NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1116 of 2024

[Arising out of Order dated 30.04.2024 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-III in IA No.58 of 2023 in C.P. NO. I.B. – 1083(PB)/2018]

In the matter of:

K.H. Khan & Anr. **...Appellants**

Vs.

Art Constructions Pvt. Ltd. & Ors. **...Respondents**

For Appellants: **Mr. Maninder Singh Sr. Advocate with Mr. Zoheb Hussain, Mr. Udai Khanna, Mr. Vivek Gurnani, Mr. Pranjal Tripathi, Mr. Rangasaran Mohan, Ms. Ashita Chawla, Advocates.**

For Respondents: **Mr. Arijit Prasad Sr. Advocate with Mr. Sanjay Bhatt, Ms. Apoorva Chowdhury, Advocates for RP/ R3.**
Mr. Krishnendu Datta Sr. Advocate with Ms. Nishtha Kauza, Ms. Alina Mathew, Mr. Kumar Shubham, Advocates for Art.
Mr. Abhijeet Sinha Sr. Advocate with Mr. Apoorv Agarwal, Mr. Manav Goyal, Ms. Ritika Prasad, Ms. Tanushvi Singh, Advocates for Parinda.

Company Appeal (AT) (Insolvency) No. 1117 of 2024

[Arising out of Order dated 30.04.2024 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-III in IA No.4648 of 2020 in C.P. NO. I.B.- 1083(PB)/2018]

In the matter of:

K.H. Khan & Anr. **...Appellants**

Vs.

Udayraj Patwardhan **...Respondents**

For Appellants: **Mr. Maninder Singh Sr. Advocate with Mr. Zoheb Hussain, Mr. Udai Khanna, Mr. Vivek Gurnani,**

	Mr. Pranjal Tripathi, Mr. Rangasaran Mohan, Ms. Ashita Chawla, Advocates.
For Respondents:	**Mr. Arijit Prasad Sr. Advocate with Mr. Sanjay Bhatt, Ms. Apoorva Chowdhury, Advocates for RP/ R1.** **Mr. Krishnendu Datta Sr. Advocate with Ms. Nishtha Kauza, Ms. Alina Mathew, Mr. Kumar Shubham, Advocates for Art.** **Mr. Abhijeet Sinha Sr. Advocate with Mr. Apoorv Agarwal, Mr. Manav Goyal, Ms. Ritika Prasad, Ms. Tanushvi Singh, Advocates for Parinda.**

JUDGMENT
(14th November, 2024)

Ashok Bhushan, J.

These two Appeals have been filed by the same Appellant challenging the order dated 30.04.2024 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-III. Company Appeal (AT) (Insolvency) No.1117 of 2024 has been filed challenging the order dated 30.04.2024 passed in IA No. 4648 of 2020 which was filed by the Appellant. By the impugned order the IA No. 4648 of 2020 has been disposed of. Company Appeal (AT) (Insolvency) No.1116 of 2024 has been filed against the order dated 30.04.2024 passed in Intervention Petition IA No. 58 of 2023 by which order Adjudicating Authority has allowed the intervention application filed by M/s. Art Constructions Pvt. Ltd., the Successful Resolution Applicant (SRA). Both the Appeals have arisen out of common facts and sequence, they have been heard together and are being decided by this common judgment. We refer pleadings in Company Appeal (AT) (Insolvency) No.1117 of 2024 for considering both the Appeals.

2. Brief facts giving rise to these Appeals are:-

2.1. Appellants herein are the owners of land measuring 36 acres 04 Guntas situated at Kengeri Village, Kengeri Hobli, Bangalore South Taluk. Appellants along with Mr. Karar Ahmed (brother of Appellant No.1) entered into MoU dated 25.04.2008 with M/s. Upkar Developers (India) Pvt. Ltd. which company was incorporated by the Appellants themselves for development of the land. A loan was taken from HUDCO of Rs.15 Crores mortgaging the assets. The Appellant entered with a Collaboration Agreement dated 05.07.2008 with M/s. Upkar Developers (India) Pvt. Ltd. and M/s. Era Landmarks (India) Ltd. M/s. Era Landmarks (India) Ltd. was referred to as Developer in the Collaboration Agreement who undertook to discharge the loan of HUDCO and obtain the building plan of the project land and develop the project. The developer undertook to pay Rs.35 Crores towards interest free Refundable Security Deposit. The developer was to market the project. The agreement captured the rights and obligations of the developers. Rights and obligations of the first party i.e. owner. First party has the rights to 37% of the gross sale proceeds received from sale of the project. By subsequent agreement dated 28.10.2009 executed in form of addendum, certain terms and conditions of the Collaboration Agreement dated 05.07.2008 was modified by the parties. The document was referred as 'Addendum (Supplementary) to Collaboration Agreement dated 05.07.2008'. The owners have also executed a General Power of Attorney dated 05.07.2008 in favour of the developer.

2.2. On 25.01.2010, an Assignment Agreement was entered into by the Developer with its one of the subsidiaries namely— 'Parinda Buildcon Private Limited' assigning rights of developer to develop and carry on the project. The developers in the Assignment Agreement had also undertaken to discharge its liabilities under the Collaboration Agreement, in event of 'Parinda Buildcon Private Limited' failed to discharge its liabilities. The owners along with M/s. Upkar Developers (India) Pvt. Ltd. issued two legal notices dated 17.02.2012 and 22.02.2012 alleging that the corporate debtor has not been able to discharge its obligations under the Collaboration Agreement. By the legal notices, Collaboration Agreement dated 05.07.2008, addendum dated 28.10.2009, Assignment Agreement dated 25.01.2010 and General Power of Attorney dated 05.07.2008 were terminated. The developers were called upon to desist from dealing with project property. The developers objected to the legal notice and asked to withdraw the allegations made in the legal notice. M/s. Era Landmarks (India) Ltd. and 'Parinda Buildcon Private Limited' filed an application under Section 11(5) of the Arbitration & Conciliation Act, 1996 praying for appointing Sole Arbitrator for adjudication of the disputes between the parties in terms of the Collaboration Agreement dated 05.07.2008. In the application, owners as well as M/s. Upkar Developers (India) Pvt. Ltd. was impleaded as Respondents. High Court of Karnataka at Bangalore vide its order dated 20.04.2012 appointed Justice N. Santosh Hegde, Former Judge of the Supreme Court of India as Sole Arbitrator to arbitrate and adjudicate upon the disputes arising out of the said Agreement. Before Sole Arbitrator, claims were filed by both the Claimants. Reply to the claim petition was filed

by the owners. A counter claim was also filed by the owners. In the Arbitration proceedings, the Arbitrator directed the developers to file original copy of the Assignment Agreement. Original Assignment Agreement was not filed by the developers. Arbitrator held that the Assignment Agreement being unregistered is liable to stamp duty and liable to be impounded. An application was filed by the Claimant No.1- M/s. Era Landmarks Ltd. praying for withdrawal of the Assignment Agreement dated 25.01.2010 from proceedings and to delete the Claimant No.2- 'Parinda Buildcon Private Limited'. Arbitrator did not accept the prayer of the Claimants to withdraw the Assignment Agreement and permitted the Claimant No.2- 'Parinda Buildcon Private Limited' to be deleted in the proceedings. Arbitrator passed a detailed order on 15.07.2015 terminating the proceedings. Against the order dated 15.07.2015 passed by the Sole Arbitrator, an application under Section 34 of the Arbitration & Conciliation Act, 1996 was filed by the developer- M/s. Era Landmarks Ltd. which came to be dismissed by the Addl. City Civil & Sessions Judge, Bengaluru on 12.10.2018. M.F.A. No. 10068 of 2018 was filed by both the Claimants before the High Court of Karnataka at Bengaluru against the order dated 12.10.2018 passed by the Addl. City Civil & Sessions Judge, Bengaluru. An order was passed on 05.12.2018 by the Adjudicating Authority in an application under Section 7 of the IBC filed by Edelweiss Asset Reconstruction Company Ltd. initiating the CIRP against M/s. Adel Landmarks Ltd. (M/s. Era Landmarks Ltd. was subsequently re-named as M/s. Adel Landmarks Ltd., the Corporate Debtor herein). On 25.06.2019, High Court of Karnataka at Bengaluru was pleased to dismiss M.F.A No.10068 of 2018 holding that Arbitral Award dated

15.07.2015 was passed under Section 32(2) (c) of the Arbitration & Conciliation Act, 1996 and hence could not have been subjected to challenge under Section 34 of the Arbitration & Conciliation Act, 1996. A Public Notice was published on 07.08.2020 in Bangalore Edition, The Times of India qua the schedule property. Notice was issued by one M/s. Brigade Enterprises Ltd. intimated that M/s. Brigade Enterprises Ltd. intends to enter into a Joint Development Agreement for the development of the properties mentioned therein. The properties mentioned therein were the properties of 35 acres 11 Guntas which was subject to the Development Agreement. The Resolution Professional after coming to know about the above notice dated 07.08.2020 sent objection in response to the public notice. Resolution Professional stated that the Corporate Debtor- Era Landmarks Ltd. is currently under CIRP. Reference of Collaboration Agreement executed by owners dated 05.07.2008 was made and Resolution Professional pleaded that any step dealing the property shall be violation of Moratorium under Section 14 of the IBC. Appellant issued a reply to the objection of the Resolution Professional. An IA No.4648 of 2020 was filed by the Appellant in the CIRP of the corporate debtor praying that the Tribunal may please to direct removal of the schedule property from the CIRP and schedule property be deleted from the Information Memorandum circulated by the Resolution Professional. In the IA No.4648 of 2020, orders were passed by the Adjudicating Authority on 21.12.2021 observing that IA No.4648 of 2020 does not contain a prayer. An IA for rectification was also dismissed. Appellants filed Company Appeal (AT) (Ins.) Nos. 854 & 855 of 2022 before this Tribunal. This Tribunal passed an order on 27.07.2022 remanding the

matter to the Adjudicating Authority and observing that the IA No.4648 of 2020 filed by the Appellant be heard and decided on merits. Reply was filed by the Corporate Debtor as well as 'M/s. Parinda Buildcon Private Limited' to the IA No.4648 of 2020. An application for Intervention being Ivn. P. No.58 of 2023 was filed by M/s. Art Constructions Pvt. Ltd. (SRA) seeking intervention on the ground that the Resolution Plan submitted by SRA has been approved by the CoC on 06.12.2022 with majority vote of 82.66%. An application for approval of the plan has been filed before the Adjudicating Authority which is pending adjudication. Adjudicating Authority passed an order disposing of IA No.4648 of 2020 and by the order of the same date, allowed the Intervention Petition No.58 of 2023 filed by the SRA. Aggrieved by the aforesaid two orders, these Appeals have been filed.

