

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

**Company Appeal (AT) (Insolvency) No. 1494 – 1495 of 2022**

[Arising out of order dated 02.12.2022 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court – V), in I.A. No. 503 of 2022, I.A. No. 931 of 2022, I.A. No. 837 of 2022 and I.A. No. 808 of 2022 in C.P. (IB) No.1390 of 2020]

**IN THE MATTER OF:**

**Beacon Trusteeship Ltd.,**

A Member of the Committee of Creditor of the Corporate Debtor having a voting share of 7.44% and having its registered office at 4C & D, Siddhivinayak Chambers, Gandhi Nagar, Opp. MIG Cricket Club, Bandra (East), Mumbai – 400 051.

**...Appellant**

**Versus**

**1. Jayesh Sanghrajka,**

Resolution Professional of Radius Estates & Developers Private Ltd., having Reg. No. IBBI/IPA-001/IP-P00216/2017-2018/10416 with office at C/o. Jayesh Sanghrajka & Co. LLP, Chartered Accountants 405-407, Hind Rajasthan Building, D. S. Phalke Road, Dadar East, Mumbai 400013.  
Email: [jayesh@jsandco.in](mailto:jayesh@jsandco.in)

**...Respondent No. 1**

**2. Adani Goodhomes Pvt. Ltd.,**

Having its registered address at Adani House, Plot No. 83, Sector 32 Institutional Area, Gurgaon, Haryana – 122001.  
CIN: U70103HR2020PTC091344.  
Email: [cs\\_realty@adani.com](mailto:cs_realty@adani.com)

**...Respondent No. 2**

**3. HDFC Bank Limited**

***Erstwhile Housing Development Finance Corporation Ltd.,***

A member of the Committee of Creditor of the Corporate Debtor having a voting share of 33.25% and having its registered address at HDFC Bank House, Senapati Bapat Marg, Lower Parel, (West) Mumbai – 400013.

Email: [Investorcare@hdfc.com](mailto:Investorcare@hdfc.com)

**...Respondent No. 3**

**4. Ten BKC Flat Owners AOP Trust,**

A private trust registered under the provisions of the Indian Trust Act, 1882 and having its registered office at 1701, B Wing, Lotus Corporate Park, Western Expressway Highway, Goregaon (East), Mumbai – 400 063.

**...Respondent No. 4**

**5. Dev Rishi Ventures LLP**

***Earlier, ICICI Prudential Venture Capital Fund Real Estate Scheme I,***

A member of the Committee of Creditor of the Corporate Debtor having a voting share of 5.71 % and having its corporate office at 405 Manek Smruti Building, Vile Parle East, Mumbai - 400057

Email: [devrishiventures@gmail.com](mailto:devrishiventures@gmail.com)

**...Respondent No. 5**

**6. ICICI Bank Ltd.,**

A member of the Committee of Creditor of the Corporate Debtor having a voting share of 0.03% and having its registered office at ICICI Bank Tower, Near Chakli Circle, Old Padra Road, Vadodara – 390007, Gujarat

Email: [companysecretary@icicibank.com](mailto:companysecretary@icicibank.com)

**...Respondent No. 6**

**7. Mr. Rajesh Sureshchandra Sheth,**

Authorised representative of the Homebuyers having a voting share of 33.41% and having his address at B-55, Shatdal Society, 7<sup>th</sup> Floor, Azad Lane, S.V. Road, Andheri West, Near Shoppers Stop, Mumbai – 400058.

Email: [rajeshshethsbi@gmail.com](mailto:rajeshshethsbi@gmail.com)

**...Respondent No. 7**

**8. Yes Bank Ltd.,**

A member of the Committee of Creditor of the Corporate Debtor having a voting share of 2.39% and having its registered office at Yes Bank House, Off. Western Express Highway, Santacruz East, Mumbai – 400055.

Email: [shareholders@yesbank.in](mailto:shareholders@yesbank.in)

**...Respondent No. 8**

**9. Infinite Buildcon Pvt. Ltd.,**

A member of the Committee of Creditors of the Corporate Debtor having a voting share of 0.50% and having its registered office at Floor 1, Plot No. 177/183, Kalyan Bhuvan, Jagannath Shankarsheth Marg, Gaiwadi, Girgaon, Mumbai – 4000 04.

Email: [dalal\\_sunil65@hotmail.com](mailto:dalal_sunil65@hotmail.com)

...Respondent No. 9

**10. Piramal Capital & Housing Finance Ltd.,**

A member of the Committee of Creditor of the Corporate Debtor having a voting share of 17.27% having its registered office at 4<sup>th</sup> Floor, Piramal Tower, Peninsula Corporate Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai – 400013.

Email: [cs.team@piramal.com](mailto:cs.team@piramal.com)

...Respondent No. 10

**Present:**

**For Appellant : Mr. Abhijeet Sinha Sr. Advocate with Ms. Sneha Jai Singh, Ms. Vaishnavi Rao, Mr. Divyam Sharma, Mr. Manan Shah and Mr. Akash Chatterjee, Advocates.**

**For Respondents : Mr. Trishmpati Sen, Ms. Riddhi Sancheti, Mr. Ashish Parwani, Mr. Dikshat Mehra, Mr. Chintan Gandhi, Mr. Anurag Anand and Mr. Mukul Kulhari, Advocates for R-1/RP.**

**Mr. R. Sudhinder, Mr. Ranjit Shetty, Mr. Sandeep Singhi, Mr. Luckyraj Indorkar, Ms. Aastha Trivedi, Mr. Arjun Amin and Ms. Ekta Bhasin, Advocates.**

**Mr. Rahul Kriplani, Ms. Suhasini Sen, Mr. Aditya Pratap Singh Chauhan, Mr. Kinnar Shah, Ms. Nitya Shah, Ms. Supraja V. and Ms. Surbhi, Advocates for R-4 & R-7.**

**Mr. Dhruv Mehta, Sr. Advocate with Mr. Denzil Arambhan, Mr. Pranaya Goyal, Mr. Dharav Shah, Ms. Amisha Patel, Mr. Dhawal Desai and Mr. Shubham Saini, Advocates for R-2.**

**WITH**

**Company Appeal (AT) (Insolvency) No. 99 of 2023**

**&**

**I.A. No. 409 of 2023**

**[Arising out of order dated 02.12.2022 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court – V), in I.A. No. 503 of 2022, I.A. No. 931 of 2022, I.A. No. 837 of 2022 and I.A. No. 808 of 2022 in C.P. (IB) No.1390 of 2020]**

**IN THE MATTER OF:**

**Dev Rishi Ventures LLP**

*Comp. App. (AT) (Ins.) Nos. 1494 – 1495 of 2022, 99, 107 & 108 of 2023*

**Earlier, ICICI Prudential Venture Capital Fund Real Estate Scheme I,**

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Email : [devrishiventure@gmail.com](mailto:devrishiventure@gmail.com)

**...Appellant**

**Versus**

**1. Jayesh Sanghrajka,**

Resolution Professional of Radius Estates & Developers Private Ltd., having Reg. No. IBBI/IPA-001/IP-P00216/2017-2018/10416 with office at C/o. Jayesh Sanghrajka & Co. LLP, Chartered Accountants 405-407, Hind Rajasthan Building, D. S. Phalke Road, Dadar East, Mumbai 400013.

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CIN: U70103HR2020PTC091344.

Email: [cs\\_realty@adani.com](mailto:cs_realty@adani.com)

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**3. HDFC Bank Limited**

**Erstwhile Housing Development Finance Corporation Ltd.,**

A member of the Committee of Creditor of the Corporate Debtor having a voting share of 33.25% and having its registered address at HDFC Bank House, Senapati Bapat Marg, Lower Parel, (West) Mumbai - 400013.

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A private trust registered under the provisions of the Indian Trust Act, 1882 and having its registered office at 1701, B Wing, Lotus Corporate Park, Western Expressway Highway, Goregaon (East), Mumbai - 400 063.

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**5. Beacon Trusteeship Ltd.,**

A Member of the Committee of Creditor of the Corporate Debtor having a voting share of 6.28%

and having its registered office at 4C & D,  
Siddhivinayak Chambers,  
Gandhi Nagar, Opp. MIG Cricket Club,  
Bandra (East), Mumbai – 400 051.  
CIN: U74999MH2015PLC271288.  
Email: [cs@beacontrustee.co.in](mailto:cs@beacontrustee.co.in)

**...Respondent No. 5**

**6. ICICI Bank Ltd.,**

A member of the Committee of Creditor of the  
Corporate Debtor having a voting share of 0.03%  
and having its registered office at ICICI Bank  
Tower, Near Chakli Circle, Old Padra Road,  
Vadodara – 390007, Gujarat  
Email: [companysecretary@icicibank.com](mailto:companysecretary@icicibank.com)

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Authorised representative of the Homebuyers  
having a voting share of 33.41% and having his  
address at B-55, Shatdal Society, 7<sup>th</sup> Floor, Azad  
Lane, S.V. Road, Andheri West, Near Shoppers  
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**Present:**

**For Appellant : Ms. Sneha Jaisingh, Ms. Vaishnavi, Mr. Divyam Sharma and Mr. Manan Shah, Advocates.**

**For Respondents : Mr. Trishmpati Sen, Ms. Riddhi Sancheti, Mr. Ashish Parwani, Mr. Dikshat Mehra, Mr. Chintan Gandhi, Mr. Anurag Anand and Mr. Mukul Kulhari, Advocates for R-1/RP.**

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**Mr. Rahul Kriplani, Ms. Suhasini Sen, Mr. Aditya Pratap Singh Chauhan, Mr. Kinnar Shah, Ms. Nitya Shah, Ms. Supraja V. and Ms. Surbhi, Advocates for R-4 & R-7.**

**Mr. Dhruv Mehta, Sr. Advocate with Mr. Denzil Arambhan, Mr. Pranaya Goyal, Mr. Dharav Shah, Ms. Amisha Patel, Mr. Dhawal Desai and Mr. Shubham Saini, Advocates for R-2.**

**WITH**

**Company Appeal (AT) (Insolvency) No. 107 of 2023**

[Arising out of order dated 09.01.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court – V), in I.A. No. 573 of 2022 in C.P. (IB) No.1390 of 2020]

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**For Appellant : Ms. Sneha Jaisingh, Ms. Vaishnavi, Mr. Divyam Sharma and Mr. Manan Shah, Advocates.**

