National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 356 of 2022

(Arising out of Order dated 14th March, 2022 passed by National Company Law Tribunal, New Delhi Bench – II, in IA No. 1610/2020 & IA No. 4130/2020 in C.P. (IB) No.- 894/ND/2019).

IN THE MATTER OF:

IDBI Trusteeship Services Limited
A Trusteeship Company having its registered office at 1009, Ansal Bhawan, KG Marg,
New Delhi – 110001. **...Appellant**

Versus

1. Mr. Abhinav Mukherji
R/o D-85, Panchseel Enclave,
New Delhi – 110017. **...Respondent No. 1**

2. Mr. Manoj Kumar Singh
(Erstwhile IRP of Palm Developers Pvt. Ltd.)
Now Replaced by Mr. Krit Narayan Mishra
(RP of Palm Developers Pvt. Ltd.
Vide Order 13/07/2022 of NCLT Delhi Bench-II)
(Registration No. IBBI/IPA/IP-P00441/2017-18),
Having office at C-3, Ashoka Apartments,
Plot No. 8, Sector-12, Dwarka,
New Delhi – 110078. **...Respondent No. 2**

3. ECL Finance Limited
R/o Upper Ground Floor, Mercantile House,
15 Kasturba Gandhi Marg, **...Proforma Respondent**
New Delhi – 110001. **No. 3**

For Appellants:	**Dr. Abhishek Manu Singhvi, Sr. Advocate with Mr. Gaurav Mitra, Mr. Dev Roy, Himanshi Rajput, Mr. Atul Sharma and Mr. Aditya Vashisth, Advocates.**
For Respondent No.1:	**Mr. Abhijeet Sinha and Mr. Raghavendra M. Bajaj, Advocate for R-1.**
For IRP:	**Mr. Milan Singh Negi, Advocate for New IRP.**

WITH

COMPANY APPEAL (AT) (INSOLVENCY) No. 358 of 2022

(Arising out of Order dated 14th March, 2022 passed by National Company Law Tribunal, New Delhi Bench – II, in IA No. 1610/2020 & IA No. 4130/2020 in C.P. (IB) No.- 894/ND/2019).

IN THE MATTER OF:

1. ECL Finance Limited
R/o Upper Ground Floor, Mercantile House,
15 Kasturba Gandhi Marg, New Delhi – 110001. **...Appellant No. 1**

2. Assets Care & Reconstruction Enterprises Ltd. (ACRE)
(Asset Reconstruction Company established under the provisions of SARFAESI Act, 2002)
R/o 2nd Floor, Mohandev Building,
Tolstoy Marg, New Delhi – 110001. **...Appellant No. 2**

Versus

1. Mr. Abhinav Mukherji
R/o D-85, Panchseel Enclave,
New Delhi – 110017. **...Respondent No. 1**

2. Mr. Manoj Kumar Singh
(Erstwhile IRP of Palm Developers Pvt. Ltd.)
Now Replaced by Mr. Krit Narayan Mishra
(RP of Palm Developers Pvt. Ltd.
Vide Order 13/07/2022 of NCLT Delhi Bench-II)
(Registration No. IBBI/IPA/IP-P00441/2017-18),
Having office at C-3, Ashoka Apartments,
Plot No. 8, Sector-12, Dwarka,
New Delhi – 110078. **...Respondent No. 2**

3. IDBI Trusteeship Services Limited
A Trusteeship Company having its registered office at 1009, Ansal Bhawan, KG Marg,
New Delhi – 110001. **...Respondent No. 3**

For Appellants: **Mr. Ramji Srinivasan, Sr. Advocate with Mr. Gaurav Mitra, Mr. Dev Roy, Mr. Atul Sharma, Ms. Renuka Iyer, Mr. Aditya Vashisth and Ms. Himanshi Rajput, Advocates.**

For Respondent No.1: **Mr. Abhijeet Sinha and Mr. Raghavendra M. Bajaj, Advocate for R-1.**

