# NATIONAL COMPANY LAW APPELLATE TRIBUNAL
# PRINCIPAL BENCH, NEW DELHI

**Company Appeal (AT) (Insolvency) No. 1008 of 2023**

[Arising out of order dated 25.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench – IV), in CP (IB) No.1185/MB-IV/2022]

**IN THE MATTER OF:**

**Mr. Atul Nathalal Patel,**
Erstwhile-Managing Director,
Atul Projects India Private Limited.,
Having address at - 37, Aakashdeep,
N. S. Road No. 5, J.V.P.D. Scheme,
Vile Parle (West), Mumbai - 400 056
Email: atulpatel@atulprojects.com **...Appellant**

**Versus**

**1. Mr. Manish Pardasani,**
102, Sani Arma, Raut Lane,
ISKON Temple, Juhu Vile Parle (West),
Mumbai - 400 049
Email: mumbaiwines@yahoo.co.in **...Respondent No. 1**

**2. Mr. Savinder Lamba**
102, Sani Arma, Raut Lane,
ISKON Temple, Juhu Vile Parle (West),
Mumbai - 400 049
Email: mumbaiwines@yahoo.co.in **...Respondent No. 2**

**3. Mr. Kulbir Rekhi**
102, Sani Arma, Raut Lane,
ISKON Temple, Juhu Vile Parle (West),
Mumbai - 400 049
Email: mumbaiwines@yahoo.co.in **...Respondent No. 3**

**4. Mr. Ashish Kanodia,**
**Interim Resolution Professional of**
**Atul Projects India Private Limited**
5, Hetal Apt, 1st Floor,
Above Arti Scan Centre,
N. S. Road, Mulund(W),
Mumbai City, Maharashtra, 400080
Email: ashishkanodia@abnjca.com **...Respondent No. 4**

**5. Mr. Ashish Kanodia,**
5, Hetal Apt, 1st Floor,
Above Arti Scan Centre,
N. S. Road, Mulund(W),
Mumbai City, Maharashtra, 400080
Email: ashishkanodia@abnjca.com **...Respondent No. 5**

**Present:**

**For Appellant : Mr. Krishnendu Dutta & Mr. Abhijeet Sinha, Sr. Advocates with Mr. Varun Kalra, Mr. Samir Malik, Ms. Niharika Sharma and Mr. Shahan Ulla, Advocates.**

**For Respondent : Mr. Gautam Singhal, Mr. Rajat Chaudhary and Ms. Kanika Balhara, Advocates for R-4.**

**Mr. Gaurav Behl, Mr. Ajit N. Makhijani and Mr. Raghav Kakkar, Advocates for R-1 to R-3.**

**Mr. Tejas Misha and Ms. Shivali Nilotpal Shyam, Advocates for R-5.**

## J U D G M E N T

**ASHOK BHUSHAN, J.**

This Appeal has been filed challenging the Order dated 25.07.2023 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench – IV) admitting a Section 7 Application filed by the Respondents No. 1 to 3 herein. The Appellant, Suspended Director of the Corporate Debtor, Atul Projects India Private Limited, aggrieved by the Order has come up in this Appeal.

**2.** Brief facts of the case necessary to be noticed for deciding the Appeal are:

i. A Memorandum of Understanding (MoU) was entered on 16.05.2010 between the Owners and M/s. Atul Projects India Private Ltd., the

Developers for redevelopment of Project on the piece of land admeasuring 576.93 $m^2$, Malabar and Cumbula Hill Division Mumbai.

ii. Under the MoU, the Developer had proposed to pay amount of ₹9.40 Crores to Owners and ₹3.5 Crores to the Confirming Parties, detailed terms and conditions for carrying out the redevelopment and payment as well as details of total 22 floors to be redeveloped was contained in the MoU.

iii. Thakkars, namely Deepak Vinod Thakkar and Prashant Vinod Thakkar entered with Articles of Understanding (AoU) with the Developers who desired to jointly redevelop the Project.

iv. AoU was also executed on same date 16.05.2023. Under the AoU, Developers were entitled to sell/dispose of 4 entire floors of the new building and Thakkars were entitled to sell/dispose of 2 entire floors, namely, 18th and 19th floor in the new building. Thakkars were liable to get investment of ₹6 Crores which shall be paid to the Developer. ₹50 lakhs was investment paid by Thakkars and the amount of ₹6.5 Crores was supposed to be used by Developer to pay the Owners and Confirming Parties, the respective shares of ₹3 Crores and ₹3.5 Crores.

v. The AoU further noticed that Thakkars did not have requisite initial investment, hence it was agreed that they can obtain the same from Investors i.e., Respondents No. 1 to 3 to the Appeal.

vi. Thakkars entered into Articles of Agreement (AoA) on the same day dated 16.05.2010 with Respondents No. 1 to 3, the Investors which contemplated the Developer was Confirming Party.

vii. The AoA contemplated that Vendors i.e., Thakkars could be liable to get initial investment of ₹6 Crores and in lieu of payment of ₹6Crores, Investor shall be entitled for allotment of 18th floor out of 2 floors of the Vendors. The amount of ₹6 Crores was to be paid by Investors on behalf of the Vendors to the Developers.

viii. The Developers were to utilise the amount as per the MoU. It was further agreed that in event the Developer failed to comply with these obligation and other terms and conditions or fail to enter into Development Agreement with the Owners within 6 months from date of execution of AoA, then a grace period of 1 month will be provided to the Developers. The Investor shall have an option to terminate the Agreement and Developer shall return the sum of ₹3 Crores to the Investor along with interest @ 18% p.a. within 15 days of the Investor making demand of the same in writing to the Developers.

ix. The amount of ₹3 Crore was paid by the Investors on behalf of the Vendors i.e. Thakkars to the Developers. Due to some dispute with the Owners, the redevelopment could not begin.

x. On 04.11.2011, the Corporate Debtor returned an amount of ₹1.3 Crores to the Respondents No. 1 to 3. The Developer also paid certain amount to Thakkars out of ₹3 Crores received from the Investors.

xi. Appellant's case is that amount of ₹1.95 Crore was paid to the Thakkars. The entire debt of ₹3 Crore given by Investors were paid. The project did not commence. The Corporate Debtor send a Complaint dated 04.07.2019 to the Senior Police Inspector, giving the details of transactions entered between the Developers, Deepak Vinod Thakkar and Prashant Vinod Thakkar. The Complaint mentioned that amount paid to the Investors payments were made to the Owner of ₹3 Crores. On request of the Investor, amount of 1.3 Crore was returned.

xii. It was stated by the Appellant that Investors got their full money refund but Appellant came to know that Investors amount taken from Appellant by Thakkars have not given to Investors. Request was made to register a case against the Vendors who have received the money to pay to Investor and have not paid.

xiii. The copy of the Complaint was also forwarded to Respondents No. 1 to 3. Respondents No. 1 to 3 after receiving the complaint sent a Legal Notice dated 30.07.2019 to the Appellant stating that only amount of ₹1.3 Crores was received by Investors till date and no further amount of ₹3 Crores have been received and total outstanding as on 28.07.2019 is ₹5,96,36,330/-. Agreement dated 16.05.2010 was terminated with immediate effect.

xiv. A Reply was sent to the said Legal Notice by the Corporate Debtor refuting any liability to pay any amount to the Respondents No. 1 to 3. It is stated that amount of ₹1.3 Crores was paid to the Respondent and

rest of ₹1.7 Crores was paid to the Thakkars, last trench of payment was made to the Thakkars on 06.04.2014.

xv. It was further pleaded that any claim of the Respondents No. 1 to 3 is not due on the Corporate Debtor and claim if any may be against Thakkars only. It was also stated that Thakkars and Respondents No. 1 to 3 are in connivance.

xvi. On 20.09.2019 again Reply was sent on behalf of the Respondents No. 1 to 3 to the Interim Reply dated 08.08.2019 and Reply dated 16.08.2019. The Respondents No. 1 to 3 issued a Demand Notice dated 05.04.2022 demanding an amount of ₹7,16,19,262/-.

xvii. After sending the Demand Notice there were further correspondence between the Parties. Respondents No. 1 to 3 filed an Application under Section 7 against the Corporate Debtor, claiming an amount of ₹7,28,09,697/-. Date of Default in Part IV is mentioned as 30.07.2019. In Section 7 Application, Notice was issued to the Corporate Debtor. Corporate Debtor filed its Reply dated 06.12.2022. A Rejoinder and Sur-Rejoinder was also filed. Adjudicating Authority after hearing the Parties, admitted Section 7 Application. Adjudicating Authority returned a finding that Corporate Debtor owes a Financial Debt in excess of ₹1 Crore which is in default, hence the Application deserves to be admitted. The objection raised by the Corporate Debtor that the Application is barred by limitation was overruled.

xviii. Challenging the Order admitting Section 7 Application, this Appeal has been filed.