3. We have heard Shri Maninder Singh, Learned Senior Counsel with Shri Zoheb Hussain for the Appellants, Shri Arijit Prasad, Learned Senior Counsel with Shri Sanjay Bhatt for the Resolution Professional, Shri Krishnendu Datta, Learned Senior Counsel for the SRA and Shri Abhijeet Sinha, Learned Senior Counsel for the Intervenor- 'Parinda Buildcon Private Limited'.

4. Learned Counsel for the Appellant challenging the order dated 30.04.2024 disposing of his IA No.4648 of 2020 submits that the Adjudicating Authority committed error in deciding the application, the Corporate Debtor had no rights in the subject land and IRP could not have taken control and custody of the subject assets. It is submitted that the ownership of the Appellant over the subject land is undisputed. Subject land

was not in possession with the corporate debtor at the time of initiation of the CIRP. In any view of the matter, assets which are owned by third party and are in possession of the corporate debtor are excluded by virtue of Section 18(1)(f) explanation of the IBC. The corporate debtor had lost all of its rights and obligations qua the scheduled properties under the agreements dated 05.07.2008 and 28.10.2009 by virtue of the Assignment Agreement dated 25.01.2010. The asset both in terms of actual as well as legal possession are with the Appellants being the absolute owners of the asset. Even as per the Agreement dated 05.07.2008, the possession was not handed over to the developers rather they were authorised to enter upon the schedule property and develop the same. The order passed by the Sole Arbitrator appointed on an application filed by the corporate debtor and 'Parinda Buildcon Private Limited' determined the rights of the parties which have attained finality. Order dated 15.07.2015 is an award delivered by the Sole Arbitrator which is binding between the parties. Challenge to the order dated 15.07.2015 passed by the Sole Arbitrator by the corporate debtor and 'Parinda Buildcon Private Limited' has been dismissed both by the Civil Court as well as the High Court, hence, the award delivered by the Arbitrator has become final between the parties and could not have been questioned by the corporate debtor in the CIRP proceedings. Sole Arbitrator has returned finding that 1st Claimant i.e. Era Landmarks (India) Ltd. has not retained any one of its rights which accrued to it from the Collaboration Agreement, meaning thereby, that no right could have been pursued either before the Sole Arbitrator or before the Adjudicating Authority on behalf of the Corporate Debtor. It is submitted that the assignee i.e. 'Parinda

Buildcon Private Limited' was deleted from the arbitration proceedings on an application filed by Era itself. Hence, there is no right in the Era or 'Parinda Buildcon Private Limited' to claim any right in the subject land. The Adjudicating Authority failed to take into consideration the effect and consequences of the Award by the Sole Arbitrator. As per Section 18 of the IBC including explanation thereof Corporate Debtor has no right whatsoever on the subject land which belong to third party i.e. Appellant. The said assets could not have been included in the Information Memorandum under Section 29(1) of the IBC. The corporate debtor does not retain any rights under the Collaboration Agreement after execution of the Assignment Agreement in favour of 'Parinda Buildcon Private Limited'. Sole Arbitrator held that the Claimant No.2 has taken over the rights and duties of the Claimant No.1. Collaboration Agreement was terminated by the owners which termination has attained finality. In view of the Award given by the Sole Arbitrator, after termination of the arbitration proceedings, the termination notice could not have been re-agitated. No steps were taken by the corporate debtor or the Resolution Professional to assail the termination notice in any proceedings. Moratorium under Section 14 of the IBC is not applicable with regard to assets which are not the assets of the corporate debtor and belong to third party. An agreement to arbitrate excludes and ousts the jurisdiction of Civil Courts and, therefore, the NCLT could not have refused to exclude the subject properties from the CIRP when the issues stand decided by the Arbitrator and have attained finality. The termination of the Collaboration Agreement was much prior in time and unconnected with the CIRP proceedings, the scheduled properties could not

be included as an asset of the corporate debtor. The Resolution Professional's duty and power to include any asset in the Information Memorandum is subject to the determination of ownership by a Court or Authority in terms of Section 18(1)(f)(vi) of the Code. The findings of the Arbitral Tribunal are clearly determination of rights of parties and therefore enforceable and binding on parties. Counsel for the Appellant submitted that the Adjudicating Authority committed error in not allowing the prayers made by the Appellant in IA No.4648 of 2020. Order passed by the Adjudicating Authority is unsustainable and IA No.4648 of 2020 deserves to be allowed excluding the subject land from the CIRP of the Corporate Debtor.

5. Shri Arijit Prasad, Learned Senior Counsel for the Resolution Professional refuting the submissions of the Counsel for the Appellant submits that the corporate debtor had acquired development rights in the subject land consequent to Collaboration Agreement dated 05.07.2008 and Supplementary/Addendum Agreement dated 28.10.2009. It is submitted that the Assignment Agreement dated 25.01.2010 was executed in favour of 'Parinda Buildcon Private Limited', the subsidiary of the corporate debtor only for operational convenience. The Corporate Debtor retained its obligation of being responsible to perform the terms of the Collaboration Agreement in case of default or failure by 'Parinda Buildcon Private Limited'. Appellants were also consenting parties to the Assignment Agreement. In terms of the Collaboration Agreement, Corporate Debtor and 'Parinda Buildcon Private Limited' repaid the entire loan amount of Rs.17.19 Crores

to HUDCO and an amount of Rs.1.34 crores was also directly paid to HUDCO towards the interests. An act of alleged unilateral termination of the Collaboration Agreement by the Appellants is unsustainable. The Corporate Debtor in total has paid an amount of Rs.64 Cr. to the Appellant. Corporate Debtor and 'Parinda Buildcon Private Limited' has filed an application for arbitration of dispute as per the agreement. In the arbitration proceedings, Learned Arbitrator sought to impound the Assignment Agreement due to the said document allegedly being deficiently stamped. On an application filed by the Adel, 'Parinda Buildcon Private Limited' was deleted from the array of the Claimants and subsequently Arbitrator held that 'Adel' having assigned its rights under the Collaboration Agreement to 'Parinda Buildcon Private Limited' is not entitled to maintain the claim. The Arbitrator terminated the proceedings vide order dated 15.07.2015 without determining the rights of the corporate debtor as regards the scheduled property. Even the counter claim of the Appellants before the Arbitrator was rejected vide order dated 08.09.2016. On account of termination of the arbitral proceedings, no determination of the rights and obligations of the parties was made by the Ld. Arbitrator. The order terminating the arbitration proceedings did not result in any award as contended by the Appellants. Challenge to the order dated 15.07.2015 was repelled by the District Court on technical ground of having been termed the petition as an appeal instead of arbitration suit. Challenge to the order of the District Court was also rejected by the High Court on 25.06.2019 on technical ground without deciding the issues on merits. It is submitted that prior to passing of the order by the Karnataka High Court on 25.06.2019, CIRP against the corporate debtor has already

commenced on 05.12.2018. The corporate debtor having development rights in the subject land, Resolution Professional has rightly included the same in the Information Memorandum. A Public Notice issued on 07.08.2020 by one M/s. Brigade Enterprises Limited informing its intention to enter into a joint development agreement with subject land was objected by filing letter dated 19.08.2020 asserting the right of the Resolution Professional on the subject land. It was thereafter IA No.4648 of 2020 was filed by the Appellant in the CIRP of the corporate debtor for exclusion of the assets from the CIRP. The order dated 27.05.2014 passed by the Ld. Arbitrator terminating the arbitration proceedings is not an award under the Arbitration & Conciliation Act, 1996. It is further submitted that a duly registered Collaboration Agreement dated 05.07.2008 entered into between the parties cannot be unilaterally terminated by way of a legal notice without following the due process of law. The legal notice issued by the Appellants has no consequence on registered Collaboration Agreement. The Assignment Agreement dated 25.01.2010 executed by the corporate debtor in favour of 'Parinda Buildcon Private Limited' its wholly owned subsidiary was only partial assignment of rights for operational convenience and that too limited to implementation and marketing under the Collaboration Agreement does not amount to novation of contract. The Collaboration Agreement dated 05.07.2008 still continues and cannot be treated to be novated by Assignment Agreement. The Corporate Debtor had paid Rs.64 Crores in respect of the scheduled land to the Appellants which have not been returned by the Appellants to the corporate debtor. The Resolution Plan in respect of Corporate Debtor has already been approved by the CoC and is

pending approval before the Adjudicating Authority. On account of the Moratorium imposed under Section 14 of the Code in respect of the corporate debtor, the development rights conferred on account of Collaboration Agreement cannot be taken away from the corporate debtor during the CIRP. Disputes with respect to validity of Collaboration Agreement, Assignment Agreement and the legal notices involving rights of the parties thereunder cannot be determined in a summary proceeding under the Code and have to be determined by a Competent Civil Court.