For IRP: **Mr. Milan Singh Negi, Advocate for New IRP.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. The present Appeals filed under Section 61(1) of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code') challenge the Impugned Order dated 14/03/2022 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi Bench – II) in I.A. No. 1610/2020 and in I.A. No. 4130/2020 filed in C.P. (IB) No. 894/ND/2019, whereby, the Adjudicating Authority, on an Application filed by a Homebuyer/Mr. Abhinav Mukherji has allowed the Application and held that *'IDBI Trusteeship Services Limited'* and *'ECL Finance Ltd.'*/the Appellants are not 'Financial Creditors' and also observed that the Appellants are 'Related Parties' to the 'Corporate Debtor'. *ECL Limited* is arrayed as Appellant No. 1 and *'Assets Care & Reconstruction Enterprises Ltd.'* as Appellant No. 2 in *Comp. App. (AT) (Ins.) No. 358 of 2022.* Since both these Appeals deal with common facts and challenge a common Impugned Order, they are being disposed of by this Common Order.

2. Facts in brief are that the Appellant/IDBI was appointed as a Debenture Trustee for the benefit of the Holders of certain Debentures issued by M/s. Saha Infratech Pvt. Limited (Issuer/Principal Borrower) vide Debenture Trustee Agreement dated 18/05/2016. The first Respondent Mr. Abhinav Mukherjee is the Homebuyer of the 'Corporate Debtor' having Claim of Rs.2,94,43,634/-; the second Respondent Mr. Krit Narayan Mishra is the RP of the 'Corporate Debtor', appointed vide letter dated 13/07/2021 in I.A.

1742/2021 replacing the erstwhile IRP, Mr. Manoj Kumar Singh. Appellant/*M/s. ECL Finance Limited* is the original Debenture Holder which has executed the Assignment Agreement dated 27/03/2020 whereby all rights in regard to the Financial Assistance were assigned in favour of Assets Care and Reconstruction Enterprise Limited ('ACRE'). While so, in June 2016, Saha Infratech with a view to augment their resources issued 110 Non-Convertible Debentures having a face value of Rs.1Crore/- each for an aggregate amount of Rs.110Crores/- and appointed the Appellant/IDBI to act as a Trustee for the Holders of the Debentures. At the request of the Issuer/*'Palm Developers Private Limited'* (hereinafter referred to as the 'Corporate Debtor') and their Promoters, Debenture Holders agreed to subscribe to the Debentures and a Debenture Trust Deed dated 01/07/2016 was executed amongst the Principal Borrower, the 'Corporate Debtor' (Corporate Guarantor) and the Appellant (Debenture Trustee) including the promoters. As per the terms of the Trust Deed a part of the Debenture Subscription amount was to be used for funding the construction of the 'Project Encore', being developed by the 'Corporate Debtor'. The Debenture Holder as on date has made a subscription of the first tranche of the Debentures i.e., 110 amounting to Rs.110Crores/-. The second tranche has not been subscribed yet. Under the terms of the Debenture Trust Deed, payment of interest and all other accounts on the respective due dates was secured by an irrevocable Corporate Guarantee of the 'Corporate Debtor', executed vide Guarantee Agreement dated 02/07/2016.

3. Additionally, the 'Corporate Debtor' executed and delivered a Demand Promissory Note, a Deed of Hypothecation, Mortgage Agreement on the properties of 'Project Encore', and Revenue Escrow Agreement in respect of

the entire receivables of the 'Project Encore' all dated 02/07/2016 in favour of the Appellants to secure the due performance of the terms and conditions of the Trust Deed. It was averred that the Principal Borrower and the Obligors committed defaults in performance of the terms of the Debenture Trust Deed, but the Appellants in utmost good fate continued with the Debentures with the hope that the Issuers/Obligors shall rectify the default in a timely manner. Despite repeated requests, as the defaults continued, the Appellants vide Letters dated 30/10/2018, 08/01/2019, 02/04/2019 exchanged communication with the Issuer and the Obligors and the Corporate Guarantor highlighting the defaults and asking them to rectify the same.