**3.** Appeal came to be heard by this Tribunal on 02.08.2023 when we heard Learned Counsel for the Appellant as well as Learned Counsel for the Financial Creditor and a detailed Order dated 02.08.2023, while issuing Notice and staying the Impugned Order was passed, which is as follows:

> ***"02.08.2023:*** *Heard Shri Krishnendu Datta, Learned Senior Counsel for the Appellant and Shri Virender Ganda, Learned Senior Counsel for the Respondents. 2. This Appeal has been filed against the order dated 25.07.2023 by which order the Adjudicating Authority has admitted Section 7 Application filed by the Financial Creditor Respondent Nos.1 to 3. There was an agreement between the Appellant who was Developers with Thakkars on 16.05.2010. Three agreements were executed on the same day in which the Developers were confirming party on the second agreement. Under the agreement, it was decided that the developer will develop the property in joint venture with the Thakkars and Thakkars for raising the investment has agreed with the investors that investors will invest an amount of Rs.6 Crores out of which Rs.3 Crores was advance for development. Agreement further contemplated that in event the development is not carried out within six months from the date of agreement then a grace period of one month shall be provided to the developers and even if developers fail to enter into agreement, investors shall have option to terminate the instant agreement and developers will return the amount with 18% interest. Developers admittedly has returned the amount of Rs.1.3 Crores and according to the case of the Appellant, amount of Rs.1.7 Crores was refunded in the years 2010 to 2014 to Thakkars and one entity as mentioned in the Appeal. It was submitted that the said amount was to be paid to the investors. The case of the Appellant is that after 2011 there was complete silence and when Appellant- Developer came to know that Thakkars have not paid amount to the investors a police complaint was filed on 04.07.2019 giving all the facts. It is submitted that this Application under Section*

*7 was filed by the investors, Financial Creditors on 11.08.2022. Reply was filed where apart from other pleas, plea of limitation was taken that Application was barred by time.*

*3. Adjudicating Authority has proceeded to admit the Application by the impugned order and has repelled the argument pertaining to limitation in paragraph 7.4, which is to the following effect:-*

> *"7.4. On the issue of limitation, this bench finds that date of default is stated as 30.07.2019. Accordingly, the period of three years expires on 29.07.2022. The financial creditor has relied upon the decision in the case of GPR Power Solutions (P) Ltd vs Supriyo Chaudhuri 2021 SCC Online SC 1328 wherein the Hon'ble Supreme Court held that in computing limitation for any application, the period from 22.03.2020 till 14.03.2021 is to be excluded. However, in this case the application was filed between these dates and accordingly the period of 90 days was allowed from after 14.03.2021 to determine the period of limitation. This bench has held in the case of Piramal Capital Housing Finance Limited Vs. Manpreet Developers Private Limited in CP.IB.700/2022 vide order dated 11.01.2023 that the whole period i.e. 15.03.2020 to 28.02.2022 shall be excluded for the purpose of determination of limitation. Following this decision, this bench finds that the petition is in limitation."*

*4. Learned Counsel for the Appellant submits that Application was clearly barred by time and Application was filed not for purpose for resolution but for other purposes to harass the developers.*

*5. Shri Virender Ganda, Learned Senior Counsel appearing for the Respondents submits that the cause of action to file Section 7 Application arose when the police complaint was filed on 04.07.2019 and agreement was terminated. It is submitted that the agreement was terminated on 30.07.2019, hence, application was filed within limitation.*

*6. We have considered the submissions of the Learned Counsel for the parties and perused the record.*

*7. The agreement was entered between the parties in the year 2010 and Rs.1.3 Crores was paid in the year 2011. It is not disputed that project did not proceed any*

*further and police complaint was filed by the developers when they came to know that amount of Rs.1.7 Crores which they have paid towards liquidating the entire investment has not been given to the investors- Financial Creditors. The Adjudicating Authority in paragraph 7.4, has prima facie misconstrued the judgment of the Hon'ble Supreme Court in Suo Motu Writ Petition. Admittedly, Application under Section 7 was filed on 11.08.2022, hence, present was not a case during which period benefit of limitation under Suo Motu Writ Petition was allowed by the Hon'ble Supreme Court i.e. till 28.02.2022 with 90 days' grace period in filing the Application. We further find substance in the submission of the Appellant that agreement did not proceed any further in 2010 and as per the agreement itself after 6 months + 1 month, cause of action to the Financial Creditor arose to take appropriate action for recovery of their money. It is submitted that cause of action shall not depend on the investors to excise their option after 9 years.*

*8. We prima facie find that Application filed under Section 7 ought not to have been admitted and case has been made out to issue notice in the Appeal.*

*9. Learned Counsel for the Appellant pointed out that IRP while giving his written consent to the Adjudicating Authority for acting as IRP in his letter dated 15.07.2022 has given the facts of the case and certified certain facts in his letter. We find that the said conduct of the IRP is wholly inappropriate. While giving the consent, IRP is not supposed to know the facts or give his own comments.*

*10. Let notice be issued to CA Ashish Kanodia who is permitted to be impleaded as Respondent No.5 to the Appeal. Shri Virender Ganda, Learned Senior Counsel appears and has made submission on behalf of Respondent Nos.1 to 3. Let amended memo be filed within three days.*

*11. Let 'Notice' be issued to Respondent No.4 through 'Speed Post'. Let the requisites together with process fee be filed within three days from today. The Appellant is required to provide the e-mail address of the Respondent No.4 and in that mode also, the service can be effected. The Appellant is also required to furnish the Mobile No. of the Respondent No.4 to the 'Office of the Registry'.*

*12. Let Reply be filed within three weeks. Rejoinder, if any, may be filed within two weeks thereafter.*

*13. In the facts of the present case, we also put notice to the Respondent Nos.1 to 3 to give a reply as to why they be not proceeded under Section 65 of the IBC Code.*

*14. List the Appeal on 20.09.2023.*

*In the meantime, the impugned order passed by the Adjudicating Authority shall remain stayed."*

**4.** We have heard Learned Counsel for the Appellant and Learned Counsel for the Financial Creditor and Learned Counsel appearing for the Interim Resolution Professional (IRP).

**5.** Learned Sr. Counsel, Mr. Krishnendu Dutta appearing for the Appellant submits that the present is a case where Financial Creditor has initiated a proceeding under Section 7 *mala fidely* whereas there was no debt existing to be paid by the Corporate Debtor to the Financial Creditor. It is submitted that under the AoA entered between Vendor, i.e., Thakkars and Developers, it was the Vendors i.e., Thakkars, who have to invest an amount of ₹6 Cores, in view of which investment of 2 floors of the building which is to be redeveloped was allotted to them. Vendors were entitled to obtain finance by Investor, which Investor was allotted 18 floors out of the share of the Vendors i.e., Thakkars. The AoA was entered between Thakkars, and the Investors in which document Corporate Debtor was only Confirming Parties. The financial facilities were obtained by Vendors from the Investors and there was no financial transaction between Developers and Investors. Developers were only a Confirming Party to the AoA. It is submitted that payment of ₹1.3 Crores to the Investors by Developers is undisputed. The rest of the amount was also

paid by the Developers to Thakkars, which payments were made till 2014. It is submitted that at no point of time, the Investors made any demand from the Corporate Debtor of any balance amount. Payments having already been received by Thakkars of the balance amount for payment to the Investors, there was no debt or default on the part of the Developers. It is submitted that when the Developers came to know that amount received from Developers by Vendors, i.e., Thakkars have not been paid to the Investors, a Police Complaint was filed by the Developers himself on 04.07.2019 complaining the acts of Vendors. It is submitted that Investors have filed Section 7 Application whereas neither there was debt nor there was any liability on the Developers. The Application filed by Financial Creditor was barred by time. The AoA dated 16.05.2010 clearly provided that in event the Developers failed to comply with their obligation within 6 months or failed to enter into Development Agreement with the Owners, a grace period of 1 month shall be provided. The Investors shall have an option to terminate the Agreement and the Developer was to return ₹3 Crores with interest. It is submitted that cause of action arose to the Investors after 7 months and they having admitted payment of ₹1.3 Crores in their letter by 15.10.2011. The cause of action arose to in 2011 itself when according to the Financial Creditor balance amount was not paid. The filing of the Application Section 7 Application in the year 2022 is nothing but abuse of process of Court and has been *mala fidely* and fraudulently initiated for purposes other than resolution of Corporate Debtor. Adjudicating Authority committed an error in holding the Application within time. The date of default mentioned in Section 7 Application, i.e., 30.07.2019 cannot be date

of default nor date of default can depend on the sweet will of the Investor as to when they decide to ask for balance payment as claimed by them. Cause of action arose to the Investors to take steps for refund of their amount after 7 months from execution of the AoA and in any event by 15.10.2011, where amount of only ₹1.3 Crores was received. In any view of the matter, the payment of ₹1.7 Crores has also been made by the Appellant which payments are supported by Bank Statements. The Financial Creditor having paid entire amount of ₹3 Crores, which was received by the Developers having been paid back, neither any debt is due, nor any default has been committed by the Appellant. The Respondents are liable to be prosecuted under Section 65 they having *mala fidely* and fraudulently filed the Section 7, and penalty be imposed upon them.

**6.** Learned Counsel appearing for the Respondents No. 1 to 3 submits that amount of ₹3 Crores was paid by the Investor to the Developer which fact is not disputed. The Investors have received back only 1.3 Crores which is also acknowledged by the Financial Creditor on 15.10.2011. No payments thereafter have been received by the Financial Creditor and the Appellant's case that 1.7 Crores was paid to the Vendors i.e., Thakkars on behalf of the Investors is incorrect. No proof of payments of ₹1.7 Crores as alleged by the Appellant has been brought on record, showing any payment to the Investors. Even the payments as referred to in Paragraph 7(n) of the Appeal are not payments to the Investors, and the said payments cannot be said to be in addition to payment of ₹1.3 Crores as claimed by the Appellant. The aforesaid payment of ₹1.7 Crores as claimed by the Appellant were made prior to

payment of ₹1 Crore 30 Lakhs. The Corporate Debtor confirmed and accepted the letter dated 15.10.2011, which mentions payment of only 1.3 Crores, had any other payment was made apart from ₹1.3 Crores Corporate Debtor in normal course ought to have objected the figure of ₹1.3 Crores. According to the Police Complaint filed by the Developers allegation is that Thakkars had paid foul with the Corporate Debtor in respect of payment which was made to the Investors. The Appellant cannot be allowed to take any contrary stand that he has discharged the rest of the amount. It is submitted that Corporate Debtor is in continuous obligation, hence the Petition cannot be said to be barred by time. Learned Counsel for Respondents No. 1 to 3 submits that under the AoA, there was option with the Investor to terminate the Agreement and demand the payment with 18% interest which option was exercised by Investor on 30.07.2019, hence the cause of action to take proceeding against the Developers arose only on 30.07.2019 and a Section 7 Application which was filed on 11.08.2022 was well within time. Learned Counsel for the Respondent has also referred to the Judgment of the Hon'ble Supreme Court in the matter of ***`RE: COGNIZANCE FOR EXTENSION OF LIMITATION'*** reported in ***Suo Moto Writ Petition (Civil) No. 03/2020.*** It is submitted that there is no whisper of malicious prosecution by the Respondents No. 1 to 3 before the Adjudicating Authority and no case under Section 65 was taken by the Corporate Debtor. Answering Respondent are the victim, hence the Adjudicating Authority rightly admitted Section 7 Application.