**For Respondents : Mr. Trishmpati Sen, Ms. Riddhi Sancheti, Mr. Ashish Parwani, Mr. Dikshat Mehra, Mr. Chintan Gandhi, Mr. Anurag Anand and Mr. Mukul Kulhari, Advocates for R-1/RP.**

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**WITH**

**Company Appeal (AT) (Insolvency) No. 108 of 2023**

[Arising out of order dated 09.01.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court – V), in I.A. No. 573 of 2022 in C.P. (IB) No.1390 of 2020]

**IN THE MATTER OF:**

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**Present:**

**For Appellant : Mr. Abhijeet Sinha Sr. Advocate with Ms. Sneha Jai Singh, Ms. Vaishnavi Rao, Mr. Divyam Sharma, Mr. Manan Shah and Mr. Akash Chatterjee, Advocates.**

**For Respondents : Mr. Trishmpati Sen, Ms. Riddhi Sancheti, Mr. Ashish Parwani, Mr. Dikshat Mehra, Mr. Chintan Gandhi, Mr. Anurag Anand and Mr. Mukul Kulhari, Advocates for R-1/RP.**

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**Mr. Dhruv Mehta, Sr. Advocate with Mr. Denzil Arambhan, Mr. Pranaya Goyal, Mr. Dharav Shah, Ms. Amisha Patel, Mr. Dhawal Desai and Mr. Shubham Saini, Advocates for R-2.**

**J U D G M E N T**

**ASHOK BHUSHAN, J.**

These appeals viz. Comp. App. (AT) (Ins.) No. 1494-1495 of 2022 & Comp. App. (AT) (Ins.) No. 99 of 2023 by two dissenting Financial Creditors *Comp. App. (AT) (Ins.) Nos. 1494 – 1495 of 2022, 99, 107 & 108 of 2023*

have been filed challenging the order dated 02.12.2022, by which I.A. 503/2022 and I.A. 931/2022 in C.P. (IB) No. 1390/2020 filed by Beacon Trusteeship Ltd. objecting to the Resolution Plan and I.A. 808/2022 in C.P. (IB) No. 1390/2020 filed by ICICI Prudential Venture Capital Fund Real Estate Scheme I, have been rejected.

**2.** Other two appeals viz. Comp. App. (AT) (Ins.) Nos. 107 & 108 of 2023 have been filed challenging the order dated 09.01.2023, by which order I.A. 573/2022 in C.P. (IB) No. 1390/2020 filed by Resolution Professional (RP) for approval of the Resolution Plan submitted by Successful Resolution Applicant (SRA) has been allowed.

**3.** Both the Appellants before us are dissenting Financial Creditors who cast their dissenting vote, Beacon Trusteeship Ltd. having 7.44 vote shares and ICICI Prudential Venture Capital Fund Real Estate Scheme I having 5.71 vote shares.

**4.** The facts giving rise to these appeals are:

- i. The parcel of land in question is owned by Maharashtra Housing and Area Development Authority (MHADA).
- ii. Middle Income Group Cooperating Housing Society has been granted long-term lease of the land in question.
- iii. Society executed a Development Agreement with one MIG (Bandra) Realtors and Builders Private Ltd. on 31.10.2010 by which society granted Development Rights to MIG Bandra for re-development of the land.
- iv. MIG (Bandra) Realtors and Builders Pvt Ltd. (hereinafter referred to as DB) executed an Agreement with Radius Estates and Developers Private

Limited (the Corporate Debtor) on 31.03.2016, as per which Agreement upon discharging certain costs and obligations, including the obligations to complete construction of Project certain rights were assigned in the project by DB to the Corporate Debtor.

- v. The Corporate Debtor issued Non-Convertible Debentures to Beacon Trusteeship Ltd. to the tune of Rs. 65 Crores through private placement to raise funds in the year 2018.
- vi. Due to certain financial constraint, the construction could not proceed since March 2018.
- vii. The society issued a letter dated 08.05.2020 to the DB terminating the Development Agreement. The termination of Development Agreement lead automatically suspension of the Corporate Debtor rights in the project.
- viii. DB filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996, before the Bombay High Court and sought interim stay of the termination. Hon'ble Bombay High Court had directed for maintaining Status Quo.
- ix. In November 2020, Beacon Trusteeship Ltd. filed a C.P. IB No. 1390/2020 under Section 7 for initiating Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.
- x. On 22.01.2021, Municipal Corporation of Greater Mumbai (MCGM) issued a circular granting a rebate/discount of 50% on the FSI premium payable by developers provided the FSI premium is paid by the developers on or before 31.12.2021.

- xi. On 30.04.2021, Adjudicating Authority admitted Section 7 application filed by Beacon Trusteeship Ltd. initiating CIRP against the Corporate Debtor.
- xii. On 05.05.2021, an interim award was passed by Learned Arbitrator in the Arbitration Proceedings initiated by DB against the society.
- xiii. Under interim award, stay was granted on the termination of the Development Agreement subject to compliance of certain terms and conditions by DB which included conditions of several payments to society.
- xiv. In the CIRP of the Corporate Debtor, Committee of Creditors (CoC) was constituted on 02.07.2021.
- xv. The CoC consisted of following:
  - a) Homebuyers – 33.41%
  - b) HDFC Ltd. – 33.25%
  - c) Piramal Capital & Housing Finance Ltd. – 17.27%
  - d) Beacon Trusteeship Ltd. 7.44%
  - e) ICICI Prudential Venture Capital Fund Real Estate Scheme I – 5.71%
  - f) Yes Bank Ltd. – 2.39%
  - g) Infinite Buildcon Private Limited – 0.50%.
  - h) ICICI Bank Ltd. – 0.03%.
- xvi. The Respondent No. 1 was appointed Resolution Professional (RP) by the Adjudicating Authority vide order dated 25.08.2021.

- xvii. In 3rd CoC Meeting, RP informed the CoC that Corporate Debtor does not have any money in its Bank Account and there is need to raise finance to implore functioning of a Corporate Debtor as a going concern.
- xviii. Homebuyers expressed their view in the CoC that the construction of the Project must commence as early as possible
- xix. On 21.09.2021, 5th CoC Meeting was held where issue of interim finance was raised but the CoC expressed its inability to provide interim finance.
- xx. The CoC issued Form-G, inviting Expression of Interest (EoI) from Prospective Resolution Applicant (PRA), which was published on 13.10.2021.
- xxi. In 8th CoC Meeting, RP informed that he has received two EoIs from the Respondent No.2 – Adani Goodhomes Pvt. Ltd. and Ashdan Properties Private Ltd.
- xxii. RP informed the CoC that Respondent No. 2 – Adani Goodhomes Private Ltd. is found to be sole eligible Resolution Applicant.
- xxiii. Respondent No. 2 filed its Resolution Plan as per the RFRP issued by the RP.
- xxiv. RFRP contemplated raising of interim finance and commencement of construction of the Project. Hence the Resolution Applicant along with the Resolution Plan submitted drafts of the Construction Management Agreement (CMA) and the Master Facility Agreement (MFA) on 17.12.2021.
- xxv. In 12th CoC Meeting held on 21.12.2021, Resolution Plan was discussed and voting was slated from 23.12.2021 to 25.12.2021.

- xxvi. An I.A. was filed by Appellants before the Adjudicating Authority seeking extension of time for voting in the Resolution Plan. Adjudicating Authority vide order dated 24.12.2021 extended the voting till 27.12.2021.
- xxvii. In 13th CoC Meeting held on 25.12.2021, again the Resolution Plan of the Respondent No. 2 and objections raised by the Appellant were discussed, on the basis of voting result dated 27.12.2021, Resolution Plan was approved with 83.99% of the vote shares. Both Beacon Trusteeship Ltd. and ICICI Prudential Venture Capital Fund Real Estate Scheme I dissented to the Resolution Plan.
- xxviii. CoC by a separate Resolution also approved the execution of the CMA & MFA by 83.93% voting shares.
- xxix. On 27.12.2021, Consent Terms were also executed between the society and the DB resolving disputes between them.
- xxx. In pursuance after approval of the Plan, the Respondent No. 2 infused an amount of Rs. 450 Crores as interim finance up to 31.12.2021, which was utilised towards payment of dues of the society, FSI premium to MCGM and commencement of construction of project.
- xxxi. The Appellants filed their I.A. Nos. 503, 837 & 808/2022, objecting to the Resolution Plan and the valuation of the Corporate Debtor.
- xxxii. On 07.10.2022, SRA filed an Additional Affidavit waving its rights over the proceeds of the avoidance transaction of an amount of ₹1052 Crores of the Corporate Debtor in favour of the CoC.
- xxxiii. Majority Members of the CoC have also approved the said Additional Affidavit by filing respective Affidavit before the Adjudicating Authority.



xxxiv. On 02.12.2022, Adjudicating Authority passed an order in I.A. Nos. 503, 837 & 808/2022, rejecting the objections filed by the Appellant to the Resolution Plan.

**5.** The Order dated 02.12.2022 was challenged by the Appellants by means of Comp. App. (AT) (Ins.) No. 1494 – 1495/2022. In Comp. App. (AT) (Ins.) No. 1494 – 1495/2022 an interim order was passed directing *“in the meantime, any order passed by the Adjudicating Authority on the Plan approval application shall abide by the result of the appeal”*.

**6.** Adjudicating Authority vide order dated 09.01.2023, allowed the I.A. 573/2022 filed by RP for approval of the Resolution Plan. Adjudicating Authority approved the Resolution Plan, holding that Resolution Plan is in compliance with Section 30 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as ‘the Code’).

**7.** In pursuance of Resolution Plan, amounts were remitted to the Appellants on 31.01.2023, which were accepted under protest.

**8.** Challenging the order dated 09.01.2023, Comp. App. (AT) Ins. Nos. 107 & 108/2023 has been filed by the Appellants.

**9.** We have heard Sh. Krishnendu Datta, learned Sr. Counsel and Sh. Abhijeet Sinha, learned Sr. Counsel appearing for Appellants. Sh. Arun Kathpalia, learned Sr. Counsel appearing for the RP, Sh. Dhruv Mehta, learned Sr. Counsel appearing for the SRA , Sh. Ramji Srinivasan, learned Sr. Counsel appearing for Housing and Development Finance Corporation Ltd. the lead Financial Creditor and Sh. Nakul Diwan Sr. Advocate appearing on behalf of the Homebuyers Association.