4. On 27/01/2020, CIRP against the 'Corporate Debtor' was initiated and Moratorium was issued. On 31/01/2020, the IRP made Public Announcement and on 10/02/2020 within the stipulated time frame, the Appellant submitted its 'Form C' showing default from the Year 2017 and claiming an amount of Rs.1,26,96,88,698/- as against the Principal and Interest 'due and payable' as on 27/01/2020. It was averred that on 20/02/2020, the IRP constituted the CoC and the Appellant was made a member thereof; that subsequently, on 25/02/2020, the first Respondent filed I.A. 1610/2020 praying *inter alia* the following reliefs:

(a) Rejections of the claim of the Appellants as accepted by the IRP of the 'Corporate Debtor'.

(b) Reconstituting of the CoC after exclusion of the Appellants.

(c) Restraining the Appellants from exercising any voting right in the CoC of the 'Corporate Debtor'.

While issuing Notice in I.A. 1610/2020, the Adjudicating Authority vide Order dated 28/02/2020 directed the erstwhile IRP to restrain from holding any Meeting of CoC till the constitution of CoC was ascertained.

5. The erstwhile IRP in his Reply to the Application I.A. 1610/2020 denied the allegation made by the first Respondent and challenge the said Application on maintainability and submitted that on seeking legal opinion from his Counsel M/s. Dua Associates, the Claims of the Appellants and the third Respondent were admitted in accordance with Section 21(1) of the Code. The Adjudicating Authority vide Order dated 07/09/2020 modified the earlier Order dated 28/02/2020 to the extent that the erstwhile IRP was allowed to proceed in the matter in accordance with the provisions of the Code but was restrained from declaring the status of the Appellants until further Orders.

6. While so, on an Application, filed by IDBI, bearing IA No. 1742/2021, the Adjudicating Authority appointed Mr. Krit Narayan Mishra new IRP on 13/07/2021. Based on the Reply filed by the new IRP, the Articles of Association (AoA) of the 'Corporate Debtor', the terms of the Guarantee Deed, the Adjudicating Authority observed as follows:

> *"39. On perusal of the Articles of Association (AOA) of the corporate debtor, we observe the part II of the Articles have overriding effect over the part 1 Articles and in case of conflict between the two, part II shall prevail over the part 1. And the clause referred to supra shows that the corporate debtor shall not take any decision without prior written approval of the debenture holders. We further observe that as per clause 7.1 of AOA, in the event of default both the debenture holders and lender have right to appoint their Nominee Director on the Board of the Company.*
>
> *40. The Respondent No. 2 and 3 in their written submissions have contended that though there is a provision but the respondents have not appointed*

their nominee Director, which would be evident from the MCA date. As it is seen that part II of the Article of Association of the corporate debtor clearly says that in case of conflict between the two, part II shall prevail over the part I, which shows that Director, or Manager of the corporate debtor cannot take any decision without the written approval of the debenture holders. In other words, the debenture holder will actively participate in the policy making process of the corporate debtor. Therefore, we have not even an iota of doubt that the Respondents no. 2 and 3 are not in a position to have control over the policy decisions of the corporate debtor and on the composition of the board of directors. As per the definition of related party, what is required to be established is, whether a person is in a position to control the composition of the Board of Directors and it is not necessary that he/they is/are the director(s) of the corporate debtor or not. Hence, we are unable to accept the contention of the Respondent no. 2 and 3 that they have not nominated any Director as yet and they are not in a position to take part in the policy making process.

41. For the reasons discussed above, we are of the considered view that in terms of the AOA, since the Respondents no. 2 and 3 are in a position to have control over the policy decisions of the corporate debtor and on the composition of the board of directors, hence they are related parties in terms of Section 5(24) of the IBC, 2016.