**7.** Learned Counsel for the IRP submits that `Form–2' of Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 provides

the option to Insolvency Professional to certify the facts averred by the Applicant. He submits that the certification given by the IRP to the facts was in exercise of the said option and it was done *bona fide* by the IRP and the Notice issued to the IRP may kindly be discharged.

**8.** From the submissions made by Counsel for the Parties and materials on record, following questions arise for consideration in this Appeal:

I. Whether Section 7 Application filed by Respondents No. 1 to 3, the Financial Creditor herein was barred by time?

II. In view of admission of Financial Creditor, that out of ₹3 Crores paid by the Financial Creditor to the Corporate Debtor, whether Corporate Debtor has able to prove discharge of liability of balance amount of ₹1.7 Crores?

III. Whether sufficient grounds have been made out to invoke Section 65 of the IBC for imposing any penalty on the Financial Creditor?

**Question No. I**

**9.** The Corporate Debtor in its Reply filed to Section 7 Application has specifically raised the plea of limitation, claiming that Application filed by the Financial Creditor is barred by time.

**10.** For considering the question of limitation, we need to first notice the three transactions as has been pleaded by the Financial Creditor in Section 7 Application relating to redevelopment of property in question. We proceed to notice the three transactions of the same date dated 16.05.2010 and the

relevant Clauses contained in the said transaction for answering the question of limitation for filing Section 7 Application.

**11.** The first transaction dated 16.05.2010 referred to as MoU was entered between the Owners, the Confirming Parties and the Developers, the Corporate Debtor M/s. Atul Projects India Private Limited being Developer. As per Clause 4 of the MoU in consideration of Owners appointing the Developers to redevelop the said property, Developers were to pay to the Owners sum of ₹9,40,00,000/-. Clause 4 of the MoU is as follows:

> *"4. In consideration of the Owners appointing the Developers to redevelop the said Property, the Developers shall pay to the Owners net sum of Rs.9,40,00,000/- (Rupees Nine crores fifty Forty lakhs only) which shall be paid in the following manner:-*
>
> > *(a) Rs.3,00,00,000/ - (Rupees Three crores only) paid by the Developers to the Owners on or before execution of this Memorandum of Understanding (the receipt whereof the Owners do hereby admit and acknowledge). The said amount has been deposited by the Developers with the Owners Advocates & Solicitors, M/s. Pravin Mehta And Mithi & Co., and the same shall remain deposited with them and shall be released with interest as provided in clause 5 upon the Developers making. the payment of the amount under sub-clause (b) hereinafter provided.*
> >
> > *(b) Rs.3,50,00,000/- (Rupees Three crores fifty lacs only) as provided in clause 5 on the Confirming Parties, (who are occupants of various premises in the said property being family members of Mr. Kikabhai Amarchand Dalai)* handing over vacant possession of their premises, in their respective occupation against the Developers entering into separate Agreement, setting out that the terms of payment of the compensation to such individual occupant tenant in lieu of Temporary Alternate Accommodation during the period of redevelopment of the said Property, and then handing over Permanent*

*Alternate Accommodation in the new building, to be constructed in the said Property.*

*(c) Rs.2,90,00,000/- (Rupees Two crores Ninety Lakhs only) as provided in clause 5 hereof on expiry of one year period from the date of handing over vacant possession of the premises by the occupants namely the family members of Mr. Kikabhai Arnarchand Dalai to the Developers as provided herein in Sub-Clause (b) hereinabove."*

**12.** Clause 5 of the MoU detailed the payments of ₹9.4 Crores. Clause 13 provided that Developer shall get the Plan sanctioned within a period of 6 months with a grace period of 1 month. In Clause 13, following is provided:

*"13. The Developers shall get the Plans sanctioned within a period of six months with a grace period of one month from the date hereof for the buildings proposed to be constructed…"*

**13.** On the same date, i.e., 16.05.2010, another Agreement was entered between the Developers, Deepak Vinod Thakkar and Prashant Vinod Thakkar, the Partners. The Agreement which is referred to as AoU. AoU recorded that the entire transaction between the Developers and Owners have been facilitated by Partners. It was agreed that Partners shall jointly develop the property and stake of Partners in the project shall be one-third. Partner shall also bring investment in the ratio of one-third and shall receive profit and loss in the same ratio. Clause 1 of the AoU is as follows:

*"01. It is hereby agreed by and between the parties hereto that the PARTNERS shall jointly redevelop the said Property along with the Developers in joint venture and that the stake of the PARTNERS in the said Project shall be forty percent accordingly in joint venture of the ratio of 1/3 : 2/3 (PARTNERS : Developers), the PARTNERS shall jointly redevelop the said Property and shall take active part in the said redevelopment. Investment always in the ratio as mentioned above 1/3 to 2/3 of Profit & Loss also in the same ratio."*

**14.** The AoU further noted that the Partner shall be entitled sell/dispose of deal with 18th and 19th floor in the new building and Partner has sold 18th floor to Investor. Clause 2 is as follows:

> *"02. It is hereby agreed by and between the parties hereto that after providing the Owners and Confirming Parties permanent alternate accommodation, the Developers shall be entitled to sell/dispose of / deal with at its discretion four entire floors of in the new building of not less than 1350 - 1400 square feet each of carpet area and the PARTNERS shall be entitled to sell/dispose of / deal with at their discretion two entire floors (namely the 19th and the 113')' floors) in the new building of not less than 1350 - 1400 square feet each of carpet area (apart from other usable areas on the specified floors or linked to the specified floors) along with the respective car decks for the respective floors (collectively referred to as "**the said Flats**"). The above mention 18th & 19th floor is the stairs of PARTNERS from which they have said, mention 18th floor to investor."*

**15.** Clause 3 provided that Partner shall be liable to get initial investment of ₹6 Crores, ₹3 Crores out of which was to be paid by the Developers to the Owners on execution of MoU. Clause 3 is as follows:

> *"03. It is hereby further agreed by the parties that the PARINERS shall be liable to get an initial investment of Rs.600,00,000/- (Rupees Six Crores only), which shall be paid to the Developers by the PARTNERS. On receipt of the said initial investment of Rs.600,00,000/- (Rupees Six Crores only) by the Developers from the PARTNERS in two stages, the Developers shall utilize the same along with the PARTNERS investment of Rs.50,00,000/- (Rupees Fifty Lakhs only) in the following manner in compliance of the said MOU, i.e.:*
>
> > *(a) Rs.3,00,00,000/- (Rupees Three Crores only) paid by the Developers to the Owners on the execution of the said MOU. The said amount has been deposited by the Developers with the Owners' Advocates & Solicitors, M/s. Pravin Mehta And Mithi & CO., and the same shall remain deposited with them and shall be released*

*with interest in terms of the said Memorandum of Understanding.*

*(b) Rs.3,50,00,000/- (Rupees Three Crores Fifty Lakhs only) on the Confirming Parties, (who are occupants of various premises in the said Property) handing over vacant possession of their premises, in their respective occupation against the Developers entering into separate Agreement, setting out that the terms of payment of the compensation to such individual occupant tenant in lieu of Temporary Alternate Accommodation during the period of redevelopment of the said Property, and then handing over Permanent Alternate Accommodation in the new building, to be constructed in the said Property."*

**16.** Clause 4 further contained an Agreement that Partners did not have the requisite initial investment, it was agreed by the Developers that Partners can obtain the same from Investor namely, Manish S. Pardasani, Mr. Savinder Singh Lamba and Mr. Kulbir Singh Rekhi, who agreed to pay aforesaid sum of ₹6 Crore in lieu of the 18th floor. Clause 4 of the AoU is as follows:

*"04. It is hereby agreed by and between the parties hereto that since the PARTNERS did not have the requisite initial investment, it was agreed by the Developers that the PARTNERS can obtain the same from the Investors, namely, Mr. Manish S. Pardasani, Mr. Savinder Singh Lamba and Mr. Kulbir Singh Rekhi, who agreed to pay the aforesaid sum of Rs.6,00,00,000/- (Rupees Six Crores only) in lieu of, eighteenth floor) in the same manner as to be paid hereinabove and in consonance of the said MOU."*

**17.** Clause 6 contained a stipulation that in event Project does not commence Investor shall be entitled to claim back the investment along with 18% p.a., which the Partners have agreed and guaranteed to return. Clause 6 is as follows:

*"06. It is hereby explicitly agreed and confirmed by and between the parties hereto that the Investors have*

*agreed to invest on the sole condition that under no circumstances the Investors shall be liable and/or exposed to any penalty and/or expenses and/or claim so imposed and/or incurred and/or sustained upon the Developers and/or the PARTNERS by any governmental authorities and/or concerned authorities and /or the Owners and/or the Confirming Parties whether under the said MOU or otherwise. In the event the said Project does not commence, then the Investors shall be entitled to claim back their investment along with 18 % interest per annum which the Partners have agreed and guaranteed to return."*