**10.** We have also heard Rejoinder submissions of learned Counsel for the Appellants.

**11.** Submission advanced by the learned Counsel for the Appellant i.e., appearing for Beacon Trusteeship Ltd. and for the ICICI Prudential Venture Capital Fund Real Estate Scheme I being similar, we proceed to refer to the submissions as submissions of the Appellant. Learned Counsel for the Appellant submits that CMA was entered between with a Corporate Debtor and SRA prior to the approval of the Resolution Plan whereby Respondent No. 2 obtained the sole right to sell the flats in the Project, irrespective of whether the Resolution Plan is approved or not. Adjudicating Authority failed to consider that Resolution Plan was in contravention of Section 30(2) of the Code and it is unfair and inequitable as it provides 93% haircut to the appellant's claims for Secured Financial Creditor, while on the other hand, it provides 100% recovery to Homebuyers by way of allotted units in the Project without them having to bear any haircut or price escalation.

**12.** The RP has hurriedly completed the CIRP Process and Respondent No. 2 has put strict timeline for approval of the Resolution Plan to put pressure on the CoC. The Valuation Report which was submitted by the valuers appointed by RP were prepared without all relevant information available to the valuers. There being no proper valuations before the CoC, the decision of the CoC cannot be said to be in exercise of its commercial wisdom. The Resolution Plan submitted by Respondent No. 2 was a conditional Resolution Plan which ought not to have been approved.

**13.** It is submitted that payments sought to be made to the Appellant who were dissenting Financial Creditor is in violation of Section 30(2)(b)(ii) read *Comp. App. (AT) (Ins.) Nos. 1494 – 1495 of 2022, 99, 107 & 108 of 2023*

with Section 53(1) of the Code since the Appellant are not being paid, the liquidation value as per value of their security interest. Appellant – Beacon Trusteeship Ltd. have security interest in 15 unsold flats and receivable from 12 sold flats whereas ICICI Prudential Venture Capital Fund Estate Scheme I has security interest in 14 unsold flats and receivables from 4 sold flats. The liquidation value of the assets of the Corporate Debtor is grossly undervalued and the Valuation Report suffers from material irregularities, there were other material irregularities committed by the RP in the entire process which were hurried to approve the Resolution Plan submitted by the Respondent No. 2. The giving of the flats to Homebuyers without they being paying any escalation price, whereas, 93% hair cut pay out to the Financial Creditor is discriminatory and not in accordance with the IBC Code and the regulations framed thereunder.

**14.** Learned Counsel for the RP refuting the submission of the Counsel for the Appellant submits that the RP conducted the CIRP in accordance with the procedure prescribed, allegation that RP hurried up the process is wholly incorrect, in the Meetings of the CoC, it was brought into the notice of the Members that as per circular issued by MCGM in event FSI premium is paid prior on 31.12.2021 the Corporate Debtor will be saving more than Rs. 100 Crores. The application inviting EoI itself provided that the Resolution Applicant has to commence the construction and has also to provide for funding. It is submitted that RFRP also required SRA to commence construction, although two EoIs were received, but there being only one eligible Resolution Applicant, i.e., Respondent No. 2, only one Plan was received in the CIRP on 17.12.2021. RFRP required commencement of

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construction by the SRA, hence the CMA as well as MFA was submitted by SRA along with the Resolution Plan which was as per RFRP. CMA itself contemplated that from the date of approval of Resolution Plan by the Adjudicating Authority, the CMA shall come to an end. The allegation that SRA was given right to sell the flats under the CMA was hedged by conditions and further from the date of execution of the CMA, i.e., 27.12.2021 and till approval of the Resolution Plan on 09.01.2023 by the Adjudicating Authority, no flats were sold by Construction Manager, hence the allegation has no substance.

**15.** It is submitted that the asset of the Corporate Debtor was only right which was conferred by the DB vide Agreement dated 31.03.2016. It is submitted that DB had been granted Development Right by society vide Agreement dated 31.10.2010 and society having terminated the Agreement unless the Corporate Debtor was resolved and an Agreement is entered into with the society, no right could have been left with the Corporate Debtor to receive anything. Since on termination of Agreement by society of DB automatically the Corporate Debtor shall lose its all rights since it has no privity with the society.

**16.** The CoC refused to give any interim finance in spite of requirement of interim finance having been noted in several Meetings of the CoC. When the CoC refused to give any interim finance, there was no option except to require the finance from the SRA. Payment of FSI premium prior to 31.12.2021 was necessary to save the benefit of Rs. 100 Cores to the Corporate Debtor. The Appellants were party to all proceedings and were well aware of all discussions and proceeding in the Meetings of the CoCs.

**17.** The argument that Valuation Reports were not correct has no substance. The RP has shared all information regarding the Corporate Debtor available with it to the valuers and valuers after detailed correspondence with the RP had provided the Valuation Report. Valuers who submitted the Reports are expert and it is not open for the Appellant or this Tribunal to sit in Appeal on the Valuation Report. It is submitted that Resolution Plan is fair and equitable to all Creditors, Homebuyers constituted a different category of Financial Creditor in a class and the fact that they are being provided homes without being asked to pay any escalation price is not a ground on which Resolution Plan can be interfered with, CoC in its commercial wisdom has approved the Resolution Plan which does not require any interference at the instance of the Appellant in this Appeal.

**18.** Adjudicating Authority considered all objections of the Appellant while passing the order dated 02.12.2022 and has also again examined the Resolution Plan and found Resolution Plan fully compliance with provisions of the IBC hence by order dated 09.01.2023 approved the Plan.

**19.** Appellant being dissenting Financial Creditors are entitled to receive the amount which have been available to them as per Section 30(2)(b), the amount offered to the Appellant is not the amount less than the amount which they are entitled under the Plan. The submission of the Appellant that they are entitled to receive the amount as per security value is incorrect. Dissenting Financial Creditor is entitled for amount as per Section 30(2)(b) and cannot claim payment as per security value.

**20.** Learned Counsel appearing for the SRA submitted that Resolution Plan submitted by SRA is in compliance with the provisions of the Code and the *Comp. App. (AT) (Ins.) Nos. 1494 – 1495 of 2022, 99, 107 & 108 of 2023*

Regulations framed thereunder. It is submitted that SRA was the only Resolution Applicant who has submitted the Resolution Plan in the CIRP of the Corporate Debtor. There was requirement in RFRP to commence construction immediately. Towards construction, the CMA was submitted by the SRA which was requirement of the RFRP. The funding was also contemplated from the SRA hence the draft MFA was also submitted along with the Resolution Plan. The CoC was well aware of the requirement of payment before 31.12.2021 to the MCGM to avail the discount of 50% FSI premium. Hence it was decided to make the payment prior to that date, the SRA was informed to infuse the interim finance as well as start construction hence the CMA cannot be said to violate any provisions of the IBC or the Regulations.

**21.** In any view of the matter, CMA came to an end on 09.01.2023 when Resolution Plan was approved and after 09.01.2023, the SRA has proceeded with the construction. The Resolution Plan has been implemented by the SRA. SRA has paid amount to the accenting Creditors under the Resolution Plan as well as to the dissenting Financial Creditors, Operational Creditors and workmen employees has also been paid the amount as per the Plan. The construction in the Project has commenced on 01.01.2022 in accordance with the Clause 5.6 of the RFRP and constructions are likely to complete by June 2024. Resolution Plan is fair and equitable. The receivables from the Corporate Debtor were much low than the amount to be spent in for the construction of Resolution. The Resolution Plan is in compliance with Section 30(2) which compliance has been checked by the Adjudicating Authority while passing the order dated 09.01.2023. The Appellants and dissenting Financial

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Creditors are entitled to the payment of the amount as per Section 30(2)(b) which amount has already been paid to the Appellant.

**22.** Sh. Ramji Srinivasan, learned Sr. Counsel appearing for lead Financial Creditor HDFC Bank Ltd. submits that HDFC is a Secured Financial Creditor having 33.25% voting shares. HDFC is also Homebuyers with 5.4% out of 33.41% Homebuyers shares. Respondent No. 3 has extended a loan facility of Rs. 1,100 Crores to MIG against which DB has given the Corporate Guarantee in favour of Respondent No. 3. Loan given to MIG is separate and different transaction between Respondent No. 3 and MIG and has no bearing on the CIRP against the Corporate Debtor. HDFC has necessarily sought protection of the Homebuyers interest in the 9<sup>th</sup> CoC Meeting. The sole asset which was available for the Resolution of the Corporate Debtor where the re-development rights in the Project as granted by DB vide its Agreement dated 31.03.2016. Corporate Debtor did not owe any other assets except the rights granted under the said Agreement. Most of the entities to which Corporate Debtor has given loan advances were themselves admitted into insolvency owing to which those monies could not be recovered by the RP as recorded in the Valuation Report. It is submitted that commercial wisdom of the CoC cannot be questioned by the Appellant. The extent of interference in the commercial wisdom of the CoC has already been laid down by the Hon'ble Supreme Court in the matter of '**CoC of Essar Steel India Limited' Vs. 'Satish Kumar Gupta & Ors.'**', reported in **(2020) 8 SCC 531**. It is submitted that dissenting Creditors are not entitled to claim the value of the security interest.

**23.** Learned Counsel appearing for the Homebuyers has also supported the order of approval of the Resolution Plan. Request for Resolution Plan provided *Comp. App. (AT) (Ins.) Nos. 1494 – 1495 of 2022, 99, 107 & 108 of 2023*

a mandatory condition that the SRA would be required to start construction immediately on approval of the Resolution Plan by the CoC. Pending the CIRP process, all Financial Creditors were requested to provide interim finance which was refused by all the Financial Creditors. Beacon Trusteeship Ltd. in fact expressed its inability to contribute towards CIRP cost. Resolution Plan has been approved with majority of 83.92% of CoC, dissenting Financial Creditors are raising frivolous objections. The Resolution Plan is fair and equitable. All Homebuyers have been treated alike. Homebuyers are suffering for last several years. All flats have been sold by the Corporate Debtor and promoters to the Homebuyers. Homebuyers were to receive possession in November 2019. Resolution Plan now provide revised date of possession as 06.06.2024.