42. At this juncture, we would also like to refer to the arguments advances on behalf of the Ld. Counsels appearing for the Respondent no. 2 and 3 that the verification of the claims can be made by the IRP only and Adjudicating Authority is not required to interfere.

43. We are unable to accept this contention of the Respondent no. 2 and 3 as the duty of the IRP is only to verify the claims and in case, if any error has been committed by the IRP, the Adjudicating Authority is empowered under Section 60(5) of the IBC, 2016 to rectify such an error.

44. Apart from that, it is also an admitted fact that the Guarantee was invoked on 07.04.2020 i.e., after the initiation of the CIRP on 27.01.2020.

45. Therefore, the Ld. Counsel appearing for the Applicant has rightly submitted that the deed of guarantee was invoked after the initiation of CIRP.

Therefore, in terms of the moratorium declared under Section 14 of the IBC, 2016, the amount claimed by the Respondent No. 3 is not liable to be admitted.

46. At this juncture, we would also like to refer to the contention of Respondent No. 2 and 3 that the Applicant has no locus standi to raise this issue. As we have also referred to the additionally reply filed by the IRP, therefore, on the request of IRP, this Adjudicating Authority is empowered to invoke section 60(5) IBC 2016 and consider whether the Respondent No. 2 and 3 are the Financial Creditor or not?

47. Hence, we find, no force in the contentions raised on behalf of the Ld. Counsels appearing for the Respondent No. 2 and 3, that the application is not maintainable.

48. In sequel to the above, we are of the considered view that the Respondents No. 2 and 3 can be treated as 'creditors' but they shall not be treated as 'Financial Creditors' under Chapter II, Section 5(7) of the IBC, 2016. Hence, we have no option but to hold that the Respondents no. 2 and 3 are not the Financial Creditors and the admission of claims of the Respondents no. 2 and 3 as 'Financial Creditor' is contrary to the provisions of law. Accordingly, in terms of this order, the IRP/RP is directed to revise the claims of Respondents no. 2 and 3 and reconstitute the CoC.

49. So far as the prayer of the applicant regarding the acceptance of interest is concerned, the IRP/RP is directed to examine the same on merit and in accordance with the provisions of law.

50. Accordingly, in terms of aforenoted order, the IA 1610/2020 stands disposed of."

(Emphasis Supplied)

7. Submissions of the Learned Sr. Counsel appearing on behalf of the Appellants:

- Learned Sr. Counsel Dr. Singhvi contended that the Adjudicating Authority has wrongly relied on the ratio of the Judgment of the Hon'ble Supreme Court in *'Anuj Jain (IRP of Jaypee Infratech Ltd.)'*

(Supra) observing that the essentials of a 'Financial Debt', in particular, the 'pre-requisite of disbursal' is not satisfied in this case and therefore the Appellant is not a 'Financial Creditor' of the 'Corporate Debtor'. It is submitted that the Adjudicating Authority misrepresented *'Anuj Jain'* case, overlooking para 43 of the Judgement which clearly states that 'Financial Debt includes liability arising out of a guarantee'. Learned Counsel placed reliance on the Judgement of this Tribunal in *'Ascot Realty Private Limited Vs. Ajay Kumar & Ors.', (2020) SCC OnLine NCLAT 732,* wherein it was held that for initiation of Insolvency Proceedings against the Corporate Guarantor, the element for disbursal of 'Time Value of Money' is not required. It was argued that *'Anuj Jain (IRP of Jaypee Infratech Ltd.)' (Supra)* does not apply to the situation wherein claim is filed against the Corporate Guarantor/Obligors when CIRP is already initiated and pending.