**18.** The third Agreement which was entered between the Deepak Vinod Thakkar and Prashant Vinod Thakkar (referred into the Agreement as Vendors) and Manish S. Pardasani, Savinder Singh Lamba and Kulbir Singh Rekhi as Investor, which Agreement notice MoU entered between the Developers and Owners. The Agreement further stipulates that Vendors has facilitated the entire transaction between the Developers and Owners. Agreement further notice as per AoU, Vendors would be liable to get initial investment of ₹6 Crores and Vendors do not have requisite initial investment, hence it per the agreed that same shall be obtained from Investors in lieu of 18th floor. Clause F of the AoA is as follows:

*"F. That vide the said AOU, it was further agreed that the VENDORS would be liable to get an initial investment of Rs.600,00,000/- (Rupees Six Crores only) and since the VENDORS do not have the requisite initial investment, it was agreed by the Developers that the VENDORS can obtain the same from the Investors who will pay the aforesaid sum of Rs.6,00,00,000/- (Rupees Six Crores only) in lieu of allotment of one floor out of the two floors of the VENDORS, i.e. being the entire eighteenth floor {apart from other usable areas on the specified floor (18th floor) or linked to the specified floor (18th floor)) along with the car deck for the 18th floor."*

**19.** Agreement further noted that initial investment of ₹6 Crores on behalf of Vendors to the Developers will be paid by the Investor. Clause 1 of the AoA notice the details and the manner of payment of ₹6 Crores. Clauses 1 & 2 are as follows:

> *"01. It is hereby agreed that the Investors shall pay the said initial investment of Rs.600,00;000/- (Rupees Six Crores only) on behalf of the VENDORS to the Developers, which the Developers shall utilize along with the VENDORS investment of Rs.50,00,000/- (Rupees Fifty Lakhs only) in the following manner in compliance of the said MOU, i.e.:*
>
> > *(a) a sum of Rs.3,00,00,000/- (Rupees Three Crores only) paid by the Developers to the Owners on the execution of the said MOU. The said amount has been deposited by the Developers with the Owners' Advocates & Solicitors, M/s. Pravin Mehta And Mithi & Co., and the same shall remain deposited with them and shall be released with interest in terms of the said MOU.*
> >
> > *(b) a sum of Rs.3,50,00,000/- (Rupees Three Crores Fifty Lakhs only) on the Confirming Parties, (who are occupants of various premises in the said Property) handing over vacant possession of their premises, in their respective occupation against the Developers entering into separate Agreement, setting out that the turns of payment of the compensation to such individual occupant tenant in lieu of Temporary Alternate Accommodation during the period of redevelopment of the said Property, and then handing over Permanent Alternate Accommodation in the new building, to be constructed in the said Property.*
>
> *02. It is hereby agreed that the said sum of Rs.600,00,000/- (Rupees Six Crores only) shall be paid by the Investors in the following manner:*
>
> > *(a) A sum of Rs.3,00,00,000/- (Rupees Three Crores only) shall be paid by the Investors to the Developers on the execution of the instant AOA;*
> >
> > *(b) The balance sum of Rs.3,00,00,000/- (Rupees Three Crores only) shall be paid by the Investors*

*to the Developers not latter than six months on the execution of the instant AOA, on simultaneously execution and registration of an Agreement for Sale for sale of the 18th floor as enumerated in clause 3 hereinafter."*

**20.** Now two Clauses which are important for the determination of issue of limitation are Clause 6 and Clause 8. Clause 6 provided that in event Developers failed to comply with its obligation or failed to enter into Development Agreement with the Owners within 6 months, then a grace period of 1 month shall be provided to the Developers, and in event the Developers failed to entered into Development Agreement, Investors shall have an option to terminate the Agreement and Developer shall return ₹3 Crores with interest of 18%. Clause 6 is as follows:

*"06. It is hereby agreed that in the event the Developers fail to comply with its obligations and the other terms and conditions of the said MOU and /or fails to enter into the Development Agreement with the Owners within six months from the date of execution of the instant AOA, then a grace period of one-month shall be provided to the Developers. In the event the Developers yet fail to enter into the Development Agreement within the grace period of one month, the Investors shall have an option to terminate the instant Agreement and the Developers shall return the sum of Rs.3,00,00,000/- (Rupees Three Crores only) to the Investors along with interest @ 18 % per annum within 15 days of the Investors making demand of the same in writing to the Developers."*

**21.** Clause 8 again contained an Agreement between the Parties that in the event of Project does not commence, Investors shall be entitled to claim back the interest along with 18% p.a. with the Developers which the Developers agreed and guaranteed to return. Clause 8 is as follows:

*"08. It is hereby explicitly agreed and confirmed by and between the parties hereto that the Investors have*

*agreed to invest on the sole condition that under no circumstances the Investors shall be liable and/or exposed to any penalty and/or expenses and/or claim so imposed and/or incurred and/or sustained upon the Developers and/or the VENDORS by any governmental authorities and/or concerned authorities and /or the Owners and/or the Confirming Parties whether under the said MOU or otherwise. In the event the said Project does not commence, then the Investors shall be entitled to claim back their investment along with 18 % interest per annum which the Developers have agreed and guaranteed to return."*

**22.** Class 12 provided that Developers and Vendors shall be equally and jointly and severely liable to the Investors towards the sum of ₹6 Crores.

**23.** From the facts brought on the record, it is clear that after payment of ₹3 Crores made by Investors which in turn was deposited with Advocates & Solicitors of the Owners as per the terms and conditions of MoU dated 16.05.2010. The fact of receipt of ₹3 Crores and deposit by the Developers is not denied. The Parties are also at Agreement that amount of ₹1.3 Crores was refunded by the Developers to the Investors by a cheque dated 15.10.2011, which was encashed on 04.11.2011.

**24.** The facts brought on record indicates that Project could not commence, the building Plan was neither approved within 6 months nor any further steps were taken towards redevelopment of the land. The case of the Corporate Debtor was that during the period that Project having not commenced, it was agreed between the Developers and Partners that the amount of Investor shall be refunded and the Developers has made a payment of ₹1 Crore 70 Lakhs to Deepak Vinod Thakkar and its Company for payment to Investors between 19.05.2010 to 06.04.2014. The admission of receipt of payment of ₹1.3 Crores

is reflected in letter dated 15.10.2011 claimed to be sent by Financial Creditor to Developers, which is part of record. There is no correspondence between the Parties after 15.10.2011 till the Corporate Debtor submitted a Police Complaint against the Thakkars on 04.07.2019. The Police Complaint 04.07.2019 triggered Legal Notices and replies between the Corporate Debtor and Investors ultimately leading to filing of Section 7 Application. We thus need to notice the Police Complaint dated 04.07.2019, which was submitted by the Corporate Debtor to the Senior Police Inspector, MIDC Police Station, Andheri East, Mumbai. The copy of Police Complaint 04.07.2019 is part of Section 7 Application. In Police Complaint, the Corporate Debtor has captured the transaction between the Parties. In the Police Complaint, Corporate Debtor has also stated about the different amount paid to Deepak Vinod Thakkar and his Vendors and his Company. It was pleaded that ₹1.3 Crores was directly refunded to Investor and ₹1.7 Crores to Investor through Vendors i.e., Thakkar. Thakkar's endorsement in cheque dated 04.06.2014 was also relied where Thakkar has accepted that amount on the cheque of ₹5 Lakhs dated 04.06.2014 has confirmed the receipt of ₹1.95 Crores which includes ₹1.7 Crores to refund to his friend. In the Police Complaint, Corporate Debtor after noticing the Agreement between the Parties noticed that ₹3 Crores was paid and out of ₹3 Crores, ₹1.3 Crores was returned on 10.10.2011 and amount of ₹1.7 Cores was paid to Deepak Vinod Thakkar and his Company. Following statement in the Complaint is relevant to notice:

> *"…As per Schedule Rs. 3 Crore was paid on execution of Articles of Agreement.*

*Clause 13, Page 9 it is hereby expressly agreed by Vendors that the investors have not pursued all the documents of Title and other agreements and understandings and have invested on the various assurances and promises of the Vendors and that in the event the investment of the investors is jeopardized in any manner whatsoever the VENDORS shall be also criminally liable for cheating as contemplated under the provisions of Indian Penal Code.*

*Since I have already paid to owner of plot Rs.3 Crore and Rs.2.20 Lakhs to Solicitor, the amount paid by Investor to me, on behalf of Vendors was lying unused. So on request of Vendors and on faith, I have paid on temporary basis till it is require for development Rs. 30 Lakhs on 19/05/2010 to Deepak Thakkar, one of the Vendors and Rs. 40 Lakhs to Vendors company on 19/05/2010.*

*Thereafter on request of Investor I have returned Rs.1.30 Crore out of Rs.3 Crore on dated 10/10/2011.*

*Vendors inform, since investor is his friend, this flat to be treated as cancel and he will pay the amount slowly, due to relation with Investor and market condition.*

*Due to D.C. rule and other issue development was not happening, so again paid Rs. 30 Lakhs to Deepak Thakkar on 07/01/2011 and Rs.20 Lakhs to Vendor's company on 26/08/2011. Still no development. Vendors finally took call to refund full amount to Investor with Investors Confirmation so accordingly, refund to Investor through Vendors Rs.50 Lakhs on 01/06/2012 and Rs.20 Lakhs on 11/07/2013.*

*Lastly paid on Rs.5 Lakhs on 06/04/2014 and confirmation given by Vendors that out of total Rs.1.95 Crore received by him from my company out of that has refunded Rs.1.70 Croce due to Investors and balance Rs.25 Lakhs is used for expenses for development (Legal & Mhada).*

*Same is confirmed by Vendors in receipt of cheque dated 04/06/2014 (enclosed herewith).*

