been urged on behalf of the Applicant.

54. In the light of the above discussion we are of the considered view that no directions can be issued to the CoC to consider only those plans which provide for protection of right, title and interest of the Applicant in the property of the Corporate Debtor on the basis of the agreements in question. Therefore, the **IA 3088 of 2023** is **dismissed** being devoid of any merit.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)