6. Learned Counsel appearing for the SRA submits that the Resolution Plan submitted by the SRA has already been approved by overwhelming majority of the CoC. It is submitted that the alleged termination of registered Collaboration Agreement dated 05.07.2008 by the Appellants is invalid and illegal. Order dated 15.07.2015 passed by the Arbitrator terminating the arbitration proceedings cannot be termed as an award. Development rights forms parts of the assets of the corporate debtor and therefore, the scheduled property is rightly included in the Information Memorandum. Adjudicating Authority has rightly disposed of the IA No.4648 of 2020 on the ground of jurisdiction. If the appeal filed by the Appellant is allowed, it would result into unjust enrichment. Corporate Debtor had made total investment of Rs.64 Crores towards the development of the project qua the scheduled property including payment of loans taken by the Appellants from HUDCO. Clause 6 of the Collaboration Agreement provides for consequences as agreed between the parties in the event of termination of the

Collaboration Agreement and till date the Appellants have not refunded the amount to the Corporate Debtor.

7. Learned Counsel for the Intervenor also supported the submissions of the Counsel for the Resolution Professional and the SRA. It is submitted that the intervenor is wholly owned subsidiary of the corporate debtor and by Assignment Agreement dated 25.01.2010, the Collaboration Agreement did not come to an end. The Corporate Debtor was liable to carry out all obligations in event assignee failed to fulfil the obligation.

8. Learned Counsel for the parties have relied on several precedents in support of their respective submissions which we shall refer hereinafter while considering the submissions in detail.

9. From the submissions of the Learned Counsel for the parties and materials on record, following are the questions which arise for consideration in these Appeals:-

(I) Whether the Adjudicating Authority had no jurisdiction to enter into issue as to whether the subject land is asset of the corporate debtor and for decision of the question, the parties were required to be relegated to the Competent Civil Court having jurisdiction?

(II) Whether proceedings conducted by Sole Arbitrator and the orders passed by the Sole Arbitrator dated 27.05.2014 and 15.07.2015 amounts to arbitral award under the Arbitration &

Conciliation Act, 1996 determining the rights of both the parties so as to bind the parties in any subsequent proceedings?

(III) Whether the IRP/ RP could or could not have included the subject land in the Information Memorandum/ CIRP process of the corporate debtor by virtue of Section 18(1)(f) *explanation*?

(IV) Whether Adjudicating Authority erred in not allowing the IA No.4648 of 2020 as prayed by the Appellant?

(V) Whether the Adjudicating Authority committed error in allowing the IA No.58 of 2023 filed by the SRA?

10. Before we come to the questions as noted above, we need to notice certain details of Collaboration Agreement dated 05.07.2008, Addendum dated 28.10.2009, Assignment Agreement dated 25.01.2010 and legal notices dated 17.02.2012 and 22.02.2012 issued by the owners to the developers.

11. The Collaboration Agreement dated 05.07.2008 was entered between Owners as First Part, 'M/s. Upkar Developers (India) Pvt. Ltd.' as Second Part and 'M/s. Era Landmarks (India) Ltd.' as Third Part. 'M/s. Upkar Developers (India) Pvt. Ltd.' was a company promoted by Appellant with whom a Joint Development Agreement dated 08.02.2007 was entered with the subject land. 'M/s. Upkar Developers (India) Pvt. Ltd.' had obtained loan of Rs.15 Crore from HUDCO against the security of the land. 'M/s. Upkar Developers (India) Pvt. Ltd.' desired to relinquish its share, right, interest and claims in the Schedule Property in favour of the developers- 'M/s. Era Landmarks (India) Ltd.'. Collaboration Agreement decided owners' share as

37% and developers' share as 63%. Clause 2 deals with 'Scope of the Agreement'. As per Clause 2.4, developers have the exclusive marketing rights of the said project and the first party and the developers shall share the expenses involved in marketing of the said project in the agreed ratio of 37:63. As per clause 2.8, all expenses on development of the project land, the construction thereon and provision of infrastructure facilities and services in relation to the same, except expenses incurred on marketing of the project, shall be incurred and borne by the Developers. The loan of HUDCO was to be cleared by the developers. Clause 2.14 stated that the owners are in possession and enjoyment of the schedule property. The owners authorise the developers for the purpose of development to enter upon the schedule property and develop the same. Clause 2.14 is as follows:-

> *"2.14 The Owners are in possession and enjoyment of the Schedule Property. The Owners hereby authorise the Developers for the purpose of development, to enter upon the Schedule Property and develop the same, however the Authority so granted does not in any manner be construed as delivery of possession by the Owners in part performance of this Collaboration Agreement under Sec. 53(A) of the Transfer of Property Act, or under Sec. 2 (47)(iv) of the Income Tax Act, 1961. The Owners shall always be entitled to inspect the progress of the work and type of work which is being done on the Schedule Property."*

12. Clause 3.3 deals with 'Cost and Expenses'. Under clause 3.3, developers agree to pay Rs.35,00,00,000/- towards interest free refundable security deposit to the first party (owners). Clause 3.3 is as follows:-

> *"3.3 That the Developers agree to pay to the First Party the following sum of money as Refundable Security Deposit.*
>
> *a. Rs.35,00,00,000/-(Rupees Thirty live Crores only) towards interest free Refundable Security Deposit.*
>
> *b. 37% of the Sale Proceeds of the Said Project, net of marketing expenses. However, it is agreed that the above Security Deposit @ 5% of the First Party's share shall be recovered from the Sale Proceeds till Rs. 35.00 Crores of security Deposit is cleared."*

13. Clause 3.4 contained the manner of deposit of refundable deposit by the Developers. Clause 6 dealt with 'Term & Termination'. Clause 6 of the Collaboration Agreement is as follows:-

> *"**6. <u>TERM & TERMINATION</u>***
>
> *This Agreement may be terminated on the happening of any of the following events:*
>
> *a) By Mutual consent of the First Party and the Developers by execution of written document duly signed by authorised representatives of both parties:*
>
> *b) Either Party becomes suspended or ineligible for participating in the Project anticipated under this*

Agreement, in accordance with applicable government regulations;

c) Failure of any party to perform its obligation under this agreement shall be deemed to be a breach of this agreement. The party claiming such failure shall notify in writing, the parties alleged to have failed to perform such obligations and shall demand performance. No breach of this agreement may be found to have occurred, if performance has commenced to the reasonable satisfaction of complaining party within thirty days of the receipt of such notice. If after the notice, the breaching party fails to cure the breach, the other party may seek any remedy available under law.

Termination on account of Material breach by the Developer or due to his inability to carry on with the project:

a. The developer would co-operate in cancelling the development agreement so that the First Party can put the subject property for use again.

b. Investments made by the Developer till the date of termination on physical construction of assets shall be taken into account thro' an independent valuer and the agreed value shall be made good by the First Party from the proceeds of the Schedule Property or from his own source within a period of 2 years of such termination. The amounts payable to the Developer on such account shall not carry interest for a period of 2 years. Any delay in paying off the dues thus ascertained, by the First Party to the Second Party,

beyond a period of 2 years shall attract interest @13% p.a. Although, the Developer has no lien on the Schedule Property against investments made, both the parties agree to respect this arrangement in the best interests of salvaging developers' investment.

c. The Developer shall execute such documents with the First party in order to assist the First party to put the subject party to further commercial use.

Termination on account of material breach by the owner or due to his inability to carryon business:

a. The Developer can cancel the collaboration agreement and pursue for refund of the initial deposit of Rs. 35.0 crores through a mutually agreed arrangement with the First party.

b. The Developer, having invested further monies into the project. finds it impractical to back off, may continue with the project as envisaged till completion. The share of sale proceeds of the First Party shall go to the account of the First party or his successors or legal heirs."

14. Clause 8 dealt with the 'Dispute Resolution'. Clause 9.2 dealt with the assignment in following manner:-

"9.2 Either party shall not assign or transfer its rights and obligations under this Agreement without the prior written consent of the Other Party."

15. An Addendum (Supplementary) to Collaboration Agreement dated 05.07.2008 was executed between the parties on 28.10.2009 for certain changes in the Collaboration Agreement with regard to share of the owners and developers and certain provisions with regard to payment of Refundable Security Deposit. As per Addendum, owners' share was determined as 29.5% and developers share was provided for 70.5%. Refundable Security Deposit was changed from Rs.35,00,00,000/- to Rs.25,00,00,000/-.

16. An Assignment Agreement was executed on 25.01.2010 between 'M/s. Era Landmarks Ltd.'- First Party, 'M/s. Parinda Buildcon Private Limited', a subsidiary of 'M/s. Era Landmarks Ltd.' as 'Second Party' and Owners as 'Third Party'. Agreement provided that the First Party has assigned all its rights, duties and obligations under the Agreement to and in favour of the Second Party. It is useful to notice following part of the Assignment Agreement: -

> *"WHEREAS the Second Party is a wholly owned subsidiary company of the First party.*
>
> *WHERAS the First party has resolved and decided to transfer all its rights, duties and obligations under The Agreement to the Second party for operational convenience of implementing and marketing the project envisaged in The Agreement to which the second party has agreed.*
>
> *Whereas The First party and the Second party approached the Third and fourth parties with this proposal and the parties have agreed to this*

assignment on the following terms and conditions. All the parties agreed to reduce the terms and conditions of this assignment into writing and register with the concerned sub-registrar to formalize the intent.