*Still my Rs. 3 Crore money is lying in Escrow with Solicitor and Rs. 25 Lakhs more is use by Vendors or taken for own use. Investor got their full refund. But recently came to know that Investors amount taken from me is not given by Vendors to Investor and hence*

*breaching trust of my and Investors and harming reputation and loss of fund, since Investor is friend of Vendors, they are not complaining to any department, but I want to teach a lesson to Vendors for unjustice to Investors and me. So register the complaint and receive the money and pay to Investor (if any) of their balance and any balance to me out of Rs.25 Lakhs by Strict Interrogation to Vendors."*

**25.** The Police Complaint was filed by the Appellant against the Vendors, alleging breach of trust by the Vendors. Action was prayed to be taken against the Vendors. After receipt of the Police Complaint which was sent to the Financial Creditor also, an Advocate Notice dated 30.07.2019 was sent on behalf of the Financial Creditor to the Corporate Debtor, where the Financial Creditor claimed to have dispersed the amount of ₹3 Crores and pleaded that since January 2011 till October 2011, the Financial Creditor continuously followed with the Developers and Thakkars regarding progress of the Project and the letter also contained admission of receipt of payment of ₹1.3 Crores. In Paragraph 2 (h) & (i), following was stated:

*"(h) Our clients instruct that since January 2011 till October 2011, our clients continuously followed-up with not only you but also the Thakkars as to the progress of the Said Project including compliance of your various obligations under the Said AOA; however, you kept expressing difficulties and hindrances and simultaneously also promised and assured that you are at the verge of obtaining all permissions and sanctions and that it is a matter of time that you shall comply with your obligations under the Said AOA. Our clients were swayed and influenced by your sweet talks and remained invested in the Said Project.*

*(i) Our clients instruct that in the month of October 2011; once again our clients called upon you to inform our clients about the progress of the Said Project when you once again informed our client that the delay is due to the various changes and modifications to the Development Control Regulations, etc. and further*

*sought time; when our client called upon you to return the Said Initial Investment Amount along with interest accrued thereon at the rate of 18% per annum from the date of making payment of the Said Initial Investment Amount till actual payment and/ or realization. That, you pleaded not to terminate the Said AOA and remain invested in the Said Project and further induced our client by paying a sum of Rs.1,30,00,000/- (Rupees One Crore Thirty Lakhs only) to our clients on the understanding that the Said AOA shall be in force and effect and that our clients will be liable to pay the Balance amount as well as a sum of Rs.1,30,00,000/- (Rupees One Crore Thirty Lakhs only) simultaneously on execution of the Agreement for Sale for the Said Flat pursuant to you obtaining the IOD and CC for the Said Project. Our clients instruct that your aforesaid act of returning a sum of Rs.1,30,00,000/- (Rupees One Crore and Thirty Lakhs only) to our clients unambiguously demonstrate that there was a failure on your part to comply with the various terms and conditions of the Said `AOA'. Our - clients instruct that the aforesaid sum of Rs.1,30,00,000/- (Rupees One Crore and Thirty Lakhs only) was returned to our clients vide Cheque bearing No. 837304; which was en-cashed by our client on 04thNovember 2011."*

**26.** By Notice dated 30.07.2019, the Financial Creditor communicated their decision that they have terminated the Agreement with immediate effect. Following was stated in the Notice by terminating the Agreement:

***"IN THE PREMISE AS AFORESAID,*** *our clients are compelled to terminate the Said AOA, with' immediate effect, and accordingly our clients have instructed us to communicate to you, which we hereby do, that our clients terminate the Said AOA with immediate effect and accordingly calls upon you to refund the Said Initial Investment Amount, along with interest accrued thereon at the rate of 18 % (Eighteen Percent) per annum from 17th May 2010 till actual payment/ or realisation. Our clients have calculated the interest up till 28th July 2019 and have also given credit to you of the amount of Rs.1,30,00,000/- (Rupees One Crore Thirty Lakhs) so paid by you to our client on 15th October 2011. The total amount outstanding as on date along with interest accrued thereon till 28thJuly 2019 aggregates to a sum of Rs.5,96,36,330.39/- (Rupees*

*Five Crores Ninety-Six Lakhs Thirty-Six Thousand Three Hundred Thirty and. Paise Thirty-Nine only), the details of which calculation are more particularly enumerated in* ***Enclosure - "I",*** *enclosed hereto. Our client instructs to also place on record that you are also liable for further and future interest on the aforesaid outstanding amount from 29thJuly 2019 till payment and/ or realisation thereof."*

**27.** After the aforesaid letter, 30.07.2019 was replied by the Corporate Debtor by Advocate Reply dated 16.08.2019, in letter dated 07.08.2019 Corporate Debtor again retreated that in addition to ₹1.3 Crores paid to Mumbai Wines & Traders Private Limited (for Investor) amount of ₹1.7 Crores have been paid to Thakkars. It was clearly pleaded that entire amount of Financial Creditor of ₹3 Crores stands paid nothing is liable to be paid by Corporate Debtor. Allegations in the letter have been made both against Thakkars and Financial Creditors and alleged that offence of criminal conspiracy is committed against the Corporate Debtor.

**28.** After noticing the relevant Clauses of the Agreement, Police Complaint dated 04.07.2019 and letter dated 30.07.2019 sent by Financial Creditor terminating the Agreement, now we proceeded to consider the issue of limitation for filing Section 7 Application. The case of the Appellant is that the Project having not commenced within 6 months and 1 month grace period after execution of MoU dated 16.05.2010, the cause of action arose for the Financial Creditor to claim refund of the amount along with interest after expiry of 7 months from 16.05.2010, the period for filing an Application arose to the Financial Creditor which could not remain suspended on the pretext that Financial Creditor has not exercised their option to terminate the Agreement. On the contrary, the submission of the Financial Creditor is that

as per Clause 6 of the AoA, the Financial Creditor had option to terminate the Agreement which option having been exercised only on 30.07.2019, limitation for filing Section 7 Application shall commence on 30.07.2019. In the Reply which was filed by the Corporate Debtor to Section 7 Application, Corporate Debtor has taken the specific plea that Application is barred by limitation. Plea was taken that even if limitation is computed from 30.07.2019, Application filed on 11.08.2022 is barred by time. It was further pleaded that cause of action arose after expiry of 6 months of the AoA i.e., 16.12.2010. We may refer to Paragraph 7 & Paragraph 20 of the Reply, which is as follows:

> *"7. A mere perusal of the Petition will demonstrate that Claim of the Financial Creditor abovenamed is barred by the Law of Limitation and therefore deserves to be dismissed with cost. It is pertinent to note that it is admitted fact that the termination of the AOA by the Financial Creditor through their Advocate is by letter bearing No. MMLA/MP/15/2019 and is dated 30th July, 2019. In terms of the clause 47 the said termination of AOA was with immediate effect. The present claim filed by the Financial Creditors is dated 11'hAugust, 2022. Hence the said termination is not within the prescribe period of the Limitation as stipulated under Limitation Act. Hence the same is barred by the law of limitation. Therefore, the Application deserves to be dismissed and be dismissed in limine with cost. I crave leave to refer to and rely upon the legal position in this regard at the time of argument on this Petition.*
>
> *20. With reference to para 1(f) of the Part — IV, clause 6 of the AOA speaks for itself and anything contrary thereto and to it's true and correct meaning is denied as if set out herein and traversed. It is therefore submitted that on Financial Creditors' own showing the cause of action arose after the expiry of six months of the Articles of Agreement dated 16th May, 2010 i.e. on 16th December, 2010 and therefore even on Financial Creditors own admission the claim of the Financial Creditors was barred by the Law of the Limitation. It is also pertinent to note that the Financial*

*Creditors having not paid any amount to Atul Projects India Pvt. Ltd. the question of repayment of the same with 18% interest or any other rate of interest does not arise. It is denied that Financial Creditors are entitled to claim back their investment with 18% interest or at any other rate of interest. Since the amount are not paid by the Financial Creditors to the Corporate Debtor the question of commercial effect of the borrowing does not arise. It is also denied that same were provided for the time values of money."*

**29.** Limitation for filing an Application under Section 7 of the IBC is governed by Article 137 of the Limitation Act, 1963, which is a settled legal position. Article 137 of the Limitation Act, 1963 is as follows:

| | | | |
|---|---|---|---|
| ***"137. Description of application:*** *Any other application for which no period of limitation is provided elsewhere in the Division.* | ***Period of Limitation:*** *Three Years.* | ***Time from which period begins to run:*** | *When the right to apply accrues."* |

**30.** The question to be considered is as to when the cause of action arose to the Financial Creditor to file an Application, claiming refund of its amount along with the interest as per AoA dated 16.05.2019.

**31.** We have noted relevant causes of MoU, AoU and AoA all dated 16.05.2019. Amounts of ₹3 Crores to be paid at the time of execution of MoU. Amount of ₹3 Crores was paid by the Financial Creditor, which amount was deposited before the Advocates & Solicitors of the Owners, as per the receipt and acknowledgement of the amount by Developer is on the record. The MoU clearly provided that Developer were to get the Plan sanctioned within a period

of 6 months with a grace period of 1 month. It is undisputed that building plan was never sanctioned. The MoU provided further payment of ₹3.5 Crores to the Confirming Party. It is an admitted fact that no occasion arose for payment of any subsequent amount by the Investor apart from initial payment of ₹3 Crores. The project could not commence is an admitted position between the Parties. It is not the case of any of the Parties that Project commenced or any building plan was approved. It is further relevant to notice that AoA of which the Financial Creditor is Party also take cognizance of MoU as well as Agreement entered between the Financial Creditor and the Vendors, i.e., Thakkars, i.e., AoU which has been specifically referred to in Clause B and Claus E of the AoA. Thus, each one of the Parties to all the three Agreements were aware of all the terms and conditions Developers obligations were known to Financial Creditor also. In light of the above, we have to look into the Clause 6 and Clause 8 of the AoA for answering the question as to when the cause of action arose. Clause 6 provides that in event the Developers failed to comply with the obligations or failed to enter into Development Agreement within 6 months from the date of execution of AoA, then a grace period of 1 month will be provided and in event developers failed to enter into Development Agreement within the grace period, Investor shall have an option to terminate the Agreement and Developers will return amount of ₹3 Crores. The case of the Financial Creditor is that the option to terminate was exercise only on 30.07.2019, hence limitation will commence on 30.07 2019.