- It is strenuously contended by Dr. Singhvi that the Clauses in the Articles of Association (AoA) are restrictive covenants included as a means to protect and preserve the huge amount of loans. Clause 5.4 of the AoA demonstrates that the Appellant does not have any hold over the composition of the Board of Directors; the only restrictive Clause with respect to change in the Board of Directors is *'the Company showing a change in the composition of the Board of Company accept in accordance with the terms of the Articles of Debenture Trust Deed'.*
- It was submitted that the Appellants neither had power to appoint or alter the Directors of the Company. The power to appoint the nominee

Director and an observer only arises on the occurrence of the 'event of default' and that such power which is contingent upon occurrence of event of default, was never exercised by the Appellant.

- In order of the entity to be termed as a 'Related Party', actual participation in the policy making process of the 'Corporate Debtor' ought to have been established. It was argued that Section 5(24)(i)(m) of the Code specifically states the person ought to be associated with the 'Corporate Debtor' and must have actual participation in the policy making process of the 'Corporate Debtor'. Dr. Singhvi placed reliance on the ratio of the Hon'ble Supreme Court in *'Arcelormittal India Pvt. Ltd.' Vs. 'Satish Kumar Gupta & Ors.', (2019) 2 SCC 1*, in which the Hon'ble Apex Court has observed that 'control' in the context of the 'Related Party', as defined under Section 5(21) of the Code, means a *de facto* control and will only include positive control and does not include mere power to restrict.
- It was submitted by the Learned Sr. Counsel that the default occurred prior to the initiation of the CIRP of the 'Corporate Debtor' as evidenced by the letters of default issued by the Respondent to the Principal Borrowers and the Obligors dated 02/04/2019 and 26/09/2019 which are much prior in time to the date of initiation of the CIRP.
- The only basis of arriving at the conclusion by the Adjudicating Authority that there has been 'no default' is a settlement made by the first Respondent that as per the information received by the Applicant, the Issuer of the Debentures continued to service the Debentures and therefore there is no default in servicing the interest due on the

Debentures. It was strenuously contended that the Adjudicating Authority has failed to appreciate that filing of 'Claims' under the Code is governed by Section 3(6), Section 13(1)(b), Section 15(1)(c) and Section 18(1)(b) of the Code and none of these Sections mandate any pre-requisite of default.

- Pre-conditions such as 'existence of default' is only to be satisfied when the Petition under Section 7 of the Code has been filed by a 'Financial Creditor'. It was further submitted that the Adjudicating Authority has erroneously applied the ratio of the Judgement in *'Laxmi Pat Surana Vs. Union of India & Anr.', (2021) 8 SCC 481,* on the premise that 'default is a pre-requisite for filing of a Claim'. This Tribunal in *'Axis Bank Vs. EDU Smart Services Pvt. Ltd. & Anr.', Company Appeal (AT) (Insolvency) No. 302 of 2017 and 'Andhra Bank Vs. M/s. F.M. Hammerle Textiles Ltd.', Company Appeal (AT) (Insolvency) No. 61 of 2018,* has held that even unmature and future debts are 'debts' for the purpose of filing of Claims.
- It was strenuously contended by Dr. Singhvi that the first Respondent being a single allottee and not represented by an 'Authorised Representative' ('AR'), had no *locus standi* to challenge the Claim of a separate 'Financial Creditor' already verified and admitted by the erstwhile IRP. The Adjudicating Authority has no *Suo Moto* powers under Section 60(5) of the Code to reverse or recall the decision of the erstwhile IRP and the sole Application filed was by a sole allottee with vested interest. It was submitted that bestowing powers on stakeholders to challenge the claims of competing stakeholders will lead to flood gates being opened and defeat the finality and certainty

to the decisions of the RP of verifying, collating and admitting Claims under Section 18(b) of the Code and Regulation 13(1) of the CIRP Regulations.