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:-

1. The First Party has assigned all its rights, duties and obligations under the Agreement to and in favour of the Second Party.

2. The First Party shall undertake the responsibilities of the Second party in case of any default by the Second-party intis performance of the obligations mentioned in The Agreement and agrees to perform its obligations detailed in The agreement as if the assignment has not been effected

3. This assignment agreement shall form part of The Agreement and shall be read together with The Agreement. All the terms and conditions of The agreement shall continue without any change.

4. The First party has furnished approvals from its board of Directors in the form of a Board resolution passed in the board meeting held on 16.01.2010 at the registered office of the Company."

17. The owners had issued a legal notices dated 17.02.2012 and 22.02.2012 addressed to 'M/s. Era Land Marks Ltd.' and 'Parinda Buildcon Pvt. Ltd.' terminating the Collaboration Agreement, Addendum to

Collaboration Agreement, Assignment Agreement as well as General Power of Attorney alleging breaches on the part of the 'M/s. Era Land Marks Ltd.' as well as 'Parinda Buildcon Pvt. Ltd.'. It was after aforesaid legal notices 'M/s. Era Land Marks Ltd.' and 'Parinda Buildcon Pvt. Ltd.' initiated arbitration proceedings, details of which we shall notice hereinafter.

18. Now we proceed to consider the questions as noted above.

QUESTION No.(I)

19. The first question which needs to be considered is as whether the Adjudicating Authority had jurisdiction to enter into issue as to whether the subject land is asset of the corporate debtor or the parties were required to be relegated to the Competent Civil Court having jurisdiction.

20. The Information Memorandum which was prepared by the Resolution Professional reflected the subject land as a land in which the Corporate Debtor has development rights by virtue of Collaboration Agreement dated 05.07.2008. The Assets of a corporate debtor are foundation for any CIRP process. All subsequent acts including inviting EoI, Resolution Plan are based on asset which is claimed as asset of the Corporate Debtor. In the CIRP process of a Corporate Debtor, determination of the assets, preparation of Information Memorandum is a solemn duty of the Resolution Professional. Under Section 29 of the IBC, Information Memorandum is to be prepared for being used for CIRP process by the Resolution Professional.

21. The Resolution Professional is also obliged to obtain documents and details of the assets from personnel of the corporate debtor. Regulation 3A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 enjoin the Resolution Professional to take into custody the records of information relating to the assets, finances and operations of the corporate debtor as well as assets recorded in the balance sheet of the corporate debtor or in any other records referred in clause (f) of section 18. Section 60(5)(c) enumerates the jurisdiction of the National Company Law Tribunal to entertain or dispose of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings. Section 60(5)(c) is as follows:-

> *"**60. Adjudicating Authority for corporate persons.** -*
> *(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –*
> *(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code."*

22. Whether an asset is required to be reflected in the Information Memorandum or the asset belong to the Corporate Debtor are the question which arise out of or in relation to the insolvency resolution process. The present is a case where the Corporate Debtor has claimed development rights in the land. It is no more *res-integra* that the development rights are

property within the meaning of Section 3(27) of the IBC. We may refer to the judgment of the Hon'ble Supreme Court in ***"Victory Iron Works Ltd. vs. Jitendra Lohia & Anr.- (2023) 7 SCC 227"*** where the Hon'ble Supreme Court had held that the development rights created in favour of the corporate debtor constitute "property" within the meaning of Section 3(27) of the IBC. In paragraph 38 of the judgment, following was laid down:-

> *"**38.** From the sequence of events narrated above and the terms and conditions contained in the agreements entered into by the parties, it is more clear than a crystal that a bundle of rights and interests were created in favour of the corporate debtor, over the immovable property in question. The creation of these bundle of rights and interests was actually for a valid consideration. But for the payment of such consideration, Energy Properties would not even have become the owner of the property in dispute. Therefore, the development rights created in favour of the corporate debtor constitute "property" within the meaning of the expression under Section 3(27) IBC. At the cost of repetition, it must be recapitulated that the definition of the expression "property" under Section 3(27) includes "every description of interest, including present or future or vested or contingent interest arising out of or incidental to property". Since the expression "asset" in common parlance denotes "property of any kind", the bundle of rights that the corporate debtor has over the property in question would constitute "asset" within the meaning of Section 18(1)(f) and Section 25(2)(a) IBC."*

23. In the very same judgment of ***"Victory Iron Works Ltd."*** (supra), one of the questions was as to whether NCLT and NCLAT had jurisdiction in the facts of the said case. In the above case, the Corporate Debtor- Avani Towers Pvt. Ltd. held Joint Development Agreement in respect of property in question. In paragraph 3 of the judgment, parties to the litigation has been noticed. The Resolution Professional has filed an application before the Adjudicating Authority seeking direction to M/s. Energy Properties Pvt. Ltd. & Others not to obstruct the sole and exclusive possession of the property. The above facts have been noted in paragraphs 6, 7 and 8 of the judgment. NCLT has passed an order directing not to obstruct the possession and activities of the resolution professional. Paragraphs 9 and 10 noticed the proceedings before the NCLT and the NCLAT challenging the order of the NCLT. Victory Iron Works Ltd. have filed an Appeal where the jurisdiction of the NCLT and NCLAT was also questioned. In paragraph 16, questions were framed and one of the questions framed in paragraph 16.2 is as follows:-

> *"**16.2.** (2) Whether NCLT and NCLAT have exercised a jurisdiction not vested in them in law by seeking to recover/protect the possession of the corporate debtor?"*

24. The Hon'ble Supreme Court while considering Issue No.2 noticed the ground of attack of the appellants to the impugned orders. In paragraph 41, following was stated:-

> *"**Issue 2***
>
> ***41.** The main ground of attack of the appellants to the impugned orders of the NCLT and NCLAT is that by*

virtue of the Explanation under Section 18 of the Code and also by virtue of the judicial pronouncements, the disputes between the corporate debtor and the third-party lessee/licensee are not amenable to the jurisdiction of the authorities under the Code."

25. After considering the submissions of the parties in paragraph 53, the Hon'ble Supreme Court upheld the decision of the NCLT and NCLAT regarding exercise of jurisdiction for protection of the property of the corporate debtor. The above judgment clearly laid down that insofar as the protection of assets of the corporate debtor is concerned, the NCLT and NCLAT does not lack jurisdiction. Following was observed in paragraph 53:-

*"**53.** Therefore, NCLT as well as NCLAT [Victory Iron Works Ltd. v. Jitendra Lohia, 2021 SCC OnLine NCLAT 128] were right in holding that the possession of the corporate debtor, of the property needs to be protected. This is why a direction under Regulation 30 had been issued to the local district administration."*

26. Counsel for the Appellant relied on the judgment of the Hon'ble Supreme Court in ***"Embassy Property Developments (P) Ltd. vs. State of Karnataka- (2020) 13 SCC 308"***. The above was a case where NCLT Chennai has passed an order on an application filed by the Resolution Professional for setting aside the order of rejection passed by the Government of Karnataka and seeking direction to Government of Karnataka to execute supplementary lease deed. Corporate Debtor held mining lease under MMDR Act, 1957. The proposal for deemed extension of

the lease was rejected by the Government of Karnataka. In the above facts, against the order of the NCLT, Chennai allowing the prayers of Resolution Professional, Government of Karnataka filed a W.P. in the High Court of Karnataka where interim order was passed staying the operations and directions of the NCLT. The Embassy Property has filed the appeal challenging the interim order of the High Court. In the above reference, the issue of jurisdiction of the NCLT came for consideration. In the above case, following was laid down by the Hon'ble Supreme Court in paragraphs 37, 40 and 41:-

> *"**37.** From a combined reading of sub-section (4) and sub-section (2) of Section 60 with Section 179, it is clear that none of them hold the key to the question as to whether NCLT would have jurisdiction over a decision taken by the Government under the provisions of the MMDR Act, 1957 and the Rules issued thereunder. The only provision which can probably throw light on this question would be sub-section (5) of Section 60, as it speaks about the jurisdiction of the NCLT. Clause (c) of sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the Government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in clause (c) of sub-section (5). Let us take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the*

time of initiation of CIRP. If Section 60(5)(c) of the IBC is interpreted to include all questions of law or facts under the sky, an Interim Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal before the NCLT, instead of moving a statutory appeal under Section 260-A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results. [It will be a different matter, if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression "operational debt" under Section 5(21), making the Government an "operational creditor" in terms of Section 5(20). The moment the dues to the Government are crystallised and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the adjudicating authority, namely, the NCLT.]

40. *If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate debtor, Section 18(1)(f)(vi) would not have made the task of the interim resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, subject to the determination of ownership by a court or other authority. In fact an asset owned by a third party, but which is in the possession of the corporate debtor under contractual arrangements, is specifically kept out of the definition of the term "assets" under the Explanation to Section 18. This assumes significance in view of the language used in*

Sections 18 and 25 in contrast to the language employed in Section 20. Section 18 speaks about the duties of the interim resolution professional and Section 25 speaks about the duties of resolution professional. These two provisions use the word "assets", while Section 20(1) uses the word "property" together with the word "value". Sections 18 and 25 do not use the expression "property". Another important aspect is that under Section 25(2)(b) of the IBC, 2016, the resolution professional is obliged to represent and act on behalf of the corporate debtor with third parties and exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings. Sections 25(1) and 25(2)(b) reads as follows:

*"**25. Duties of resolution professional**.—(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.*

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions:

*(a) ****

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings;"

(emphasis supplied)

This shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of Section 60(5).