**32.** When we look into the Clause 8 of the AoA, which Clause also contain following statement *"in the event the said project does not commence, then the*

*Investors shall be entitled to claim back their investment along with 18% p.a., which the Developers have agreed and guaranteed to return".* Thus Clause 8 also contain eventuality when Investor shall be entitled to claim back their investment. The eventuality is *"in the event the said project does not commence".* Even if for argument sake, we may accept the submission of the Counsel for the Financial Creditor that cause of action under Clause 6 commence only on 30.07.2019, the cause of action which accrued to the Financial Creditor by Clause 8 is not dependent on exercise of option by the Financial Creditor. When the Project does not commence, the cause of action arose to Financial Creditor to claim back their investment. Admittedly, building plans were never approved within 6 months as was contemplated in the MoU. No further steps were taken under the MoU or AoU and AoA after 16.05.2010, thus it is undisputed that Project never commenced. Whether the cause of action will not arise for Financial Creditor to claim back their amount till they exercise their option under Clause 6 is question to be answered. We are of the clear opinion that the cause of action which accrued to Financial Creditor under Clause 8 is independent from exercise of any option under Clause 6. Under Clause 8, the cause of action arose to the Investor when project did not commence without the Agreement been terminated by the Financial Creditor under Clause 6. Thus, cause of action and running on the limitation under Clause 8 cannot be arrested or controlled by exercise of option by Financial Creditor in Clause 6.

**33.** There is no material on record to indicate that project has commenced at any point of time even after 6 months of execution of MoU on 16.05.2010.

The building plan having been never approved within 6 months, which was period prescribed in MoU for approval of the building sanction of the Plan within period of 6 months with grace period of 1 month. The period of 7 months came to an end on 16.12.2010 itself after expiry of 7 months from execution of the Agreement dated 16.05.2010. Thus, cause of action for filing the Application claiming refund of the investment arose to the Financial Creditor after 16.12.2010 and the same cannot remain suspended as contended by Counsel for the Financial Creditor till 30.07.2019.

**34.** The project having not commenced within seven months from execution of Agreement, the Plan having not been sanctioned within a period of 6 months and grace period of one month from 16.05.2010, the Project never commenced and under Clause 8, the cause of action arose to Financial Creditor to claim refund of the said investment and the said cause of action cannot remain arrested or suspended till the Financial Creditor exercise its option under Clause 6. Limitation for filing the proceeding for claiming refund of investment long expired after three years from 16.12.2010 i.e., in 15.12.2013 itself.

**35.** Long silence of the Financial Creditor after 16.12.2010 till filing of Police Complaint by Corporate Debtor itself speaks volumes of the ground realities and State of Affairs between the Parties. We, thus are satisfied that Application filed by the Financial Creditor was hopelessly barred by time and deserves to be rejected. Adjudicating Authority had only adverted to the one part of the submission of the Appellant that on commencement of limitation from 30.07.2019, the Application was barred by time, without adverting to

and finding out as to when the cause of action arose for filing the Section 7 Application to the Financial Creditor. As and above the cause of action for filing the Application arose on 16.12.2010 and Section 7 Application which was filed by the Financial Creditor was hopelessly barred by time.

**36.** We also need to notice certain Judgments relied by a Counsel for the Financial Creditor in support of their submissions that limitation for filing Section 7 Application is a continuing limitation and Corporate Debtor was in continuous obligation, hence default is continuous and the Petition is not time barred. Learned Counsel for the Financial Creditor have relied on the Judgment of the Hon'ble Supreme Court in ***`Samrudhi Co-operative Housing Society Limited' Vs. `Mumbai Mahalaxmi Construction Private Limited'*** reported in ***Civil Appeal No. 4000/2019*** decided on 11.01.2022. The above case arose out of Order of National Consumer Disputes Redressal Commission, in the above case, Complaint was filed by the Appellant to refund the excess taxes and charges paid by the Appellant to the Municipal Authorities due to the alleged deficiency of service of Respondents. The question was as to whether the Complaint was barred by limitation. In the above case, the Hon'ble Supreme Court has noted the provisions of Section 22 of the Limitation Act, 1963, which provides for computation of limitation in the case of a continuing breach of project of Contract…. Hon'ble Supreme Court held that since there was continuous failure to obtain a occupancy certificate, which was a breach of obligation, hence it was a continuous wrong. Following was laid down in Paragraph 18:

> *"18 Based on these provisions, it is evident that there was an obligation on the respondent to provide the occupancy certificate and pay for the relevant charges till the certificate has been provided. The respondent has time and again failed to provide the occupancy certificate to the appellant society. For this reason, a complaint was instituted in 1998 by the appellant against the respondent. The NCDRC on 20 August 2014 directed the respondent to obtain the certificate within a period of four months. Further, the NCDRC also imposed a penalty for any the delay in obtaining the occupancy certificate beyond these 4 months. Since 2014 till date, the respondent has failed to provide the occupancy certificate. Owing to the failure of the respondent to obtain the certificate, there has been a direct impact on the members of the appellant in terms of the payment of higher taxes and water charges to the municipal authority. This continuous failure to obtain an occupancy certificate is a breach of the obligations imposed on the respondent under the MOFA and amounts to a continuing wrong. The appellants therefore, are entitled to damages arising out of this continuing wrong and their complaint is not barred by limitation."*

**37.** Above Judgment of the Hon'ble Supreme Court was on its own facts and has no Application in the present case. In the present case, the Project did not commence within 6 months and 1 month grace period, which was provided in the MoU when Project did not commence, cause of action arose to the Financial Creditor as per Clause 8 of AoA noted above. Hence the submission of the Respondent that there being continuous obligation, limitation will not commence cannot be accepted.

## **Question No. II**

**38.** The refund of ₹1.3 Crores vide cheque dated 10.10.2010, which was encased on 04th November is an admitted fact. We may refer to Part IV of the

Section 7 Application filed by the Financial Creditor, where in Part IV sub-Clause (k) following was pleaded:

> *"(k) …In the circumstances as aforesaid, the aforesaid sum of Rs.1,30,00,000/- (Rupees One Crore and Thirty Lakhs only) was refunded to the Financial Creditors vide Cheque bearing No. 837304 which was en-cashed on 4th November 2011."*

**39.** How the balance amount of ₹1.70 Crores was dealt with need to be noticed. We have noted the AoU between the Developers and Thakkars (Partners) where it was the liability of the Partners to bring investment of ₹6 Crores they having not possess with sufficient fund. It was Thakkars who were referred to as Vendors in the AoA with Financial Creditor, where amount of ₹6 Crores was to be paid invested by the Financial Creditor out of which ₹3 Crores was paid on execution of MoU. The Developers and AoA Clause 6, which we have noticed above, pleaded following:

> *"In the event, the said Project commenced then the Investor shall be entitled to claim back their investment along with 18% p.a., which the Partners have agreed and guaranteed to return."*

**40.** AoA between the Thakkars and Investors also provided that Developers and Vendors (Thakkars) shall be equally and jointly liable to Investor towards the aforesaid amount and the amount of investment made by the Investor to the Developers was on behalf of the Partners, i.e., Thakkars. In the above clause of the Agreement between the Parties, the claim of repayment by the Developers to Thakkars need to be looked into. After execution of Agreement dated 16.05.2010 an acknowledgement of amount of ₹1.3 Crores received by the Financial Creditor vide letter dated 15.10.2011, the first correspondence between the Parties which is on the record before the Police Complaint i.e.,

04.07.2019 sent by the Corporate Debtor, in which payment of various amounts to Thakkars and his Company has been mentioned. In the present Appeal, Appellant has also detailed the payments made to Thakkars and its Company, which is contained in pleadings in Paragraph 7(n), which is as follows:

> *"(n) However, due to the prolongation of the family dispute between the Owners, it was decided between the Thakkars and the Corporate Debtor that full amount of Investors (Respondents No. 1 to 3) shall be refunded. Accordingly, the Corporate Debtor refunded all the amounts to the Thakkars to be refunded to the Respondents No. 1 to 3. The total amount disbursed to the Thakkars, to be refunded to Respondents No. 1 to 3 is as follows:*

| ***S. No.*** | ***Date*** | ***Particulars of Bank Transfer in favour of Thakkar's or their Companies*** | ***Amount (In Rs.)*** |
|---|---|---|---|
| *1.* | *19.05.2010* | *Mr. Deepak Thakkar* | *30,00,000/-* |
| *2.* | *19.05.2010* | *Vision Corporation* | *40,00,000/-* |
| *3.* | *07.01.2011* | *Mr. Deepak Thakkar* | *30,00,000/-* |
| *4.* | *26.08.2011* | *Vision Infraventures Pvt. Ltd.* | *20,00,000/-* |
| *5.* | *01.01.2012* | *Vision Infraventures Pvt. Ltd.* | *50,00,000/-* |
| *6.* | *11.07.2013* | *Vision Infraventures Pvt. Ltd.* | *20,00,000/-* |
| *7.* | *06.04.2014* | *Vision Infraventures Pvt. Ltd.* | *5,00,000/-* |
| ***Total*** | | | ***Rs. 1,95,00,000/-*** |