**24.** We have heard Counsel for the parties and perused the record.

**25.** For considering the submissions raised by learned Counsel for the parties, we need to first notice few Minutes of the CoC and certain clauses of application inviting the EoI and RFRP. We have already noticed above that Corporate Debtor was not developer appointed by the society. Society has appointed DB granting right of redevelopment of the land by Agreement dated 31.10.2010. The DB who was to execute the redevelopment Agreement granted certain rights to the Corporate Debtor upon discharging certain costs and obligations, including the obligation to cause and complete the construction of the Project. Under the Agreement with the society the DB had to provide flats to the Members of the society and there were under the Agreement certain rights to the DB for free sale. The society had terminated the Development Agreement on 08.05.2020. The consequence of which was

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that rights given by DB to the Corporate Debtor were to automatically come to an end. Termination letter dated 08.05.2020 was challenged by the DB before the Bombay High Court in Arbitration Proceedings where an interim award was given by Arbitrator on 05.05.2021, by which Termination Notice was stayed subject to various conditions to be fulfilled by the DB which included payment of arrears of hardship compensation to the society as well as payment of hardship compensation of Rs.3,09,00,000/- per month.

**26.** In the CoC Meetings, the progress in the CIRP were apprised from time to time by the RP. In the 3<sup>rd</sup> CoC Meeting held on 13.09.2021 and under Item No. 7, letter received on 04.09.2021 from MIG Bandra (DB) was noted. In Item No. 7 following was recorded:

**“Item No. 7**

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

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

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

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

*Upon query raised by the RP as to the business plan, representative of Adani informed that they are working on the same and would be able to present to the CoC by September 17, 2021. On further query raised by the RP, representative MIG stated that they have received*

*information/ data pertaining the project from employees of the CD prior to the CIRP. The Chairman then invited to the CoC for discussion.*

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

*Mr. Sunil Munot from ICIC stated that they require details of complete business plan in order to arrive at any decision and further, the structure/plan proposed by MIG and Adani should not affect the CIRP and rights of the secured creditors of the CD. Concurring with the view of ICIC, Mr. Vinayak representative of HDFC further added that:*

*a) It is important that the Adani present its credentials in the real estate industry;*

*b) Clarity on rights and obligations of the society and*

*c) the business plan should clearly provide timelines of project completion, cost involved, means of financing, projected cash flows, selling plans etc.*

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

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

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

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

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

**27.** Further in Item No. 13, Homebuyers views was noted where Homebuyers expressed their satisfaction on the offer made as communicated vide letter dated 04.09.2021. In 4<sup>th</sup> CoC Meeting held on 17.09.2021, where it was decided to carry on the construction. The views of the CoC as noticed in 4<sup>th</sup> CoC Meeting under Item No. 5 are as follows:

*“On the funding aspect, following were the views of the CoC Members:*

*a) Representative of Beacon stated that as it is a debenture trustee, it is not possible for them to finance.*

*b) Representative of ICICI stated that since it is a venture capital fund manager, money is not available for further finance to an investment where it is at recovery stage; and*

*c) Representatives of HDFC and Yes Bank also apprehended their inability to sanction further finance of the CD in view of the internal policies.*

*Mr. Sunil Munot form ICICI expressed his view that there should not be any legal issue to commence the project as a going concern, however, how will fund the same is an issue.*

*Adv. Ashish Parwani emphasized that the CoC should find a solution to stop the termination from the Society to safeguard the interest of the CD and its stakeholders.*

*The CoC after detailed discussion and deliberation, in principle agreed that the construction of the project has to be commenced in order to save the project. Since further discussion on the legal structure and commercial aspects to commence the project was felt necessary by the CoC, it was decided to convene next meeting on Tuesday, September 22, 2021 to decide further course of action.”*

**28.** The views of lead Financial Creditor HDFC were also recorded in the Minutes which stated that in order to save and safeguard the only assets of the Corporate Debtor i.e., development rights over the Ten BKC Project it is important to start the project and enter into settlement with the society. In

5<sup>th</sup> CoC Meeting held on 21.09.2021, the fee of appointment of the registered valuers was approved. It was further recorded in Item No. 12 that Members of the CoC shown their inability to contribute as interim finance towards construction of the Project. Following is recorded in Item No. 12:

**“Item No. 12**

***To Consider raising of interim finance***

*The chairman apprised the CoC members that during the last COC meeting, majority of the COC members shown their inability to contribute as interim finance towards the construction of the project.”*

**29.** In various CoC Meetings, the Homebuyers had requested to urgently commence construction and arrange for interim finance which is recorded in 6<sup>th</sup> CoC Meeting held on 07.10.2021. In 7<sup>th</sup> CoC Meeting, CoC discussed several issues including cost of construction, draft RFRP. The 7<sup>th</sup> Meeting held on 20.05.2021 draft RFRP was also approved in the said Meeting, subsequently, RFRP was issued by the RP. In Clause 5.6 it was contemplated that after approval of the Plan and issue of LoI, SRA is required to commence construction. Clause 5.6 of the RFRP is as follows:

*“5.6 Within [•] days from the acceptance of the LoI, the Successful Resolution Applicant shall be required to commence construction on the site against reimbursement of cost basis, or such other basis as the CoC may approve. The aforesaid obligation shall continue until the Successful Resolution Applicant becomes eligible to implement the approved Resolution Plan, consequent upon issuance of all necessary approvals.”*

**30.** We may also notice that in the 7<sup>th</sup> CoC Meeting held on 20.05.2021 under Item No. 9, it was also resolved that the required funds for the premium payment are to be made before 31.12.2021. It was further noticed that

Resolution Applicant was to make payment of around Rs. 600 Crores towards commencement of the construction. Under Item 9, following was recorded:

**“Item No. 9**

**To discuss and approve draft of Request for Resolution Plan (RFRP) along with the performance security as required under regulation 36B(4A) of the CIRP Regulations, 2016:**

*The Chairman informed the CoC that draft of the suggested RFRP had been circulated the CoC via email dated October 19, 2021. He then sought views of the CoC on the draft RFRP including the EMD and Performance Security Amount considering the fact that Resolution Applicant, whose Resolution Plan is approved by the CoC, has to immediately deploy the required funds for the premium payment before 31<sup>st</sup> December 2021, to pay monthly rent to the society and the construction cost in order to resolve the society related issues and save the project.*

*The CoC Members agreed with the views of the Chairman and discussed that the Resolution Applicant will have to bring upfront payment of around Rs. 600 Crores towards commencement of the construction, rent to the society members and the premium liabilities immediately upon approval of its Resolution Plan by the CoC. The CoC therefore decided that:*

*a) A Resolution Applicant has to provide Earnest Money Deposit of Rs. 1,00,00,000/- (Indian Rupees One Crore) at the time of submission of Resolution Plan.*

*b) A Resolution Applicant, whose Resolution Plan is approved by the CoC, shall submit Performance Security of Rs. 25,00,00,000/- (Indian Rupees Twenty-Five Crores) as per the terms and condition of the draft RFRP. The performance security provided by the resolution applicant to be returned once they infuse the funds of Rs. 25 Crores or more for the project cost such as approval cost/premium payable to MHADA/MCGM, rent payment, construction cost etc. before 31<sup>st</sup> December, 2021.*

*It was further agreed by the CoC members that Performance Security in the form of Bank Guarantee shall be taken in the name of HDFC Limited being the largest stakeholder.*

*Representative of HDFC stated that they have observed some referencing errors in the draft RFRP and the same will be emailed separately to incorporate in the draft RFRP.*

*Copy of the Request for resolution plan (RFRP) is attached as **Annexure – B**.*

*Accordingly, the following resolution has been put to vote through electronically.*

**“RESOLVED THAT** *pursuant to provisions of the Reg. 36B of the CIRP Regulations 2016, the Committee of Creditors (“CoC”) hereby approves the RFRP, draft of which was circulated to the CoC and discussed and finalized in the Meeting.”*

**31.** As noted above in pursuance of obligation of `Form-G’ an EoI was received from two entities including Respondent No. 2 but only one Resolution Plan was received from Respondent No. 2, which fact has been noticed that it was only Respondent No. 2 who was only eligible Resolution Applicant. In Item No. 7 of the 9<sup>th</sup> CoC Meeting held on 11.11.2021, following was recorded:

**“Item No. 7**

**To take note of the Provisional List of Prospective Resolution Applicants (“PRAs”) and further course of action:**

*The Chairman informed the CoC that the Provisional List of PRAs had been circulated to the CoC and the PRAs on 2<sup>nd</sup> November 2021 consisting of sole PRA viz. Adani Goodhomes Private Limited (“Adani”) fulfilling eligibility criteria set out by the CoC u/s 25 (2)(h) of the Code. He further informed that another PRA i.e. Ashdan Group, which was not eligible, has withdrawn its EOI and has sought refund of the deposit vide email dated 4<sup>th</sup> November 2021. Hence, Rs.25,00,000/- paid by the Ashdan Group alongwith EOI has deposited will be refunded.*

*The Chairman further informed the CoC that he has issued RFRP. Evaluation Matrix and Information Memorandum to Adani to submit its Resolution Plan for the CD on or before 7<sup>th</sup> December 2021. Further, the Final List of PRAs had been issued on 11<sup>th</sup> November 2021 to the CoC.*

*The CoC took note of the above.”*

**32.** It was due to the decision of the CoC as noted above and the condition of RFRP that Respondent No. 2 submitted the Resolution Plan and along with the Resolution Plan draft CMA and MFA was submitted. The Resolution Plans were discussed in the 12<sup>th</sup> CoC Meeting held on 21.12.2021 and 13<sup>th</sup> CoC Meeting held on 25.12.2021 voting was concluded on 27.12.2021 on which date, the Plan was approved with 83.93% vote shares. The above Minutes of the CoC and the sequence of the event clearly indicate that the submission of the Appellant that RP rushed through the CIRP process and hurriedly put the Plan for voting is incorrect. All steps in the CIRP process were taken under the decision of the CoC who being well aware that payments have to be made to MCGM before 31.12.2021 decided to put the Plan to vote before that date.

**33.** It is further relevant to notice that after approval of the Plan on 27.12.2021, the Respondent No. 2 has infused the interim finance of Rs. 450 Crores which was used to pay the FSI premium to MCGM as well as payment to the society and the payment towards construction.

**34.** The submission of the Appellant that by CMA rights were given to the Respondent No. 2 to sell the flats before an approval of the Resolution Plan needs consideration. It is to be noticed that it was insisted in the Meeting of the CoC by the Homebuyers that construction should immediately commence. In event, the construction would not have immediately commenced and the disputes with society was not resolved, nothing would have been left in the Corporate Debtor to be resolved, since in event of Termination of Development Agreement with DB, coming into operation all rights of Corporate Debtor could have automatically vanished. The insistence of CoC to complete the process

urgently was need of time and circumstances of the case and was in the interest of the Corporate Debtor.