> ***41.*** *Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right."*

27. The order which was challenged before the NCLT by the Resolution Professional was an order passed by the State Government rejecting the prayer for deemed extension of the lease. In the above context, the Hon'ble Supreme Court held that the Resolution Professional cannot short-circuit the same and bring a claim before NCLT under Section 60(5). It was held that where the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the Resolution Professional cannot short-circuit the same. It was held that where corporate debtor has to exercise a right that falls outside the purview of the IBC especially in the realm of the public law, Resolution Professional cannot take a bypass and go before NCLT. The judgment of the Hon'ble Supreme Court in ***"Embassy Property Developments (P) Ltd."*** is clearly distinguishable and not applicable in the facts of the present case.

28. In the present case, in the Information Memorandum, Resolution Professional has included the subject land as asset of the corporate debtor in which corporate debtor claimed development rights. An IA was filed by the owners, Appellants herein being IA No.4648 of 2020 for excluding the assets from the CIRP of the Corporate Debtor, hence, in the above background, we

are of the view that the Adjudicating Authority had jurisdiction to examine the application on merits and take a decision as to whether the subject land can be treated to be asset of the corporate debtor or not. Adjudicating Authority in paragraph 47 has made following observations: -

> *"47. Further, it will not be out of place to mention that the disputes that have arisen in this case are complex in nature and go to the root of the validity of the Collaboration Agreement, the Assignment Agreement and the Legal Notices given by the Applicants and also as to whether the right, title, interest and possession over the Scheduled "Properties have been transferred to the Corporate Debtor and to the Parinda (PBPL) by virtue of the said Agreement and the fact that the Ld. Arbitrator had framed several issues concerning the rights of the parties. We are therefore, of the view that such issues involving disputed questions of facts cannot be determined in a summary proceeding under the IBC and have to be determined by a Competent Civil Court having jurisdiction after recording evidence."*

29. The question as to whether the assets which are included in the Information Memorandum are the assets of the corporate debtor is foundation of entire CIRP process. When the inclusion of the said asset is questioned before the NCLT by the Appellant, Adjudicating Authority does not lack jurisdiction in entering into question and deciding as to whether assets are part of the CIRP or it should be excluded. We, thus, are of the view that the above question could be determined by the Adjudicating Authority and parties need not have to be relegated to the Civil Court having

jurisdiction, the view of the NCLT to the contrary cannot be approved. Judgment of the Hon'ble Supreme Court in Victory Iron, as noticed above, clearly has held that the NCLT and NCLAT can exercise jurisdiction in the above facts. We, thus, answer Question No.(I) in following manner:

The Adjudicating Authority had jurisdiction to enter into as to whether the subject land is asset of the corporate debtor and for decision of the question, the parties were not required to be relegated to the Competent Civil Court having jurisdiction.

QUESTION NO.(II)

30. The main thrust of submission of the Counsel for the Appellant is on the orders passed by the Sole Arbitrator dated 27.05.2014 and 15.07.2015. Submission is that the Sole Arbitrator has held that no rights are left in the Claimant No.1 i.e. M/s. Era Landmarks Ltd. on account of Assignment dated 25.01.2010 in favour of 'Parinda Buildcon Private Limited'. Hence, it is submitted that the rights of the parties having been determined by the award given by Sole Arbitrator, the corporate debtor cannot claim any right in the subject land. Submission advanced by Counsel for the Appellant has been refuted by the Counsel for the Resolution Professional/ Corporate Debtor contending that the order dated 15.07.2015 passed by the Sole Arbitrator terminating the proceedings is not an arbitral award so as to bind the parties. It is submitted that the arbitration proceedings were terminated which order is referable to sub-section (2) clause (c) of Section 33 of the Arbitration & Conciliation Act, 1996. It is submitted that there being no

award by the Sole Arbitrator, there is no question of finality between the parties regarding the rights of the parties on the subject land.

31. Before we proceed, we need to notice the proceedings before the Sole Arbitrator and orders passed therein to come to a conclusion as to whether the orders passed by the Sole Arbitrator is an award within the meaning of Arbitration & Conciliation Act, 1996 and have finality between the parties. As noted above, an application filed by M/s. Era Landmarks Ltd. and 'Parinda Buildcon Private Limited' before the High Court of Karnataka, Bangalore under Section 11 of the Arbitration & Conciliation Act, 1996 in which application by an order dated 20.04.2012, Sole Arbitrator was appointed. Both the Applicants filed statement of claim before the Sole Arbitrator claiming their rights on the basis of Collaboration Agreement dated 05.07.2008, Addendum dated 28.10.2009 and the Assignment Agreement dated 25.01.2010. Claimant also pleaded the payments made to the HUDCO as well as amount paid to the owners as per the Collaboration Agreement. In the claim petition, amount of Rs.64,04,81,076/- was claimed. Appellant has prayed in the claim petition for declaration of the Collaboration Agreement, Addendum, General Power of Attorney and Assignment Agreement as legally valid and subsisting. The owners filed their objections to the claim petition. One of the questions which came for consideration before the arbitrator was as to whether the document dated 25.01.2010 executed by the 1st Claimant as an Assignment Agreement in favour of 2nd Claimant is required to be stamped with the specified stamp duty under the provisions of Karnataka Stamp Act, 1957. In the said order,

the questions were framed by the arbitrator in paragraph 7 which is as follows:-

> *"7. From the above arguments of the learned counsel for the parties following points arises for the Tribunal's consideration:*
>
> *(a) Is 'Assignment Agreement' dated 25.1.2010 sought to be produced by the claimants in evidence is sufficiently stamped or not?*
>
> *(b) If not, is the said instrument liable to be impounded?*
>
> *(c) Can this, Tribunal exercise the power of examination and impound the instrument as contemplated under Sec.33 of the Act?*
>
> *(d) What relief?"*

32. The Arbitrator answered the point no. (a) and (b) in paragraph 8(viii) in following words:-

> *"(viii) Having come to the conclusion that the Assignment Agreement dated 25,1.2010 is liable for stamp duty under Sec.3 read with Schedule 5(f) of the Act, and the same having not been satisfied, this document is liable to be impounded as contemplated under Sec.33 of the Act*
> *Points (a) and (b) are answered accordingly."*

33. On point no. (c), Arbitrator opined that the Arbitral Tribunal is mandated by the Statute to examine the question of sufficiency of the stamp

duty paid on this instrument of Assignment Agreement. Considering point no.(d) is relief. In paragraph 10, following direction was issued by the Sole Arbitrator:-

> *"10. Point No.(d)*
>
> *What relief?*
>
> *Since the original of the Assignment Agreement dated 25.1.2010 under consideration is not before the Tribunal, this Tribunal directs the claimants who are in possession of the same to produce the said document before this Tribunal within 30 days from the date of receipt of this order, for the purpose of impounding the said document and taking necessary steps for recovery of the stamp duty and penalty due."*

34. The Claimant did not produce the original assignment agreement dated 25.01.2010 and had filed an application for amending the statement of claim dated 16.07.2012. In the application which was filed by the Claimant, following prayers were made:-

> *"(i) Permit the applicant/claimant Adel Landmarks Limited to amend the claim petition by dropping the 2nd claimant and by withdrawing the reliance/reference to the assignment deed dated January 25, 2010;*
>
> *(ii) proceed with the arbitration proceedings by taking the applicant to be the sole claimant and the arbitration proceedings and the claims being arising only out of the*

collaboration agreement dated July 5, 2008 and the addendum thereto dated October 28, 2009;.

(iii) grant any other relief, as this Hon'ble Tribunal may deem fit in the facts and circumstances of the present case.
It is still further respectfully prayed that the application may kindly be allowed as prayed for."

35. The Sole Arbitrator on 02.01.2015 considered the application. The prayers of the claimants to take back the document and the prayer that the proceedings of impounding of the document be dropped, was rejected. In paragraph 16, following was held:-

"16. For the reasons stated hereinabove, the prayer of the claimant to take back the document in question, as also the prayer that the proceedings of impounding of the document in question be dropped, is rejected."

36. In proceeding dated 08.05.2015, the Tribunal allowed the prayer to delete applicant no.2 from the array of the parties which was noticed in paragraph 3 of the proceeding in following words:-

"3. The learned counsel for the respondent submitted that since the first applicant itself is seeking to delete applicant No.2 in the claim petition, he has no objection for the same. Hence, prayer granted. Applicant No.2 is deleted from the array of parties. The sole claimant to the claim petition now to amend the cause title of the claim petition accordingly. Application allowed accordingly to that extent."

37. Now we come to the order dated 15.07.2015 which was passed by the Tribunal. The Sole Arbitrator after taken note of the arbitration proceedings observed that the 1st claimant cannot pursue the claim petition because it has lost all its rights, duties and obligations, on the schedule properties and the claim petition cannot be pursued by the 1st claimant on its own in the absence of the 2nd claimant whom it has deleted from the array of parties. The said observation made in paragraph 28 of the order dated 15.07.2015, which reads as follows:-

> *"28. On the basis of the above findings, I am of the opinion that that the 1st claimant cannot pursue this claim petition, because it has lost all its rights, duties and obligations, on the schedule properties and this claim petition cannot be pursued by the 1st claimant on its own in the absence of the 2nd claimant whom it has deleted from the array of parties with the permission of the Tribunal."*

38. The Sole Arbitrator thereafter considered as to what order be passed in view of the findings. In paragraphs 29 to 32, following was held:-

> *"**Point No.3***
>
> *29. Next point for consideration is what should be the order that should be made in view of the above findings:*
>
> *30. In view of the finding of this Tribunal that 1st claimant has lost all its rights, duties and obligations accrued by it under the collaboration agreement which is now transferred in favour of 2nd claimant (since*

deleted) by the assignment agreement, the Tribunal is of the opinion, the claim petition tiled before this Tribunal jointly by the 1st and 2nd claimants, cannot be continued any further, because 1st claimant has lost all its rights to pursue this petition, by virtue of transfer of rights under assignment agreement and the 2nd claimant (since deleted) cannot now pursue this claim petition, because it is no more a party to this petition. Hence, since there being no claimants eligible to pursue this claim petition, the undersigned is of the opinion that the claim petition has become infructuous, consequently, this arbitration proceedings is liable to be terminated,

31. There is a counter claim petition filed by the respondents before this Tribunal, which the learned counsel for the respondents contends that the respondents are legally entitled to pursue its claim independent of the main claim petition. This will be considered separately.