**41.** Out of ₹1.95 Crores as mentioned in above sub-Clause amount of ₹25 Lakhs was towards the development, hence the disbursement of ₹1.7 Crores

was towards the refund of amount to the Financial Creditor, which is again pleaded in Paragraph 7(o) of the Appeal, which is to be following effect:

> *"(o) In light of the above disbursed amounts, the Thakkars, on the last cheque payment of Rs. 5,00,000/- on 06.04.2014, gave a receiving dated 02.06.2014 stating that "I confirm receipt of Rs. 1.95 Crores, includes 1.70 Crore. final refund to my friend& balance for Approval", meaning thereby that the out of the Rs. 1.95 Crores disbursed to the Thakkars by the Corporate Debtor, Rs. 1.70 Crores shall be used by him to refund the amounts to Respondents No. 1 to 3, and the rest Rs. 25 Lakhs shall be used for expenses and approvals from authorities including Legal and MHADA.*
>
> *Therefore, it is submitted that the original alleged financial debt had been taken by the Thakkars from Respondents No. 1 to 3 and not by Atul Projects. Moreover, the security in lieu of that debt was also given by the Thakkars i.e., the 18th Floor of the new building which was originally assigned to the Thakkars. Therefore, the liability to repay the said debt, qua the Respondents No. 1 to 3 herein, in terms of the AoU, is also of the Thakkars, and not of the Corporate Debtor. Without prejudice, Corporate Debtor had duly made good its liability towards the Thakkars by paying them the amounts eventually due on them qua the Investors/Respondents No. 1 to 3. Therefore, Respondents No. 1 to 3 herein, i.e., the Petitioners in the underlying Company Petition cannot claim the alleged Financial Debt against the Appellant or Atul Project and ought to have filed the said petition against the Thakkars."*

**42.** In the Reply, which was filed to Section 9 Application by the Corporate Debtor, there was clear and categorical pleading of the refund of the aforesaid amount to the Thakkars and its Companies. In the Reply which was filed by the Corporate Debtor, it was also pleaded that Thakkars and Financial Creditors are friends and they have colluded with each other with *mala fide*

intention to cheat the Corporate Debtor which pleadings are in Paragraph 11 to the following effect:

> *"11. Without Prejudice to what has been stated herein above, it is submitted that Manish Shrichand Pardashani and Deepak Vinod Thakkar / Prasan Vinod Thakkar are school friend from their childhood and Mr. Manish Shrichand Pardasani and Mr. Moksha Shrichand Pardasani are the Director of Mumbai Wines & Traders Private Limited. All of them have colluded with each other with malafide intention to cheat Atul Projects India Pvt. Ltd. It is pertinent to note that in the AOA in clause No.13 a right is vested to take Criminal Action against the Vendors i.e. Deepak Vinod Thakkar and Prasan Vinod Thakkar and the Financial Creditors have not initiated any action against the Vendors i.e. Deepak Vinod Thakkar and Prasan Vinod Thakkar. This will sufficiently and conclusively establish the collusion as mention in this para."*

**43.** The Reply also clearly pleaded that amount of ₹1.70 Crores has also been paid by the Corporate Debtor as per the directions of Financial Creditor to Deepak Vinod Thakkar and Vision Infraventures Private Limited. Para 12 of the Reply is as follows:

> *"12. Without prejudice to what is stated herein above, I submit that the Financial Creditors are guilty of suppressio veri and suggestio falsi. The Financial Creditors have themselves not advanced any amount to Atul Projects India Private Limited, and the Financial Creditors are put to the strict proof thereof. It is Mumbai Wines & Traders Private Limited and who had somewhere in or about 16th May, 2010 paid to Atul Projects India Pvt. Ltd., a sum of Rs.3,00,00,000/-. Out of the said Rs.3,00,00,000/- Atul Projects India Private Limited, refunded an amount of Rs.1,30,00,000/- to Mumbai Wines & Traders Private Limited somewhere in or about 15thOctober, 2011. The said amount of Rs.1,30,00,000/- was refunded by Atul Projects India Private Limited. Hereto annexed and marked* ***Exhibit - "1"*** *is the copy of Bank Statement of Account of Citi Bank, showing payment of amount of Rs.1,30,00,000/- in favour of Mumbai Wines &*

*Traders Private Limited. Therefore, without prejudice to the right and contentions it is Mumbai Wines & Traders Private Limited alone had right if any for the balance amount. The said balance amount of Rs.1.70 crores has been paid by Atul Projects India Private Limited, as per the directions of Mr. Manish Pardasani, being the Director of Mumbai Wines & Traders Private Limited to Mr. Deepak Thakkar and Vision infrastructure Private Limited., of which Mr. Deepak Thakkar is also a Director. Hereto annexed and marked* ***Exhibit - "2"*** *is the copy of the letter dated NIL, addressed to pay the balance amount to Mr. Deepak Thakkar. It is pertinent to note that said letter is signed by Mr. Manish Pardasani, Director of Mumbai Wines & Traders Private Limited. Accordingly, Atul Projects India Private Limited as per the directions of Mumbai Vines & Traders Private Limited paid the amount to Mr. Deepak Thakkar and therefore the entire amount of Rs.3,00,00,000/- was fully repaid by Atul Projects India Private Limited. Hereto annexed and marked* ***Exhibit - "3"*** *the copy of Bank Statement viz. Citi Bank of the Corporate Debtor showing proof of payment to Mr. Thakkar and Vision Infrastructure Private Limited. The Corporate Debtor craves leave to refer to and rely upon the records from the ROC, Mumbai showing Mr. Deepak Thakkar as Director of copy of signatory."*

**44.** The payment of ₹1.70 Crores which was claimed by the Corporate Debtor to be paid to Thakkar and his Companies Vision Infraventures Private Limited are duly supported by Bank Statement. Learned Counsel for the Respondent has contended that Manish Pardasani has never gave any written instructions to the Corporate Debtor to refund the amount to Thakkars and the letter which is relied by the Corporate Debtor in its Reply Affidavit, undated letter of Manish Pardasani relied by Corporate Debtor, was never signed by Manish Pardasani. The letter which is claimed by the Corporate Debtor written by Manish Pardasani, being disputed, we proceed as if no such authorisation was given by the Financial Creditor to the Corporate Debtor to refund the money to Deepak Vinod Thakkar. However, the Bank Statement

which are filed along with the Reply indicates payments to Deepak Vinod Thakkar and its Company Vision Infraventure Private Limited, which is reflected as claimed by the Appellant from the Bank Statement filed by the Corporate Debtor.

**45.** We may further refer to a cheque dated 04.06.2014 containing endorsement of Deepak Vinod Thakkar, where he confirmed the receipt of ₹1.95 Crores which include ₹170 Crores for refund. Counsel for the Financial Creditor has disputed that said endorsement was never made by Deepak Vinod Thakkar and the endorsement was fabricated. Again, it is not necessary for us to return any finding as to whether Deepak Vinod Thakkar has given endorsement on cheque dated 04.06.2014 or not. It is sufficient to note that the amount of cheque payment in favour of Deepak Vinod Thakkar and Vision Infraventure Private Limited, Company of the Thakkar is reflected from the record. There is no plea from any of the Parties that the said amount of ₹170 Crores paid by Corporate Debtor to Deepak Vinod Thakkar and his Company were towards any other obligations. Partners/Vendors/Thakkars, who have brought the investment from Financial Creditors, which was paid to the Developers, and the investment was brought on behalf of the Partners to the Developers. Refund of any amount to the Partners for payment for refund to the Financial Creditor cannot be said to be against the terms and conditions of the Agreement. In any view of the matter, the amount of ₹170 Crores which were refunded by Corporate Debtor to the Thakkar and his Company were only with respect to payment of amount of refund of ₹3 Crores received from Financial Creditors.

**46.** The fact that right after execution of the Agreement on 16.05.2010 till sending of the Police Complaint by Corporate Debtor on 04.07.2019, there is not even the letter of demand of any amount from Financial Creditor to the Corporate Debtor towards refund of ₹3 Crores speaks for itself. As noted above, letter dated 15.10.2011 was sent by the Financial Creditor, acknowledging the receipt of the payment of ₹1.3 Crores. A Submission was advanced by the Counsel for the Financial Creditor that after receipt of the letter dated 15.10.2011, Corporate Debtor never wrote back to the Financial Creditor that there was other amounts paid by to the Thakkars. The letter dated 15.10.2011 which was sent by the Financial Creditor was only towards acknowledgement of ₹1.3 Crores. When we read the said letter, the said letter does not indicate that Financial Creditor had complaint of non-receipt of any balance amount apart from ₹1.3 Crores. Thus, the said letter 15.10.2011 cannot read to mean that no amount was paid by the Corporate data towards refund of ₹3 Crores received by them.

**47.** The Financial Creditor who has advanced ₹3 Crores for a Project to start after expiry of 7 months which was a maximum period for a Project to start having come to an end, has not even written a letter demanding any amount for long more than 8 years to the Corporate Debtor demanding any amount speaks for itself that the Financial Creditors was satisfied about his refund of the amount and the State of Affairs indicate that there was no cause to take any action by the Financial Creditor. Corporate Debtor has already pleaded that Financial Creditor and the Partners, i.e., Vendors/Thakkars, were friends and in collusion with each other. Not even writing a letter after 16.12.2010

till 30.07.2019 i.e., after lapse of more than 8 years by the Financial Creditor itself indicates that they have no genuine claim against the Corporate Debtor. In event the huge dues were there on the Corporate Debtor due to Project having not commenced, there was no reason as to why the Financial Creditor will not write or demand or take any proceeding for recovery of the amount. Silence of Financial Creditor for long eight years speaks for itself. The Financial Creditor initiated the proceedings by filing Section 7 Application only after Police Complaint was filed by the Corporate Debtor on 04.07.2019, making allegations against Thakkars. Financial Creditor found an opportunity to launch a proceeding after the receipt of the Police Complaint dated 04.07.2019. We, thus are satisfied that Corporate Debtor had refunded the amount of ₹1.7 Crore to Thakkars and their Company, which was meant for refund to the Investors towards their amount of ₹3 Crores.