- The first Respondent has 4.43% of the Voting Shares in the CoC and not being represented by (AR) cannot challenge the 'Claims' of the Appellants being 'Financial Creditors' already verified and admitted by the erstwhile IRP.
- The Adjudicating Authority vide Order dated 21/10/2021, dismissed the Impleadment Application filed by *'Ashray Social Welfare Association'* bearing I.A. No. 2366/2021 in the pending I.A. No. 2275/2021 filed by the Appellant, on the ground of no *locus standi* as the Association had not filed the said Application through the 'AR'.
- Being the original lender, the Appellant has disbursed the amount of Rs.90Crores/- in terms of the Facility Agreement which is clearly shown in the Balance Sheet of the Borrowers/Saha Infratech for the FY 2018-19 and as such the debt of the Appellant is clearly acknowledged beyond doubt by the Borrower.
- It is also evident from the Auditor's Report and Forensic Audit Report that the allegations with regard to fraud are against the Management of the Borrower/Saha Infratech and the 'Corporate Debtor' and by no stretch of imagination, can these allegations be made against the Appellant and even if such allegations are proven to be correct, then the Appellant being a *bona fide* lender could also be an affected party who has lent a substantial sum of money.
- Learned Counsel for the Appellants in support of their submissions placed reliance on the following Judgements:

Sr. No.	Judgements	Relevant Paras
1.	*'Arcelor Mittal India Pvt. Ltd. Vs. Satish Kumar Gupta & Ors.' (2019) 2 SCC 1.*	*Paras 51-54*
2.	*'Ebix Singapore Pvt. Ltd. Vs. 'CoC Educomp Solutions Ltd.' (2022) 2 SCC 401.*	*Para 101*
3.	*'Ascot Realty Pvt. Ltd. Vs. Ajay Kumar Agarwal & Ors.' (2020) SCC OnLine NCLAT.*	*Paras 21-24, 28-30*
4.	*'Axis Bank Ltd. Edusmart Vs. Services Pvt. Ltd.', Company Appeal (AT) (Insolvency) 302 of 2017.*	*Paras 36, 45, 46 49-51*
5.	*'Andhra Bank Vs. M/s. FM Hammerle Textile Ltd.' (2018) SCC OnLine NCLAT 883.*	*Paras 10-11*
6.	*'State Bank of India Vs. Mr. Animesh Mukhopadhyay', (2021) SCC OnLine NCLAT 30.*	*Para 14*
7.	*'State Bank of India Vs. Athena Energy' (2020) SCC OnLine NCLAT 774.*	*Paras 16-19*
8.	*'Edelweiss Asset Reconstruction Company Ltd. Vs. Gwalior Bypass Projects', Company Appeal (AT) (Ins) No. 1186 of 2019.*	*Paras 8-9*
9.	*'Aashray Social Welfare Society Order in IDBI Trusteeship Services Ltd. Vs. Saha Infratech Pvt. Ltd.', (IB) 1781 (ND)/2018.*	*Paras 20-23*
10.	*'Phoenix ARC Pvt. Ltd. Vs. Spade Financial Services Ltd. & Ors.', (2021) 3 SCC 475.*	*Paras 103-104*
11.	*'Sai Peace and Prosperity Apartment Buyers Association Vs. ASK Investment Managers Pvt. Ltd.', Company Appeal (AT) (Ins) No. 252/2020.*	*Para 34*

8. Submissions of the Learned Counsel appearing on behalf of the first Respondent/Homebuyer:

- Learned Counsel Mr. Abhijit Sinha submitted that the first Respondent is a 'Financial Creditor' as defined under Section 5 (8)(f), Explanation (i) of the Code and holds 4.43% of the Voting Shares in the CoC of the 'Corporate Debtor'. It is strenuously argued that even a single Homebuyer in his role as a 'Financial Creditor' has the locus to challenge the admission of claims by the RP. The 'AR' has only a limited role of representing the 'Financial Creditor' in class in the CoC Meetings and vote on their behalf, therein as per Section 21(6)(A) of the Code. The AR does not have any duty/obligations to represent the Homebuyers before the Adjudicating Authority. The AR receives his fees for attending the Meeting of the CoC. There is no provision in the Code which prevents a single 'Financial Creditor' from challenging the illegal inclusion, of the claim, if any, of another creditor.
- The Hon'ble Supreme Court in *'Phoenix ARC Pvt. Ltd. Vs. Spade Financial Services Ltd. & Ors.', (2021) 3 SCC 475,* has held that 'Financial Creditor' forming part of the CoC must be heard during such proceedings determining the status of other Financial Creditor's.
- There is no amount due to the Appellants from the Principal Borrower and hence there is no basis to file any 'Claim' in the CIRP of the Corporate Guarantor. The Appellant is the Trustee of the Debenture of Rs.100Crores/- issued by Saha Infratech which are held by ECL. The said Debentures have not been issued by PDPL and the amount of Rs.110Crores/- have also not been disbursed to PDPL. The Appellant also filed its claim in the CIRP on Saha Infratech which claim has not