32. So far as proceedings in claim petition filed by M/s. Era Land Marks. Limited arid Parinda Build Con Pvt Ltd before this Tribunal, is terminated for the reasons mentioned herein above."

39. The proceedings in claim petition filed by M/s. Era Landmarks Ltd. was thus, terminated by order dated 15.07.2015.

40. It is relevant to notice that against the order dated 15.07.2015, M.A. No.37 of 2015 was filed by both the Claimants before the Addl. City Civil & Sessions Judge, Bengaluru. An application being IA No.3 was filed objecting

to maintainability of the M.A. After hearing the parties, Ld. Addl. City Civil & Sessions Judge took the view that the order dated 15.07.2015 is an order passed under Section 32(2)(c) which finding has been returned. Paragraphs 17 and 18 of the order are as follows:-

> *"17. As could be seen from the cause-title of order, dated 15.07.2015 passed by the Hon'ble Sole Arbitrator, it is under Section 23(3) of the Arbitration and Conciliation Act, 1996. It appears the Provision is wrongly quoted. Because, on reading of the entire order passed by the Hon'ble Sole Arbitrator, it is an order under Section 32(c) of the Arbitration and Conciliation Act, Section 32 reads like this:*
>
> > *"**Termination of proceedings.-(**1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2)*
> >
> > *(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where,*
> >
> > > *(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute.*
> > >
> > > *(b) the parties agree on the termination of the proceedings, or*
> > >
> > > ***(c) the arbitral tribunal finds the continuation of the that proceedings has for any other reason become unnecessary or impossible.***
> >
> > *(3) Subject to Section 33 and sub-section (4) of Section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.*

18. The Hon'ble Sole Arbitrator directed the Appellants to produce the original Assignment Agreement, dated 25-1-2010 for impounding of the same and to impose duty and penalty. The Appellants wanted to take benefit of the Assignment Agreement but in spite of direction by the Hon'ble Sole Arbitrator have not produced the same. Therefore, the Hon'ble Sole Arbitrator terminated the whole proceedings. In view of this fact situation, this court is of the opinion that the order passed by the Hon'ble Tribunal is under Section 32(2)(c) of the Arbitration and Conciliation Act 1996."

41. Ld. Addl. City Civil & Sessions Judge passed following order dismissing the Appeal:-

"ORDER

I.A.No.3 is allowed.

The Appeal filed under Section 34 of the Arbitration and Conciliation Act is not maintainable.

Consequently, the entire Appeal is dismissed with cost."

42. Against the order passed by the Trial Court, Misc. First Appeal No. 10068 of 2018 was filed by both the Claimants in the High Court of Karnataka at Bengaluru which also came to be dismissed by the judgment and order of the High Court dated 25.06.2019. High Court in the above judgment held that the order dated 15.07.2015 is an order under Section

32(2)(c) of the Arbitration & Conciliation Act, 1996. In paragraphs 4 and 5, High Court held following:-

> *"4. I have perused the entire impugned order. "It can very well be said that the order passed by the Arbitral Tribunal. on 15.07.2015 amounts to an order passed according to Section 32 (2) (c) of the Arbitration and Conciliation Act. This kind of an order is not challengeable and cannot be questioned under Section 34 of the Arbitration and Conciliation Act. In a case decided by the Bombay High Court in Anuptech Equipments. Private Ltd., Vs. Ganpati Co-Operative Housing Society Ltd., Mumbai and others reported in 1999 (2) Maharashtra Law Journal, it field as below:*
>
> > *"10: .....What that means is that the expression order and award are distinct and different. One is termination of proceedings without deciding the merits of the matter, the other is termination on merits. Therefore, It is clear that looking at the Act itself there is no provision to challenge certain orders or decisions."*
>
> *The High Court of Calcutta in the case of* ***NPR Projects Pvt. Ltd. and Another. Vs. Hirak Mukhopadhyay and Another*** *has also taken a view, which is as follows:-*
>
> > *"61. The remedies that are available may be noticed now. An arbitral award, be it final or interim, may be challenged in an application*

under Section 34 of the Act, Section 37 provides for appeal against orders of the arbitral tribunal, but except for those mentioned therein other orders passed by it are not appealable."

5. In view of the proposition laid down in the above two decisions, it is to be stated. that even the proceedings under Section 34 of the Arbitration and Conciliation Act In the District Court was not maintainable. Whatever may be the classification of the proceedings In the District Court, the appellant could not have invoked Section 34 of the Arbitration and Conciliation Act. In view of the above, I do not find any ground to hold that the appeal is maintainable. Therefore, appeal is dismissed."

43. After noticing the various proceedings and the final order passed on 15.07.2015 by the Sole Arbitrator, we now need to look into the statutory scheme of the Arbitration & Conciliation Act, 1996 to find out as to whether the order dated 15.07.2015 can be held to be arbitral award. Arbitral award is defined in Section 2(c), which is as follows:-

"2. ***Definitions.*** *(c) "arbitral award" includes an interim award;"*

44. Chapter VI of the Act deals with 'making of arbitral award and termination of proceedings'. Section 31 deals with 'form and contents of arbitral award'. Section 32 deals with 'termination of proceedings'. Section 32 which is relevant in the present case is as follows:-

> ***"32. Termination of proceedings.*** *(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).*
>
> *(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—*
>
> *(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,*
>
> *(b) the parties agree on the termination of the proceedings, or*
>
> *(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.*
>
> *(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings."*

45. Section 34 deals with 'application for setting aside arbitral awards'. Section 34(1) provides as follows:-

> ***"34. Application for setting aside arbitral awards.*** *(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)."*

46. Section 35 deals with 'finality of arbitral awards' which is as follows:-

> ***"35. Finality of arbitral awards.-*** *Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively."*

47. Section 36 deals with 'enforcement' and Section 37 deals with 'appealable orders'. When we look into Section 32, the statutory scheme provides that arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2). Thus, expressions 'final arbitral award' and 'an order of the arbitral tribunal under sub-section (2)' are two distinct natures of orders contemplated by sub-section (1) of Section 32. Both the expressions have been used for two separate natures of orders. Thus, an arbitral award and an order of the arbitral tribunal under sub-section (2) of Section 32 are two different natures of orders and have different consequences. When we look into Section 34, it is clear that recourse is provided only against arbitral award under Section 34. Thus, an application under Section 34 is maintainable only against an arbitral award.

48. Now we come to Section 35 which provides for 'finality of arbitral awards'. The statutory scheme under Section 35 thus, is clear that an arbitral award shall be final and binding on the parties and persons claiming under them respectively. Thus, finality has been attached under Section 35 to the arbitral award and by virtue of Section 36 arbitral award can be enforced.

49. Counsel for the Appellant in support of his submission that the order dated 15.07.2015 is an arbitral award has relied on a judgment of Calcutta High Court and a judgment of Delhi High Court which need to be noticed. Reliance is placed on judgment of Calcutta High Court in ***"India Trading Company vs. Hindustan Petroleum Corporation Ltd.- 2016 SCC OnLine SC Cal 479"***. In the above case, Appeal was filed against an order passed by City Civil Court dismissing an application of the Appellant under Section 34 of the Arbitration & Conciliation Act, 1996. In the above case, from paragraph 2 of the order, it is clear that the arbitration proceedings were terminated under Section 25(a) of the Arbitration & Conciliation Act, 1996. Paragraph 2 of the judgment is as follows:-

> *"**2.** The relevant part of the impugned order is set out hereinbelow for convenience.*
>
> *"Accordingly, the Ld. Arbitrator conclude the proceeding on 6.1.2004 under the following observations:-*
>
> *I) The claimant did not produce any order of stay or arbitration proceeding. The claimant did not produce any statement of claim. There was no agreement between the par ties that the arbitration should be kept on being delayed further. The act of sole arbitrator is a time-bound manner and nearly two years were passed from the date of appointment of the arbitrator but the proceeding did not progress at all and as such, the arbitration proceeding*

was terminated as per provision u/s 25(a) of the Arbitration and Conciliation Act, 1996.

II) As per Section 34 of Arbitration and Conciliation Act, 1996, the order had passed by the arbitrator is not award at all. Moreover, the petitioner was given several opportunities to file his statement of claim and to proceed with the arbitration proceeding but the petitioner taking advantage of the contempt proceeding, took several attempts to conclude the proceeding and the proceeding was delayed due to Act of the petitioner. The arbitration proceeding is a time-bound factor.

Therefore, in view of the above observation, I do not find any illegality or irregularity in the observation of the Ld. Arbitrator. Moreover, the order passed by the arbitrator is not an award and no Misc. Case lies u/s 34 of Arbitration and Conciliation Act.