**48.** Silence of Financial Creditor for long 8 years of not writing even letter to Corporate Debtor or Vendors/Thakkars clearly indicates that refund of ₹3 Crores was satisfied. We, thus hold that Developers have refunded the amount of ₹1.7 Crores through Thakkars and its Companies for payment to Investors.

**Question No. III**

**49.** We had also issued Notice to the Financial Creditor to show cause as to why they not be proceeded under Section 65 of the IBC Code. Learned Counsel for the Respondent submits that Corporate Debtor in the Reply of Section 7 has not raised any plea with regard to Section 65 nor has been filed

any Application under Section 65. Learned Counsel for the Respondent has also referred to Judgment of the Hon'ble Supreme Court in the matter of ***`Beacon Trusteeship Limited' Vs. `Earthcon Infracon Pvt. Ltd. & Anr.'*** reported in ***Civil Appeal. 7641/2019*** decided on 18.02.2020 where in Paragraph 7 following was laid down:

> *"7. Considering the provision of Section 65 of the IBC, it is necessary for the Adjudicating Authority in case such an allegation is raised to go into the same. In case, such an objection is raised or application is filed before the Adjudicating Authority, obviously, it has to be dealt with in accordance with law. The plea of collusion could not have been raised for the first time in the appeal before the NCLAT or before this Court in this appeal. Thus, we relegate the appellant to the remedy before the Adjudicating Authority."*

**50.** We have also looked into the Reply which was filed by the Corporate Debtor to Section 7 Application, although it was pleaded that there is a collusion between Financial Creditor and Thakkars and they have colluded with each other with *mala fide* intention to cheat the Corporate Debtor, but there are no averment that Section 7 Application has been filed fraudulently or with malicious intent. We, thus, are of the view that in the facts of the present case, especially when Corporate Debtor has not pleaded that proceedings have been initiated maliciously with fraudulent intent, we are of the view that ingredients of Section 65 are not fulfilled, hence Notice under Section 65 is discharged.

**51.** There is one more question, which need to be noticed, by Order dated 02.08.2023 we had also issued Notice to the IRP, noticing that IRP by giving his written consent to the Adjudicating Authority for acting as IRP has given

certificate to the facts of the case. Learned Counsel for the IRP during his submission has referred to Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016. He has referred to Optional Certificate which is at the end of Form–2'.

**52.** The use of the expression "Optional Certification" in `Form – 2' itself indicates that the said certification is only optional and not required to be given by the IRP, who is giving consent to act as. The Optional Certificate which has been given by the IRP is part of Section 7 Application, which is as follows:

> *"I hereby certify that the facts averred by the Applicant in the present application are true, accurate and complete and a default has occurred in respect of the relevant corporate debtor. I have reached this conclusion based on the following facts and / or opinion:-*
>
> *That, the Corporate Debtor approached the Financial Creditors that the Corporate Debtor was redeveloping a project ("**Said Project**") wherein the property being all that piece and portion of Land admeasuring 576.93 square meters registered in the books of the Collector of Land Revenue under Old No. 52, New 1C/455, Old Survey No. 763 Malabar and Cumbala Hill Division and in the books of the ,Collector of Municipal Rates and Taxes under "D" Ward No. 3521(2) and former Street No. 37A and present Street No. 61B ("**Said Property**") will be redeveloped and accordingly, the Corporate Debtor entered into a Memorandum of Understanding ("**Said MOU**") dated 16th May 2010 with the Owners of the Said Property. Further, the Corporate Debtor represented to the Financial Creditors that one Mr. Deepak Thakcal. and Mr. Prasan Thakkar ("**Vendors**") were interested in jointly re-developing the Said Property and accordingly have entered into an Article of Understanding ("**Said AOU**") with Vendors for the purpose of jointly re-developing the Said Property. The Corporate Debtor subsequently approached and induced the Financial Creditors to*

*invest in the Said Project and upon the various assurances and representations by the Corporate Debtors as well as that of the Vendors; an Articles of Agreement (on a franking of 1NR 100/- dated 15th May 2010) ("**Said AOA**") was entered into by and between the Vendors herein; Financial Creditors and Corporate Debtor.*

*The Financial Creditors in terms of the Said AOA agreed to invest an initial investment amount being a sum .of Rs.6,00,00,000/- (Rupees Six Crores only) in lieu of allotment of one floor in the new building admeasuring not less than 1350-1400 square feet of carpet area, being the 18thfloor in the new building along-with the car decks for the 18th floor (collectively referred to as the "**Said Flat**") of the Building that was to be constructed/ developed on the Said Property which amount was to be paid in the manner as enumerated in the Said AOA. The Financial Creditors invested an Initial amount of Rs. Rs.3,00,00,000/- (Rupees Three Crores only) on execution of the Said AOA and the balance sum of Rs.3,00,00,000/- (Rupees Three Crores only) was required to be paid by the Financial Creditors, subjected to the Corporate Debtors duly complying with all the obligations under the Said MOU including but not limited to obtaining Intimation of Disapproval ("IOD"), Commencement Certificate ("C. C."), execution and registration of an Agreement for Sale of the Said Flat, etc. The Said AOA categorically records that the Corporate Debtor shall comply with all the obligations under the Said MOU within 06 months from the date of execution of Said AOA.*

*That, the Said AOA categorically records that in the event the Corporate Debtor fails to comply with its obligations under the Said MOU and/ or fails to enter into a Development Agreement with the Vendors within 06 months from the date of execution of the Said AOA, then the Financial Creditors shall have an option to terminate the Said AOA and the Corporate Debtor shall be liable to return to the Financial editors the sum of Rs.3,00,00,000/- (Rupees Three Crores only) so invested by the Financial Creditors with the Corporate Debtor along-with interest at the rate of 18% per annum. That, the Corporate Debtor did not comply with the obligations under the Said MOU and accordingly pleaded to the Financial Debtors not to terminate the Said AOA and remain invested in the Said Project by paying a sum of Rs.1,30,00,000/- (Rupees One Crore*

*Thirty Lakhs only) vide Cheque bearing No. 837304 towards interest on the amount invested by the Financial Creditors which cheque was en-cashed on 04`" November 2011.*

*That, since the payment of Rs.1,30,00,000/- (Rupees One Crore and Thirty Lakhs only); the Financial Creditors have been continuously and regularly calling upon either the Corporate Debtor or the Vendors as to the further progress of the Said Project including obtaining IOD and CC; however, time and again Corporate Debtor has been only expressing the various hurdles faced in complying with the obligations under the Said MOU. Subsequently, the Corporate Debtor vide the Letter dated 04th July 2019 addressed to the Senior Police Inspector of MIDC Police Station preferred an Application to register a Complaint against the Vendors for siphoning of money. The aforementioned Complaint enumerates various dealings by and between the Corporate Debtor and the Vendors to which the Financial Creditors are neither a party nor concerned with the same. The Corporate Debtor has vide the aforementioned Complaint stated that the Corporate Debtor has paid certain monies directly to the Vendors on behalf of the Financial Creditors.*

*The Financial Creditors apprehends that the Corporate Debtor has connived with the Vendors right from inception to cheat and defraud the Financial Creditors deliberately and intentionally inducing the Financial Creditors to invest in the Said Project. The Corporate Debtor had deliberately and intentionally failed to comply with its obligations under the Said MOU and neglected to return the aforesaid amount invested by the Financial Creditor and hence this Application / Petition is being preferred by the Financial Creditor."*

**53.** When we look into the above Optional Certificate, the entire case which is set up by the Financial Creditor has been stated by the IRP and has been verified. Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 refers to IRP which provides as follows:

> ***"9. Interim resolution professional.—****(1) The applicant, wherever he is required to propose or proposes to appoint an insolvency resolution professional, shall obtain a written communication in*

*Form 2 from the insolvency professional for appointment as an interim resolution professional and enclose it with the application made under rules 4, 6 or 7, as the case may be.*

*(2) The application under sub-rule (1) shall be accompanied by a certificate confirming the eligibility of the proposed insolvency professional for appointment as a resolution professional in accordance with the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016."*

**54.** The detail facts and opinion as extracted above, given by the IRP were wholly uncalled for IRP who is giving a certificate on 15.07.2022 is not supposed to know the events and facts which transpired between the Parties from 16.05.2010. Learned Counsel for the IRP submits that in view of the `Form–2' requiring Optional Certificate, the IRP has given the Option Certificate and there was no *mala fide* intention of the IRP or an intent to help the Financial Creditor. We are of the clear view that Optional Certificate was not necessary, and the use of the word "Optional" itself indicates that unless IRP is aware of the facts and events, he is not required to give facts or opinion. We, thus are of the view that IRP's Optional Certificate was wholly uncalled for, however, in any view of the matter, we do not propose to refer the matter to IBBI for any action against the IRP, except by recording our disapproval of the actions of IRP in giving Optional Certificate as noted above.

**55.** In view of our above reasons and conclusions, we are satisfied that Section 7 Application filed by the Financial Creditor was hopelessly barred by time and was nothing but abuse of process of the Court by the Financial Creditor.

**56.** For the reasons and conclusions above, we allow the Appeal, set aside the Order passed by the Adjudicating Authority dated 25.07.2023, admitting Section 7 Application and dismiss Section 7 Application filed by the Financial Creditor.

The Parties shall bear their own cost.

**[Justice Ashok Bhushan]**
**Chairperson**

**[Barun Mitra]**
**Member (Technical)**

**NEW DELHI**

***27th November, 2024***

*himanshu*