**35.** We thus do not find any hurry or procedural violation by the RP in conducting the CIRP and approving the Resolution Plan.

**36.** Learned Counsel for the Appellant(s) have challenged the Valuation Report obtained by RP in the CIRP. It has been contended that Valuation Report were submitted by Valuers without there being complete information available with them. It is submitted that the Valuation Reports were submitted before the Adjudicating Authority was challenged by the Beacon and ground for challenging the Valuation Reports were advanced, which were rejected by the Adjudicating Authority vide its order dated 02.12.2022 on insufficient ground. The submission of the Appellant(s) have been opposed by the learned Counsel appearing RP and SRA. It is submitted that appointment of Valuers was approved by the CoC and the Valuers were appointed in accordance with CIRP Regulations, 2016, who have submitted comprehensive Reports. It is submitted that two Valuers were appointed for valuation of immovable property, whereas two Valuers were appointed for financial assets. It is submitted that Reports were submitted by Experts, after considering all aspects of the matter. In the Valuation Reports submitted by both the Valuers, there was no substantial difference.

**37.** To appreciate the submissions of the learned Counsel for the parties, it is useful to refer briefly the Valuation Report of immovable property submitted by Sudeep H.B. & Co., who was appointed to value the land and building. The Valuation Report has been brought on the record, which indicate that Valuation Report has been indexed in 51 subjects. The Valuer has captured



the details of Agreement relating to Re-development dated 13.03.2016 as well as the Supplemental Agreement dated 25.02.2021. In paragraph-34 of the Valuation Report, 'Determination of Liquidation Value' has been dealt with. In the Report submitted by Sudeep H.B. & Co., it is useful to extract paragraph-34 of the Valuation Report, where Liquidation Value was determined as 4,18,20,66,363. Paragraph 34 of the Valuation Report is as follows:

**"34.0 DETERMINATION OF LIQUIDATION VALUE**

*The 'Residual Method of Valuation' has been adopted to determine the Liquidation Value and the working is shown below*

<b>Summary Details Sold/ Unsold and Balance Receivables</b>		
Sr. No.	Particulars	Radius Estates And Developers Pvt. Ltd. Area Share (sq.ft.)
1	Total Saleable Area	7,87,008
2	Area Sold	4,46,921
3	Less: Area not considered in valuation (as per para 21.0 of Valuation Report)	10.878
4	Balance Unsold Area	3,29,209
5	Total Agreement Value (Rs.)	11,61,01,29,032
6	Amount Received Till Date (Rs.)	7,33,97,85,328
7.	Balance Receivables (Rs.)	4,27,03,43,704
8	Less: ITC Credit to be give on flat cost (Rs.)	8,82,77,341
9	Balance Receivables considered for Valuation (Rs.)	4,18,20,66,363

	Amount (In Rs.) (Incoming)	Amount (In Rs.) (Outgoings)
Total Sale value of Unsold Saleable area Residential Flats (Radius Estates and Developers Pvt. Ltd.'s Share) of 3,29,209 sq. ft.	1053,46,88,000/-	

@ Rs.32,000/- per sq. ft. on Saleable area		
Balance Receivables from Sold Area (Radius Estates and Developers Pvt. Ltd.'s Share)	418,20,66,363	
<b>TOTAL</b>	<b>1471,67,54,363</b>	
Balance construction cost of Rehab and Sale Buildings including GST and Contingencies [As per Para 19.1 of the valuation report]		812,60,49,063

	Amount (In Rs.) (Incoming)	Amount (In Rs.) (Outgoings)
Balance Premiums to be paid [As per para 17.1 of the valuation report]		147,88,72,847/-
Society related Rent [As per para 6.0 of the valuation report]		105,62,04,500/-
Stamp Duty for 50% premium reduction		52,67,34,400/-
Admin + Selling expenses etc.		14,00,00,000/-
Refund amount (Units already resold)		37,19,30,998/-
Statutory Costs (LUC Tax) [As per Annexure-1]		28,61,15,356/-
Interest @ 11% for a period of 30 months		131,81,19,788/-
Net Turnover from the Project i.e. Rs.1471,67,54,363/- - Rs.131,81,19,788/- = Rs.1339,86,34,575/-		
Assuming Developer's Profit from the Net Turnover value @10%		133,98,63,457/-
<b>Total</b>	<b>1471,67,54,363/-</b>	<b>1464,08,90,409/-</b>

$$\begin{aligned}
\therefore \text{Total Value of Project} &= \text{Gross Turnover from the project} - \text{Outgoings} \\
&= \text{Rs.1471,67,54,363/-} - \text{Rs.1464,08,90,409/-} \\
&= \text{Rs.7,58,63,954/-} \text{ -(A)} \\
&=====
\end{aligned}$$

The above Residual is differ for a period of 1.5 years @ 13% p.a. (Capitalization WACC rate)

$$\begin{aligned}
\therefore \text{Present Value (P.V.)} &= \frac{1}{(1 + 13/100)^{1.5}} \\
&= 0.8325 \\
\therefore \text{Fair Value} &= A \times 0.8325 \\
&= \text{Rs.7,58,63,954/-} \times 0.8325 \\
&= \text{Rs.6,31,56,464/-} \\
&===== \\
\text{Say :} &= \text{Rs.6,31,56,500/-} \text{ -(B)} \\
&=====
\end{aligned}$$

Therefore Fair Value of the project is Rs. 6,31,56,500/-

Further discount of 20% has been allocated for the same to determine the Liquidation Value.

$$\begin{aligned}
\therefore \text{Value} &= \text{Rs. 6,31,56,500/-} \times 80\% \\
&= \text{Rs.5,02,25,200/-} \\
&=====
\end{aligned}$$

Further, deducting acquisition cost @ 5% as stamp duty which works out to Rs.24,05,961/-

$$\begin{aligned}
\therefore \text{Liquidation Value of Project} &= \text{Rs.5,02,25,200/-} - \text{Rs.24,05,961/-} \\
&= \text{Rs.4,81,19,239/-} \\
&===== \\
\text{Say :} &= \text{Rs.4,81,19,200/-} \\
&=====
\end{aligned}$$

**38.** When we look into the aforesaid Report, it indicate that all relevant factors have been given due consideration. There is another Report of the immovable property, which also gave detailed consideration.

**39.** The Adjudicating Authority has also considered the objections raised by the Appellant to the Valuation Report. In paragraph-5 of the order dated 02.12.2022, the Adjudicating Authority dealt with the objections and upheld the Valuation Reports. It is useful to extract following observations of the Adjudicating Authority in paragraph-5 of the order, which is as follows:

*“5. .... The present Resolution Professional as per the regulations obtained valuation reports from five valuers namely M/s Sundeep H.B. & Co., M/s TrueVal Advisors, Mr. Shrenik Doshi, CA, Mr. Mahish Jaju, CA and M/s G. M. Kapadia & Co. The independent valuers who have given separate valuation report did not find fault with the earlier valuers in so far as the method of valuation adopted by the earlier valuers is concerned. The TrueVal Report Showed the fair value of the Project to be Rs.3.24 crores and the liquidation value of the Project to be a mere Rs. 2.47 Crores whereas the Sundeep H.B. Report showed the fair value of the Project to be Rs. 6.31 Crores and the liquidation value of the Project to be Rs. 4.81 Crores which is not so disproportionate.*

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

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

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

*(Emphasis Supplied)*

**40.** In the reference of valuation, which is conducted in the CIRP, we need to notice judgment of the Hon'ble Supreme Court in **Ramkrishna Forgings Ltd. vs. Ravindra Loonkar, Resolution Professional of ACIL Ltd. & anr. – (2024) 2 SCC 122**. In the case before the Hon'ble Supreme Court, the Adjudicating Authority on the Application filed by the RP for seeking approval of Resolution Plan, direction was issued to keep the Application in abeyance while directing the Official Liquidator to carry out the revaluation of the assets of the Corporate Debtor. The proceedings before the NCLT and NCLAT have been noticed in paragraph-1 of the judgment, which is as follows:

*“Heard the learned counsel for the parties. The present appeal under Section 62 [“62. Appeal to Supreme Court.—(1) Any person aggrieved by an order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within forty-five days from the date of receipt of such order.(2) The Supreme Court may, if it is satisfied that a person was prevented by sufficient cause from filing an appeal within forty-five days, allow the appeal to be filed within a further period not exceeding fifteen days.”] of*

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*the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) is directed against the judgment dated 19-1-2022 (hereinafter referred to as “the impugned judgment”) passed by the National Company Law Appellate Tribunal (hereinafter referred to as “NCLAT”) in Ramkrishna Forgings Ltd. v. ACIL Ltd. (Resolution Professional) [Ramkrishna Forgings Ltd. v. ACIL Ltd. (Resolution Professional), 2022 SCC OnLine NCLAT 1151] which has upheld the order [IDBI Bank Ltd. v. ACIL Ltd., 2021 SCC OnLine NCLT 30896] passed by the adjudicating authority (National Company Law Tribunal | The National Company Law Tribunal is a creature of Section 408 of the Companies Act, 2013. Under Section 60 of the Code, it has been designated as the adjudicating authority for corporate persons.) ) [hereinafter referred to as “the adjudicating authority — NCLT” or “adjudicating authority” or “NCLT”], Principal Bench dated 1-9-2021 [IDBI Bank Ltd. v. ACIL Ltd., 2021 SCC OnLine NCLT 30896] by which the application seeking approval of a resolution plan for ACIL Ltd. (hereinafter referred to as either “ACIL” or “the corporate debtor”) being IA No. 1636 of 2019 in CP (IB) No. 170(PB)/2018 (hereinafter referred to as “the approval application”) was kept in abeyance while directing the Official Liquidator (hereinafter referred to as “the OL”) to carry out a revaluation of the assets of the corporate debtor and to provide exact figures/ value of the assets and exact valuation details.*

**41.** The Hon’ble Supreme Court did not approve the judgment of NCLT and NCLAT and has held that Adjudicating Authority’s order to direct the revaluation was unsustainable. Revaluation directed by Adjudicating Authority was frowned upon. Following was held in paragraph 35, 36 and 37:

**“35.** *At this juncture, it also cannot be lost sight of that it is for the FC(s) who constitute the CoC to take a call, one way or the other. Stricto sensu, it is now well settled that it is well within the CoC’s domain as to how to deal with the entire debt of the corporate debtor. In this background, if after repeated negotiations, a resolution plan is submitted, as was done by the appellant (resolution applicant), including the financial component which includes the actual and minimum upfront payments, and has been approved by the CoC with a majority vote of 88.56%, such commercial*

wisdom was not required to be called into question or casually interfered with.