Accordingly, this Misc. Case is not maintainable at all."

50. Calcutta High Court also noticed Section 25 as well as Section 32 of the Act, 1996 and in paragraph 8 of the judgment has observed *"an order under Section 32(2) would not be an award"*. Paragraph 8 of the judgment is as follows:-

*"**8.** Section 32 provides that the Arbitral proceedings are to be terminated by the final award or by an order of the Arbitral Tribunal, under sub-section 2 of Section 32. An order under sub-section 2 of Section 32 might be issued in the circumstances specified in*

Clauses (a) to (c) of Sub-section (2) of Section 32, that is, where the claimant withdraws his claim, or where the parties agree on the termination of the proceedings, or where the Arbitral Tribunal finds that the continuation of the proceedings has, for any other reason, become unnecessary or impossible. An order under Section 32(2) would not be an award."

51. Counsel for the Appellant has relied on paragraphs 9 to 14 of the judgment which is as follows:-

*"**9.** Once the arbitral proceedings are terminated, whether by a final award, or by an order of the Arbitral Tribunal under Sub-section (2), the mandate of the arbitral tribunal also terminates in view of Section 32(3) of the 1996 Act, subject, however, to Section 33 and Section 34(4), that is, subject to the power of the arbitral tribunal to correct any error of computation or any clerical or typographical errors or any other errors of a similar nature occurring in the award, within the time stipulated and subject to the power of the Court under Section 34(4) to adjourn proceedings for setting aside of an award under Section 34 for a limited period of time determined by the Court in its order, to give the Tribunal an opportunity to resume arbitral proceedings or to take such other action, as in the opinion of the arbitral tribunal would eliminate the grounds for setting aside the arbitral award.*

***10.** On a conjoint reading of Section 25A with Section 32 and the definition of arbitral award in Section 2(1)(c), it is patently clear that, except for an order for the termination of the arbitration proceedings on*

grounds stipulated in Section 32(2) of the 1996 Act, and save and except ministerial directions, any other decision of the Arbitral Tribunal is an award.

11. *Arbitral proceedings are terminated by the final arbitral award or by an order of the arbitral tribunal under Sub-section (2) i.e. an order of termination, where the claimant withdraws his claim, where the parties agree on the termination of the proceedings or the tribunal finds the continuation of the proceedings has, for any reason, become unnecessary or impossible.*

12. *Termination of proceedings under Section 25(a) is a final decision which puts an end to the arbitral proceedings. The decision amounts to rejection of the claim, even though there is no adjudication on merits. It is, akin to dismissal of a suit on a technical ground, may be, non prosecution.*

13. *There is a difference between a decision which puts an end to the arbitral proceedings and a decision whereby the arbitrator withdraws from the proceedings. Where the arbitrator withdraws from the proceedings, a substitute arbitrator may be appointed in accordance with the procedure, applicable to the appointment of the arbitrator who is replaced, but where the arbitrator puts an end to the arbitral proceedings, the claimant cannot pursue his claim.*

14. *The decision of the arbitral tribunal to put an end to the proceedings is a final award which can only challenged by way of an application for setting aside under Section 34 Sub-section (2) of the 1996 Act. Once the arbitral proceedings are terminated, the claimant*

cannot re-agitate the same claim by initiation of fresh proceedings since the claim would be hit by principles of constructive resjudicata."

52. When we look into the above judgment, the Calcutta High Court itself has carved an exception to an order passed under Section 32(2) from being treated an award which is clear from what has been held in paragraphs 8 and 10 of the judgment as noted above. Paragraphs 8 and 10 of the judgment are as follows:

*"**8.** Section 32 provides that the Arbitral proceedings are to be terminated by the final award or by an order of the Arbitral Tribunal, under sub-section 2 of Section 32. An order under sub-section 2 of Section 32 might be issued in the circumstances specified in Clauses (a) to (c) of Sub-section (2) of Section 32, that is, where the claimant withdraws his claim, or where the parties agree on the termination of the proceedings, or where the Arbitral Tribunal finds that the continuation of the proceedings has, for any other reason, become unnecessary or impossible. An order under Section 32(2) would not be an award.*

***10.** On a conjoint reading of Section 25A with Section 32 and the definition of arbitral award in Section 2(1)(c), it is patently clear that, except for an order for the termination of the arbitration proceedings on grounds stipulated in Section 32(2) of the 1996 Act, and save and except ministerial directions, any other decision of the Arbitral Tribunal is an award."*

53. The above judgment of the Calcutta High Court was a case where arbitration proceedings were terminated under Section 25(a) which was held to be amendment to Section 34(2). The above judgment of the Calcutta High Court is clearly distinguishable and rather supports the submissions of the Counsel for the Respondent that an order under Section 32(2) is not an award.

54. Next judgment which has been relied by the Appellant is the judgment of the High Court of Delhi in ***"Joginder Singh Dhaiya vs. M.A. Tarde- 2017 SCC OnLine Del 12559"***. In the above case, arbitration proceedings were held to be abated on account of substitution of legal representatives of Mr. Tarde was rejected, against which order, the petition was filed in the High Court. The Delhi High Court noticed the relevant provisions of the Arbitration Act and has made following observations in paragraphs 25 and 26 which is relied by the Appellant:-

> *"**25.** From the above, it would be apparent that the distinction between an 'order' and an 'award' lies in the fact whether the decision of the arbitral tribunal affects the rights of the parties, concluding the dispute as to the specific issue, and has finality attached to the same.*
>
> ***26.** In the present case, the impugned Award has resulted in termination of the arbitration proceedings and would bar the petitioner from re-agitating the same in any other proceedings. The said award, therefore, has finality attached to it and determines a vital right of the parties."*

55. The order which was challenged was held to be award amenable to proceeding under Section 34 of the Arbitration & Conciliation Act, 1996 which has been held in paragraph 29 of the judgment. The above case was not a case of termination of arbitration proceedings under Section 33(2) rather a case of rejecting an application for substitution of legal heirs. Thus, the issue which has arisen in the present case was neither considered nor decided.

56. Counsel for the Respondents has placed reliance on a subsequent judgment of the Delhi High Court in ***"PCL Suncon vs. National Highway Authority of India- 2021 SCC OnLine Del 313"***. The order under challenge before the Delhi High Court was an order dated 20.04.2020 terminating the arbitral proceedings under Section 32(2)(c) of the Arbitration & Conciliation Act, 1996. In the above case, the question arose as to whether order constitutes an award. After considering the submissions of the parties, Delhi High Court laid down following in paragraphs 23 and 24:-

> *"**23.** The first and foremost question to be addressed is whether the impugned order constitutes an award. As noted above, the Arbitrators had, by the impugned order, terminated the arbitral proceedings under Section 32(2)(c) of the A&C Act on account of failure on the part of the petitioner to nominate an arbitrator to fill the vacancy resulting from the resignation of Justice E. Padmanabhan (Retd.). Recourse to a court against an award is available only under Section 34 of the A&C Act. This is clear from the plain language of sub-section (1) of Section 34 of the A&C Act which*

reads as : -(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).” The use of the word ‘only’ in Section 34(1) of the A&C Act is significant and it clearly implies that except under Section 34 of the A&C Act, no other recourse is available against an arbitral award, to which Part-I of the A&C Act applies. The contention that the present petition is not maintainable and the only recourse available to the petitioner was to file an application under Section 34 of the A&C Act is founded on the assumption that the impugned order is an award.

24. *The term ‘award’ is defined under Clause (c) of Sub-section (1) of Section 2 of the A&C Act, in wide terms : The said Clause defines ‘arbitral award’ to include an interim award. Section 31 of the A&C Act provides for the form and the content of an arbitral award. The question as to the distinction between an award and an order of an Arbitral Tribunal has been a subject matter of a number of rulings. It is now well settled that an award constitutes a final determination of a particular issue or a claim in arbitration.”*

57. The Delhi High Court after considering certain judgments of the Delhi High Court and the Hon’ble Supreme Court came to the conclusion that the order terminating the arbitral proceeding is not an award. In paragraph 30 of the judgment following has been laid down:-

> *"**30.** Viewed in the aforesaid context, it is clear that an order, which terminates the arbitral proceedings as the Arbitral Tribunal finds it impossible or unnecessary to continue the arbitral proceedings, would not be an award. This is so because it does not answer any issue in dispute in arbitration between the parties; but is an expression of the decision of the Arbitral Tribunal not to proceed with the proceedings."*

58. It is relevant to notice that both the cases relied by the Appellant i.e. 'Indian Trade Company' and 'Joginder Singh Dahiya' was also considered by the Delhi High Court and noticed in the judgment.

59. In view of the statutory scheme of the Arbitration & Conciliation Act, 1996, as noted above and the fact that both City Civil & Session Court Judge as well as High Court of Karnataka having held that the order dated 15.07.2015 passed by the Sole Arbitrator is an order under Section 33(2)(c), the order dated 15.07.2015 cannot be held to be arbitral award within the meaning of Arbitration & Conciliation Act, 1996 so as to make it binding on the parties under Section 35 of the Act. Thus, in view of the fact that the Sole Arbitrator terminated the arbitration proceedings under Section 33(2)(c) by order dated 15.07.2015, the order dated 15.07.2015 cannot be held to be an award within the meaning of Arbitration & Conciliation Act, 1996.

60. The answer of Question No.II is:-

The proceedings conducted by the Sole Arbitrator and the orders passed by the Sole Arbitrator dated 27.05.2014 and 15.07.2015 does not amount to an arbitral award under the Arbitration & Conciliation Act, 1996

determining the rights of both the parties so as to bind both the parties in any subsequent proceedings.