**36.** Surprisingly, the discussion in both orders is wanting, except for the difference in the figure of the total outstanding dues and the amount of money which the appellant was to put up initially for taking over the corporate debtor, for this Court to understand as to what other reasons, grounded in the Code's provisions, compelled the adjudicating authority — NCLT to embark upon the novel path of ordering revaluation by the OL. At the cost of repetition, nobody had moved before NCLT or raised any objection challenging the resolution plan pending approval. Even NCLAT has only indicated that when “figures of crores” are emerging stage-wise, “then there is no harm to look at the expert opinion”, which the adjudicating authority — NCLT in this case has asked for.

**37.** It is worthwhile to note that the adjudicating authority has jurisdiction only under Section 31(2) of the Code, which gives power not to approve only when the resolution plan does not meet the requirement laid down under Section 31(1) of the Code, for which a reasoned order is required to be passed. We may state that NCLT's jurisdiction and powers as the adjudicating authority under the Code, flow only from the Code and the Regulations thereunder. It has been held in *Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd.* [*Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd.*, (2022) 1 SCC 401 : (2022) 2 SCC (Civ) 165] : (SCC p. 669, para 273)

“273. ... 273.1. The adjudicating authority has limited jurisdiction in the matter of approval of a resolution plan, which is well-defined and circumscribed by Sections 30(2) and 31 of the Code. In the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by the Committee of Creditors. If, within its limited jurisdiction, the adjudicating authority finds any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after

*satisfying the parameters delineated by the Code and exposted by this Court.”*

*(emphasis supplied)”*

**42.** The Adjudicating Authority has rightly noted and relied on the judgment of Hon’ble Supreme Court as referred to in paragraph-5 as extracted above, where Hon’ble Supreme Court held that valuation of immovable property is not an exact science, nor can it be determined like an algebraic problem, as it abounds in uncertainties and no straitjacket formula can be laid down for arriving at exact market value of the land. The valuation of Experts cannot be disregarded on objection filed by dissenting Financial Creditors. The Valuation Reports have been shared to all Financial Creditors and after examining the Valuation Reports, the Resolution Plan was approved by overwhelming majority.

**43.** Another submission, which has been pressed by learned Counsel for the Appellant(s) is that there is unfairness in bargain as is reflected from the Resolution Plan. It is submitted that whereas Financial Creditors are subjected to haircut of 93%, the Homebuyers are being given their flats without escalation of any price. Insofar as, haircut of 93% given to Financial Creditors is concerned, we have noticed above the judgment of the Hon’ble Supreme Court in **Ramkrishna Forgings Ltd.** where Adjudicating Authority was swayed away by haircut of 94.25% and Hon’ble Supreme Court in paragraph-34 of the judgment as extracted above observed that Adjudicating Authority was unduly swayed away with the haircut of 94.25%.

**44.** Coming to the giving of the flats to the Homebuyers under the Resolution Plan, without escalation of price, it is to be noted that Homebuyers are creditors in a class and they have been recognized as Financial Creditors  
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by amendments made in the Code. This Tribunal in its judgment in **Company Appeal (AT) (Insolvency) No.926 of 2019 – Flat Buyers Association Winter Hills – 77, Gurgaon vs. Umang Realtech Pvt. Ltd. through IRP & Ors.** decided on 04.02.2020, has noted the case of the Homebuyers and also noted the distinction between ‘Secured’ and ‘Unsecured’ Creditors. It is useful to extract paragraphs 4, 5 and 11 of the judgment, which are as follows:

**“4. In “Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.”**, the Hon’ble Supreme Court made a distinction between the ‘Secured’ and ‘Unsecured Creditors’ and observed that protecting creditors in general is, no doubt, an important objective. Protecting creditors from each other is also important. If an “equality for all” approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the Corporate Debtor is liquidated. This would defeat the objective of the Code which is resolution of distressed assets and only if the same is not possible, should liquidation follow. The amended Regulation 38 does not lead to the conclusion that ‘Financial Creditors’ and ‘Operational Creditors’, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of Operational Creditors rights under the Regulation 38 involves the resolution plan stating as to how it has dealt with the interests of Operational Creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.

**5. In “Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors.”**, the

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*Hon'ble Supreme Court upheld the Explanation below Section 5(8) (f) to hold that allottees (Homebuyers) of Infrastructure Company are 'Financial Creditors'. It further observed that RERA is in addition to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies. Therefore, provisions of the Code would apply in addition to RERA.*

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

**45.** With regard to assets, i.e, unit, it was observed by this Tribunal that units have to be transferred to Unsecured creditors - the Homebuyers and not to the Secured Creditors. Hence, comparison of their claim by the dissenting Financial Creditors from the Homebuyers, is not appropriate. The Homebuyers, who have been allotted the house and amount of consideration has already been fixed in the allotment and it was undertaken by the Corporate Debtor to handover the units on payment of consideration, no exception can be taken to handing over of the units to the Homebuyers on consideration, already paid. In this context, we may refer to judgment of this Tribunal, delivered on 02.11.2023 in ***Company Appeal (AT) (Insolvency) No.1162 of 2023 - Sabari Realty Pvt. Ltd. vs. Sivana Realty Pvt. Ltd. & Ors.*** In the above case, Homebuyers were treated in two groups, i.e. 'affected' and 'unaffected'. Affected Homebuyers were those whose units were mortgaged, but allotment was made without taking consent of the Financial Creditor, to whom the units were mortgaged. The other category was those Homebuyers, who were allotted the units, after obtaining no objection from Financial Creditor, to whom the units were mortgaged. The Resolution Plan *Comp. App. (AT) (Ins.) Nos. 1494 – 1495 of 2022, 99, 107 & 108 of 2023*

was approved treating them in two different categories, which was challenged before this Tribunal, on the ground that the treatment of Homebuyers, cannot be discriminated. This Tribunal in the above context held that treatment of Homebuyers in two categories as per the Resolution Plan, which was approved by the CoC, cannot be objected. This Tribunal also observed that reference has to be on fair and equitable treatment. It is useful to extract paragraphs 24, 25, 26 and 27 of the judgment, which are as follows:

*“24. The above judgment does not help the Appellant in the present case since in the above case the question was distribution of amount under the Resolution Plan to the Operational Creditors inter se and this Tribunal directed payment of amount to the Operational Creditors in the same proportion to uphold the Resolution Plan. The present is not a case of distribution of any amount rather Resolution Plan provides for ways and manner to complete the project and handover units to the allottees. Allottees have been classified in two groups – ‘Affected’ and ‘Unaffected’, as noted above, and we have found the classification justified in the treatment of claims. Learned counsel for the Appellant has failed to point out any violation of any provision of law by aforesaid classification of ‘Affected’ and ‘Unaffected’ homebuyers. We, thus, are of the view that the Resolution Plan does not violate any provision of law.*

*25. We are conscious that the Hon’ble Supreme Court in **“Committee of Creditors of Essar Steel India Limited Through Authorised Signatory vs. Satish Kumar Gupta & Ors., (2020) 8 SCC 531”** has laid down that there can be difference in payment of the different category of creditors. In Para 88 of the judgment following has been held:*

*“88. By reading paragraph 77 (of Swiss Ribbons) de hors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Paragraph 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors. This being so, the observation in paragraph 77 cannot be read to mean that financial and operational creditors*

*must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, paragraph 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in paragraph 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said Regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.”*

**26.** *What was emphasised in the judgment is that there shall be fair and equitable treatment in dealing dues of Operational Creditors and further there can be difference in payment to the Financial Creditor and the Operational Creditors. Hon'ble Supreme Court in the said judgment has held that commercial wisdom of the Committee of Creditors cannot be substituted. In Para 144 and 147 following has been held:*

*“144. What is important to note is that when one reads the abovementioned judgment, it is a majority of 66% of the Committee of Creditors who has exercised the discretion vested in it under the Code in this particular manner, which has then*

*correctly not been disturbed by the NCLT and NCLAT. Far from helping Shri Sibal's client, the principle that is applied in such a case is that ultimately it is the commercial wisdom of the requisite majority of the Committee of Creditors that must prevail on the facts of any given case, which would include distribution in the manner suggested in Orissa Manganese (supra). It is, therefore, not possible to accept the argument that the Adjudicatory Authority and consequently the Appellate Authority would be vested with the discretion to apply what was applied by the Committee of Creditors in the Orissa Manganese case (supra). This submission is also devoid of merit and is, therefore, rejected."*

*"147. The NCLAT judgment which substitutes its wisdom for the commercial wisdom of the Committee of Creditors and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgment, must therefore be set aside."*

**27.** *We, thus, are of the view that commercial wisdom of the Committee of Creditors, which has approved the Resolution Plan under which different treatment has been given to 'Affected Homebuyers' and 'Unaffected Homebuyers', cannot be faulted. We, thus, are of the view that there are no grounds made out to challenge the approval of the Resolution Plan. Further, the Adjudicating Authority has also rightly rejected the objections filed by the Appellant by I.A. No. 933 of 2022."*

**46.** It is further relevant to notice that in the present case, the CoC has approved the Resolution Plan, which directed the haircut to the Financial Creditors and decided to handover the units to Homebuyers, after completion of the construction, which construction cost was undertaken to be spent by the SRA, as per the RFRP and Resolution Plan. It was a 'commercial wisdom' of the CoC, which approved the pay-out to different Creditors. Present is not a case, where any violation of Section 30, sub-section (2) has been proved by the Appellant. As observed above, Appellant(s) being dissenting Financial

Creditors are entitled to receive their payment as per Section 30, sub-section (2) (b) (ii) and the amounts, which have been offered to dissenting Financial Creditors, is in accordance with the said provision. We, thus, are not persuaded to interfere with the order of the Adjudicating Authority, approving the Resolution Plan on the above ground raised by the Appellant. The Adjudicating Authority in the order dated 09.01.2022, has adverted to all relevant consideration on which Resolution Plan is to be checked for compliances of the statutory provisions and there is detailed consideration in the judgment. The Adjudicating Authority in paragraph-6 of the judgment has returned a finding regarding compliance of Sections 30(2)(a), 30(2)(b), 30(2)(c), 30(2)(d), 30(2)(e) and 30(2)(f). The Adjudicating Authority has also adverted to the various Minutes of the CoC. We may only notice the observation of the Adjudicating Authority in paragraph-6 (f) and (j), which are as follows:

*“(f). **Section 30(2)(f) of IBC read with Regulations 38 and 39 of CIRP Regulations:** The key requirements under these provisions essentially speak to the feasibility and viability of the Plan and the capability of the RA. These aspects have been adequately dealt with in the Chart reproduced hereinabove and we may only add that there has not been any serious challenge to the capability of the RA, or the feasibility or viability of the Plan. Moreover, the way the RA has effectively dealt with the Society and DB, paid the outstanding amounts towards MCGM premia and other outgoings, and proceeded to resume construction under the Project as its Construction Manager pending consideration of the Plan under Section 31 of IBC, bears testimony to the feasibility and*

*viability of the Plan as also the capability and keenness in implementation on part of the RA.*

*(j) This Tribunal has already upheld the CoC's decision on the equitable treatment and distribution under the Plan to various classes of creditors in its Order dated 2.12.2022 and we confirm the same. We wish to emphasize that the ultimate decision on technical and commercial aspects of the Plan is that of the COC under the commercial wisdom doctrine. It is not open to this Tribunal to second-guess the merits of such decision in exercise of its power under Section 31 of IBC. This has been the consistent legal position as laid down by the Hon'ble Supreme Court of India in **K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150, Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531 and several decisions thereafter, including Jaypee Kensington v. NBCC, (2022) 1 SCC 401, wherein the resolution plan involved the revival of a real estate company and dealt with the interests of homebuyers and other classes of financial creditors.**"*

**47.** We, thus, do not find any infirmity in the order of the Adjudicating Authority, approving the Resolution Plan dated 09.01.2022.

**48.** Now we come to the submission advanced by the Counsel for the Appellant that Appellants are entitled for payment as per value of their security interest in the assets of the Corporate Debtor. As noted above, Beacon Trusteeship Ltd. claims security interest in 16 unsold flats receivable from 12 sold flats, ICICI Prudential Venture Capital Fund Real Estate Scheme I claims security interest in 14 unsold flats and receivables from 4 sold flats.

**49.** The question that a Financial Creditor including a dissenting Financial Creditor whether is entitled to receive the amount in a Resolution Plan as per his security interest has been considered and decided by the Hon'ble Supreme Court and this Tribunal as well. We may refer to the Judgment of the Hon'ble Supreme Court in the matter of '**India Resurgence ARC Pvt. Ltd.' Vs. 'Amit Metaliks Ltd. & Anr.'**' reported in **2021 SCC OnLine SC 409**. The Hon'ble Supreme Court in the above case has held that extent of the amount receivable by a dissenting Financial Creditor is provided in Section 30(2)(b). The argument that Financial Creditor is entitled to receive amounts as per security interest was rejected. In para 22 of the Judgment following was laid down:

*“22. The limitation on the extent of the amount receivable by a dissenting financial creditor is innate in Section 30(2)(b) of the Code and has been further expounded in the decisions aforesaid. It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above the other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors.”*

**50.** Another Judgment which needs to be noticed is the Judgment of this Tribunal in the matter of '**Edelweiss Asset Reconstruction Ltd.' Vs. 'Mr. Anuj Jain, Resolution Professional of Ballarpur Industries Ltd. & Ors.'**', **2023 SCC OnLine NCLAT 1908**. While considering the security interest which was owned by Financial Creditor, it was held that despite Financial Creditor have security interest in the assets of the Corporate Debtor they can be dealt with in the Resolution Plan in any manner as per the commercial wisdom of the CoC. In paragraph 22 of the Judgment, following was observed:  
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*“22. The above can be explained by taking example of a Financial Creditor. Financial Creditors may also have security interest in the assets of the Corporate Debtor. Section 30 of the Code, as amended from time to time, provides for payment to Operational Creditor(s) as well as dissenting Financial Creditor(s), which payment shall not be less than the amount which they are entitled to receive under Sub-section (1) of Section 53 in event of liquidation of the Corporate Debtor. Insolvency resolution process and liquidation are two different concepts with two different consequences. When in the insolvency resolution process claim of Financial Creditors are dealt with, there is no cap to the effect that they are entitled to receive the amount equivalent to their debt which is owed by the Corporate Debtor. Thus, despite Financial Creditor having security interest in the assets of the Corporate Debtor, they can be dealt with in the resolution plan in any manner as per the commercial wisdom of the CoC. When the security interest of Financial Creditor can be dealt with in the resolution plan in any manner, we fail to see that how a third party having security interest in the assets of the Corporate Debtor can claim any higher status or different status from the Financial Creditor.”*

**51.** Another Judgment which needs to be noticed in the Judgment of the Hon’ble Supreme Court in **Comp. App. (AT) (Ins.) No.405/2023, ‘ICICI Bank Ltd.’ Vs. ‘BKM Industries Ltd. & Anr.’**. In paragraphs 15 and 16 of this Judgment following was held:

*“15. When we look into Section 53, sub-section (1) (b), debt owed to a secured creditor has to be distributed equally between and amongst workmen’s dues and debts owed to a secured creditors. The debt owed to the secured creditor is a debt as admitted in the CIRP. Admittedly, the claim as submitted by the Appellant was admitted in the CIRP and debt owed to Appellant is as per admitted claim. The distribution of the debt has to be as per the debt of the Financial Creditors. The ‘debt’ is defined in Section 3(11) of the IBC, which is as follows:*

*“3(11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”*

16. Section 3, sub-section (6) defines the 'claim', which claim is to be filed by a Financial Creditor as per Regulation 8, sub-section (1) of the CIRP Regulations, 2016. Thus, the scheme of Section 53, sub-section (1), clearly indicates distribution as per the debt and in the legislative scheme there is no scope of distribution of assets among the Financial Creditors as per security interest. The issue which has been raised by the Appellant, came for consideration before this Tribunal in *Small Industries Development Bank of India vs. Vivek Raheja and Ors.* where also the Appellant had claimed distribution of assets as per security interest. An IA was filed by the Appellant (SIDBI), seeking a direction to distribute as per security interest. In paragraph 2, following case of the SIDBI has been noticed:

*"2. Brief facts of the case giving rise to this Appeal are:-*

- *Oriental Bank of Commerce had filed a Section 7 Application under the Insolvency and Bankruptcy Code, 2016 (IBC in short) against the Corporate Debtor – M/s. Gupta Exim (India) Pvt. Ltd. which was admitted by the Adjudicating Authority vide Order dated 29th October, 2019. In the 'Corporate Insolvency Resolution Process' in 16th Meeting of 'Committee of Creditors', Resolution Plans were discussed. Revised Resolution Plans were submitted by the prospective Resolution Applicants. Resolution Plan was put to e-Vote between 07th August, 2021 and 16th August, 2021 and by majority of 97.97%, the Resolution Plan of 'Lotus Textiles' and Mr. Vijayant Mittal was approved. Appellant sent an Objection dated 16<sup>th</sup> August, 2021 to the distribution to the Appellant under the Resolution Plan.*

- *An I.A. No. 581 of 2021 was filed by the Appellant for direction to the Resolution Professional to distribute the proceeds of the Resolution Plan where following prayers were made:*

1. *The present application may kindly be allowed and the directions be issued to the Respondent No. 1 modify/clarify the distribution to dissenting members as per*

*the Resolution Plan and distribute the proceeds of the resolution plan to Applicant SIDBI for an amount of Rs. 5,64,97,893/- in priority in accordance with provisions of IBC 2016 in the interest of justice and equity.*

*2. Interim stay be granted on distribution of the resolution plan amount by the Resolution Professional to the CoC members till the present application is decided.”*

*• The case of the Appellant in the Application was that as per security interest of the Appellant, the Appellant is entitled to 6.93 % i.e. the amount of Rs. 5,64,97,893/- and as per voting share as approved by the CoC, the Appellant is entitled to 2.03% i.e. Rs. 1,65,47,078/-. The case of the Appellant set up in the Application is that he is entitled for his distribution of plan amount as per value of the security interest of the Appellant. The Application was objected by the Resolution Professional. The Adjudicating Authority by the Impugned Order dated 17th March, 2022 rejected the I.A. No. 581 of 2021 upholding the decision of the CoC for distribution of proceeds of the Resolution Plan as per the voting share. Appellant aggrieved by the said Order, has come up in this Appeal.”*

**52.** Another Judgment which needs to be noticed is Judgment of this Tribunal in **Comp. App. (AT) (Ins.) No. 654/2022, 'Paridhi Finvest Private Ltd.' Vs. 'Value Infracon Buyers Association & Ors.'** In the above case also the Resolution Plan was sought to be challenged on the ground that Appellant was a Financial Creditor was entitled for higher amount. The submission of the Appellant that Appellant was entitled for payment as per security value of the Appellant was not accepted. In paragraph 12 of the Judgment following was held:

*“12. The Appellant’s claim was admitted in the CIRP for Rs.1,86,00,000/- and it having vote share of 2.38%, it has been proposed an amount of Rs.1,00,00,000/-,*

*Comp. App. (AT) (Ins.) Nos. 1494 – 1495 of 2022, 99, 107 & 108 of 2023*

*which is more than the amount, which would have been payable to the Appellant in case the amount is paid as per priority under Section 53(1) of the IBC. The learned Counsel for the Appellant submits that the Appellant was entitled for amount as per security value of the Appellant. It having equitable mortgage of 30 units/flats. It is well settled that the security holder cannot insist payment of amount as per security interest, when there is resolution of the Corporate Debtor through a Resolution Plan. In this context, we may refer to judgment of the Hon'ble Supreme Court in **India Resurgence ARC Pvt. Ltd. V. Amit Metaliks & Anr. (2021) SCC OnLine SC 409**. In paragraphs 16 and 17 of the judgment, following have been held:*

*“16. The repeated submissions on behalf of the appellant with reference to the value of its security interest neither carry any meaning nor any substance. What the dissenting financial creditor is entitled to is specified in the later part of sub-section (2)(b) of Section 30 of the Code and the same has been explained by this Court in Essar Steel [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] as under : (SCC pp. 628-29, para 128)*