QUESTION NO.(III) & (IV)

61. Both the questions being inter-related are taken together.

62. The CIRP against the Corporate Debtor commenced by order dated 05.12.2018 passed by the Adjudicating Authority. The Respondent No.1 herein was appointed as IRP who was subsequently confirmed as RP. The RP has made public announcement in Form A on 07.12.2018. The RP came to know about the public notice dated 07.08.2020 issued by M/s. Brigade Enterprises Ltd. intending to enter into a Joint Development Agreement of the scheduled property with owners. The RP vide letter dated 19.08.2020 immediately sent his objection which was also sent to the owners. RP has included the assets in the Information Memorandum prepared under Section 29 whereafter IA No.4648 of 2020 was filed by Appellants herein dated 05.10.2020. In paragraph 2 of the application, following was pleaded by the Appellants:-

> *"2 The instant application is filed seeking for the deletion of the Schedule Properties which absolutely belong to the Applicants from the Corporate Insolvency Resolution Process ("CIRP") and Information memorandum circulated by the Resolution Professional ("RP") in this petitions."*

63. In the application, the Appellant has given the details of Collaboration Agreement, Addendum, General Power of Attorney, Assignment Agreement

as well as the legal notice dated 17.02.2012 terminating the aforesaid. In the application, following prayers were made:-

> *"WHEREFORE it is prayed that this Hon'ble Tribunal may be pleased to direct removal of the Schedule Properties from the CIRP Process and deletion of the Schedule Properties, from the information memorandum circulated by the Resolution Professional of the respondent in CP No. 1B-1083 (PB)/ 2018 and pass such other and further order as deemed fit in the facts and circumstances of the case in the interest of justice and equity."*

64. While answering the Question No.(I) as above, we have already held that the development rights claimed by the corporate debtor is a property within the meaning of Section 3(27) and the RP has to include the assets in which the corporate debtor has development rights.

65. Shri Maninder Singh, Learned Senior Counsel for the Appellant relying on Section 18(1)(f) explanation submits that the IRP can take control and custody of only those assets over which the corporate debtor has ownership as recorded in the balance sheets. It is undisputed fact that the ownership rights in the subject land still vest with the Appellants. Counsel for the Appellant referring to explanation also submits that the assets which are owned by third party and in possession of the corporate debtor held under trust or under contractual agreement are excluded from the definition of asset. Hence, subject property which is owned by the Appellants cannot be taken into custody by the IRP by virtue of above statutory scheme.

66. The present is a case where corporate debtor is not claiming any ownership rights over the subject land. Corporate debtor is claiming development rights and the ownership of the Appellants is not even denied by the Resolution Professional. Reply to the IA was filed by the Resolution Professional. In the reply, Resolution Professional has pleaded that the Resolution Professional has rightly included the project in the Information Memorandum as besides receiving the compensation due and payable by the Applicants in terms of clause 6, the Resolution Professional is also required to deal with the claims of Real Estate Allottee pertaining to said project.

67. We have already noticed the judgment of the Hon'ble Supreme Court in **Victory Iron (supra)** where it was held that the development rights is a property within the meaning of Section 3(27) and the Resolution Professional has every right to move to the NCLT to protect for the interest of the corporate debtor in the land where corporate debtor claims development rights.

68. We may also need to notice few more clauses of the Collaboration Agreement between the parties. Clause 9.2 of the Collaboration Agreement provided that either party shall not assign or transfer its rights and obligations under this Agreement without the prior written consent of the other party. Thus, the assignment was contemplated under the Collaboration Agreement itself with the consent of other party. A perusal of the clause of the development agreement which we have noticed above

indicate that the developers has development rights to the extent of his share of 70.5% in the assets and was also entitled to refund of Refundable Security Deposit. Termination of the Development Agreement was also contemplated which clause we have already noticed above. Clause 6 of Collaboration Agreement also provided that the investments made by the developer till the date of termination on physical construction of assets shall be taken into account to an independent valuer and the agreed value shall be made good by the First Party from the proceeds of the schedule property or from his own source within a period of two years of such termination.

69. Now we come to the Assignment Agreement which is relied by the Appellant to support his submission that no rights are left in the corporate debtor. The Assignment Agreement has been brought on the record in the reply filed by the Resolution Professional as Annexure-5. The Agreement entered between 'M/s. Era Landmarks Ltd.'- First Party, Parinda Buildcon Pvt. Ltd.- Second Party and Mr. K. H. Khan, Mrs. Shaheda Begum and Mr. Karar Ahmed as Third Party. Thus, the owners are also part of the agreement, hence, the assignment is made in accordance with Clause 9.2 of the Collaboration Agreement. We have already extracted Clause 3 of the agreement which provided *"all the terms and conditions of the agreement shall continue without any change"* and it was further stated that the Assignment Agreement shall form part of the agreement and shall read together with the agreement. Assignment Agreement did not cancel the Collaboration Agreement and to be read as part of the Agreement. Agreement at very beginning has noticed that the First Party has resolved

and decided to transfer all its rights, duties and obligations under the Agreement to the Second Party ***for operational convenience of implementing and marketing the project envisaged in the Agreement to which the second party has agreed***. We have already held that the order dated 15.07.2015 passed by the Sole Arbitrator is not an award within the meaning of Arbitration & Conciliation Act, 1996.

70. We may also refer to the judgment of this Tribunal in ***"Nilesh Sharma, Resolution Professional- Today Homes and Infrastructure Pvt. Ltd. vs. Mordhwaj Singh & Ors.- Company Appeal (AT) (Ins.) No. 1691 of 2023"*** which was also a case where owners of the land have filed an application for excluding the assets which was owned by the owners. There was development agreement between the developers and the owners with respective shares to the parties. License was obtained by developers and group housing colony was constructed. There was also a consent award dated 05.09.2009 between the parties and award by the Sole Arbitrator dated 09.12.2017 where certain directions were issued to claimant as well as to the owners. Owners, after the consent award, by notice have revoked the Power of Attorney. The CIRP commenced on 31.10.2019. Resolution Professional took possession of the project who was dispossessed subsequently by the owners an IA was filed by the Resolution Professional in which under interim order Resolution Professional was again put back in possession. Owners filed an IA seeking direction to the Resolution Professional to exclude the project from the CIRP. In the above judgment, the application filed by the owners was rejected by the Adjudicating

Authority. Adjudicating Authority refused the prayers made by the owners. Appeals were filed by the owners before this Tribunal where one of the questions which came for considering was as to whether Adjudicating Authority has jurisdiction to decide the question of possession of the Resolution Professional of the assets. In the above case also, there was no dispute to the ownership rights of the owners and claim raised by the corporate debtor was on the basis of development agreement. This Tribunal after referring to the provisions of Section 25, Section 3(27) had noticed the ratio of the judgment of the Supreme Court in Victory Iron (supra) at paragraph 50 and ultimately held that the corporate debtor has development rights in assets. In paragraph 51, following was held:-

> *"51. From the above, it is clear that Corporate Debtor had Development Rights in the asset, area of 10.81 acres of land on which Project Canary Green was constructed by the Corporate Debtor. In the Project, allotments were also made to the 500 Homebuyers."*

71. In view of the foregoing discussions, we answer Question Nos. (III) and (IV) in following manner:-

(III) IRP/RP has rightly included the subject land in the Information Memorandum/ CIRP and he was not precluded by virtue of Section 18(1)(f) *explanation* from asserting development rights in the subject land.

(IV) Adjudicating Authority did not commit any error in not allowing IA No.4648 of 2020 which prayed for exclusion of subject land from the Resolution Plan/CIRP of the corporate debtor.

QUESTION NO. (V)

72. Question No.(V) relates to the order passed by the Adjudicating Authority dated 30.04.2024 passed in IA No.58 of 2023. We have noticed above that the Resolution Plan of 'M/s. Art Construction Pvt. Ltd.' in the CIRP of the Corporate Debtor was approved by the CoC on 15.09.2022/ 06.12.2022 with majority vote of 82.66%. The Applicant- Art Construction Pvt. Ltd. who had filed an Intervention Petition was the SRA whose plan was approved by the CoC. Adjudicating Authority while deciding the Intervention Petition observed following in paragraph 3:-

> *"3. Having regard to the fact that the present intervention has been filed by the M/s. Art Construction Pvt. Ltd., who is the major stakeholder in the resolution of the Corporate Debtor and since the Resolution Plan has been approved by the CoC in its 27th meeting dated 15.09.2022 by 82.66% voting share in respect of the CIRP of the Corporate Debtor, we deem it appropriate to allow the intervention application and permit the applicant to intervene in the main application and make submissions."*

73. Intervener who has filed an application for intervention being SRA, we see that the Adjudicating Authority did not commit any error in allowing Intervention Petition filed by Art Construction Pvt. Ltd. Question No. (V) is answered in following manner:-

Adjudicating Authority did not commit any error in allowing IA No.58 of 2023 filed by the SRA.

74. In view of the foregoing discussions and our conclusions, we uphold the order dated 30.04.2024 passed in IA No.58 of 2023. The order dated 30.04.2024 passed by the Adjudicating Authority in IA No.4648 of 2020 insofar as it does not allow the prayers made in IA No.4648 of 2020 are upheld. We have already held that the questions raised in the applications IA No.4648 of 2020 were not required to be referred to for determination by a Competent Civil Court having jurisdiction.

75. We dismiss Company Appeal (AT) (Insolvency) No. 1117 of 2024 and Company Appeal (AT) (Insolvency) No. 1116 of 2024 for the reasons as noted above. Both the parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi
Anjali