*“128. When it comes to the validity of the substitution of Section 30(2)(b) by Section 6 of the amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives the operational creditors something more than was given earlier as it is the higher of the figures mentioned in subclauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to the operational creditors. The same goes for the latter part of subclause (b) which refers to dissentient financial creditors. Ms Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of the operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of the operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, preamendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing*

*for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2). Ms Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder.”*

*(emphasis supplied)*

*17. Thus, what amount is to be paid to different classes or sub-classes of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.”*

**53.** Learned Counsel for the Appellants have relied on the Judgment of the Hon’ble Supreme Court in **‘Vistara ITCL (India) Ltd. & Ors.’ Vs. ‘Dinkar Venkatasubramanian & Anr.’, (2023) 7 SCC 324.** Judgment of the Hon’ble Supreme Court in **‘Vistara ITCL (India) Ltd. & Ors.’ (Supra)** was a case where Hon’ble Supreme Court has exercised its jurisdiction under Article 142 of the Constitution. In **‘Edelweiss Asset Reconstruction Company Ltd.’ (Supra).** The Judgment of the **‘Vistara ITCL (India) Ltd. & Ors.’ (Supra)** was noticed in detail and following observations were made from paragraphs 33 to 38, which is reproduced as follows:

**“33.** *The Appellant has next relied Hon’ble Supreme Court judgment in “Vistra ITCL (India) Ltd.” (supra). In the above case also Amtek Auto Limited (Corporate*

Debtor) has pledged its shares for loan facility availed by two group companies i.e. Brassco Engineers Ltd. and WLD Investments Pvt. Ltd. In the insolvency proceeding of the Corporate Debtor, claim was filed by Vistra ITCL (India) Ltd., the Security Trustee in Form 'C', which claim was rejected. Resolution Plan was approved. Thereafter, an application was filed claiming right on the basis of pledged shares. I.A. No. 62 of 2020 as well as Appeal having been dismissed, Appeal was filed before the Hon'ble Supreme Court. Hon'ble Supreme Court in the above case, noticed the judgment of "Anuj Jain v. Axis Bank Ltd." (supra). Hon'ble Supreme Court in Para 9 noticed the issues raised and observed that two-fold answers can be given to the problem. First was to treat the Secured Creditor as a Financial Creditor, which according to the judgment of the Hon'ble Supreme Court may require reference to a larger bench. Hence, the Hon'ble Supreme Court proceeded to the Second option under which the Hon'ble Supreme Court held that Appellant was entitled to retain the security interest in the pledged shares, which means was entitled to retain the security proceeds on the sale of the said pledged shares. In Para 9 following was held:

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

*option is to treat the Appellant No. 1 - Vistra as a secured creditor in terms of Section 52 read with Section 53 of the Code. In other words, we give the option to the successful resolution applicant - DVI (Deccan Value Investors) to treat the Appellant No. 1 - Vistra as a secured creditor, who will be entitled to retain the security interest in the pledged shares, and in terms thereof would be entitled to retain the security proceeds on the sale of the said pledged shares under Section 52 of the Code read with Rule 21A of the Liquidation Process Regulations. The second recourse available, would be almost equivalent in monetary terms for the Appellant No. 1 Vistra, who is treated it as a secured creditor and is held entitled to all rights and obligations as applicable to a secured creditor under Section 52 and 53 of the Code. This to our mind would be a fair and just solution to the legal conundrum and issue highlighted before us.”*

**34.** *In the aforesaid judgment the Hon'ble Supreme Court has noticed provisions of Section 52, Section 53 and Section 30 of the Code. The submission which has been pressed by learned counsel for the Respondent is that the judgment of the Hon'ble Supreme Court in “**Vistra ITCL (India) Ltd.**” is judgment of the Supreme Court where Hon'ble Supreme Court has exercised its jurisdiction under Article 142 of the Constitution. Observation of the Hon'ble Supreme Court in Para 9 that “This to our mind would be a fair and just solution to the legal conundrum and issue highlighted before us.”, indicate that the solution which was followed by Supreme Court was in the facts of the said case and observation of the Hon'ble Supreme Court in Para 9 cannot be read as laying law within meaning of Article 141.*

**35.** *A third-party security interest holder is entitled to retain the security proceeds on the land of security interest under Section 52 of the Code. As noted above, Section 52 and 53 becomes applicable only in Liquidation Proceeding and reference of Section 53 under Section 30(2) is for the purpose of computing the payment to Operational Creditors and dissenting Financial Creditors to which they may be entitled under Section 53.*

**36.** *We, thus, accept the submission of learned counsel for the Respondent that judgment of Hon'ble Supreme Court in “**Vistra ITCL (India) Ltd.**” and direction*

issued in Para 9 have been in exercise of Article 142. Learned counsel for the Respondent has placed reliance on judgment of Hon'ble Supreme Court in **“State of Pujab v. Rafiq Masih, (2014) 8 SCC 883”**, where Hon'ble Supreme Court dealing with Article 141 and 142 of the Constitution of India enumerated the principles in Paras 8 and 11, which are to the following effect:

“8. In our view, the law laid down in Chandi Prasad Uniyal's case, no way conflicts with the observations made by this Court in the other two cases. In those decisions, directions were issued in exercise of the powers of this Court under Article 142 of the Constitution, but in the subsequent decision this Court under Article 136 of the Constitution, in laying down the law had dismissed the petition of the employee. This Court in a number of cases had battled with tracing the contours of the provision in Article 136 and 142 of the Constitution of India. Distinctively, although the words employed under the two aforesaid provision speak of the powers of this Court, the former vest a plenary jurisdiction in supreme court in the matter of entertaining and hearing of appeals by granting special leave against any judgment or order made by a Court or Tribunal in any cause or matter. The powers are plenary to the extent that they are paramount to the limitations under the specific provisions for appeal contained in the Constitution or other laws. Article 142 of the Constitution of India, on the other hand is a step ahead of the powers envisaged under Article 136 of the Constitution of India. It is the exercise of jurisdiction to pass such enforceable decree or order as is necessary for doing ‘complete justice’ in any cause or matter.

11. Article 136 of the Constitution of India was legislatively intended to be exercised by the Highest Court of the Land, with scrupulous adherence to the settled judicial principle well established by precedents in our jurisprudence. Article 136 of the Constitution is a corrective jurisdiction that vest a discretion in the Supreme Court to settle the law clear and as forthrightly forwarded in the case of Union of India v. Karnail Singh, it makes the law operational to make it a binding precedent for the future instead of



*keeping it vague. In short, it declares the law, as under Article 141 of the Constitution.”*

**37.** *It has categorically held by the Hon'ble Supreme Court in the above judgment that Article 142 of the Constitution is supplementary in nature and cannot supplant the substantive provisions, though they are not limited by the substantive provisions in the statute. It is a power that gives preference to equity over law. Differentiation in Article 141 and 142 has been noticed. Following has been observed in Para 12:*

*“12. ....This Court on the qui vive has expanded the horizons of Article 142 of the Constitution by keeping it outside the purview of Article 141 of the Constitution and by declaring it a direction of the Court that changes its complexion with the peculiarity in the facts and circumstances of the case.”*

**38.** *We, thus, are of the view that judgment of Hon'ble Supreme Court in “**Vistra ITCL (India) Ltd.**” is in facts of the said case. The Appellant in the present case cannot rely on the said judgment as a declaration of law within the meaning of Article 141 of the Constitution of India.”*

**54.** Judgment of the Hon'ble Supreme Court in '**Vistara ITCL (India) Ltd. & Ors.**' (*Supra*) does not come to help of the Appellant in the present case. It is relevant to notice that Hon'ble Supreme Court in '**DBS Bank Ltd. Singapore**' Vs. '**Ruchi Soya Industries Ltd. & Anr.**' 2024 SCC OnLine SC **3**, made a reference to the earlier Judgment of the Hon'ble Supreme Court in '**India Resurgence ARC Pvt. Ltd.**' (*Supra*), which reference is pending consideration before the Hon'ble Supreme Court. Law declared by Hon'ble Supreme Court in '**India Resurgence ARC Pvt. Ltd.**' (*Supra*) can very well be relied until a different view is expressed by the Hon'ble Supreme Court in the reference pending before it.

**55.** We thus are fully satisfied that Appellants are not entitled to claim payment as per the security interest in the asset of the Corporate Debtor.

**Order in I.A.**

**56.** I.A. No. 5442–5443/2023 has been filed in Comp. App. (AT) (Ins.) No.1494–1495/2022, seeking permission to file amended memo for replacing the Respondent No. 3 – Housing Development Finance Corporation Ltd. as HDFC Bank Ltd. Similar applications have been filed in all other Appeals for replacement of Respondent No. 3 – Housing Development Finance Corporation Ltd. as HDFC Bank Ltd. Amended memo has been filed along with application.

**57.** I.A. Nos. 5442–5443, 5412, 5413 and 5449/2023, are allowed. Amended memo is taken on record. Let Respondent No. 3 be substituted with HDFC Bank Ltd.

**58.** The Debentures of the Corporate Debtor held by ICICI Prudential Venture Capital Fund Real Estate Scheme I has been transferred to Dev Rishi Ventures LLP. I.A. Nos. 1073–1074, 1069, 835 and 887/2024, have been filed in these Appeals praying for substitution of Dev Rishi Ventures LLP in place of ICICI Prudential Venture Capital Fund Real Estate Scheme I. Amended memo of parties have been filed along with the IAs.

**59.** All the aforesaid IAs are allowed and Dev Rishi Ventures LLP is permitted to be substituted in place of ICICI Prudential Venture Capital Fund Real Estate Scheme I. Amended memo of parties filed along with the applications are taken on record.

**60.** The Adjudicating Authority vide order dated 02.12.2022 has rejected the objections raised by the Appellants by I.A. Nos. 503, 931/2022 & 808/2022, raising objections to the Resolution Plan approved by the CoC on 27.12.2021. All the submissions which are advanced by the Appellant *Comp. App. (AT) (Ins.) Nos. 1494 – 1495 of 2022, 99, 107 & 108 of 2023*

challenging the Resolution Plan has been noted and considered by us as above, we do not find any substance in any of the submissions of the Appellant warranting an interference in either the order dated 02.12.2022 or the order dated 09.01.2023.

**61.** In result, all the above Appeals are dismissed.

**[Justice Ashok Bhushan]  
Chairperson**

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

**NEW DELHI**

**27<sup>th</sup> May, 2024**

*himanshu/ashwani*