been accepted by the IRP of Saha Infratech as the Appellant owes Rs.12,60,77,970/– to Saha Infratech and PDPL cannot in any event be saddled with any liability on account of the Corporate Guarantee which had illegally executed to secured redemption of Debentures issued by Saha Infratech. The Principal Borrower for default for far lesser amount then what it has claimed.

- The third Respondent/ECL continued to disburse the amount to the Principal Borrower despite 'default' committed and interest and other parties in terms of the Debentures not having been paid. The defaults were committed from the Year 2017 itself to ECL has been continuing to disburse the loans to Saha Infratech till October, 2019. The Learned Counsel has drawn our attention to the dates and the amounts disbursed which is detailed as follows:

Date	***Amount Disbursed (in Rs.)***
07.11.2017	*50,00,00,000*
23.11.2017	*10,00,00,000*
15.02.2018	*8,00,00,000*
23.03.2018	*7,00,00,000*
23.05.2018	*7,00,00,000*
01.03.2019	*2,00,00,000*
24.10.2019	*25,00,000*
Total	***84,25,00,000***

- It is submitted that the Appellant and ECL are the alter egos of the Promoters of the 'Corporate Debtor' and are hand in glove with the Promoters which is evident from the fact that the erstwhile RP had been suspended for two years by the IBBI for failing to proceed with the CIRP of the 'Corporate Debtor' since he had refused to constitute the CoC and adhere to the timelines in the CIRP process till ECL and Appellant were made part of the CoC. This stand of the erstwhile RP

only helped the Promoters of the 'Corporate Debtor' to the detriment of the interest of the Homebuyers. Vide Order dated 17/01/2022, the Adjudicating Authority has held that the IRP was in contempt of the directions passed in the Order dated September 2020. In the Order dated 08/04/2022 passed by the IBBI it was observed that the erstwhile IRP has erroneously constituted the COC by including the guarantee holders i.e., ECL and Appellant whose guarantee has not yet been invoked.

- The Resolution Professional has appointed an Auditor for the performance of conducting the Forensic Audit Account and the said Report stated that the Appellant was fraudulently used as a vehicle to transfer funds from Saha Infratech Companies controlled by the Promoters of the 'Corporate Debtor' without any amount coming into it for its own use and the 'Corporate Debtor' was fraudulently made to mortgage its assets in favour of ECL and the Appellant for such round tripping of funds.
- The non-reporting of the fraud committed by the Promoters of the 'Corporate Debtor' to SEBI, the continued disbursal of finance to Saha Infratech despite the defaults, together with the fact that the 'Corporate Debtor' was used as a vehicle to transfer funds from Saha Infratech to other Companies controlled by the Promoters and 'Corporate Debtor' shows their collusion and hence they are nothing but alter egos of the Promoters of the 'Corporate Debtor'.
- Learned Counsel Mr. Sinha submitted that the Appellant is a 'Related Party' of the 'Corporate Debtor' and a bare reading of the AoA of the 'Corporate Debtor' shows that the Debenture Holder, of the

Debentures issued by Saha Infratech, can control the composition of the Board of Directors of the 'Corporate Debtor' and all decisions taken in the Meeting of the Board of Directors are subject to the confirmation of the Debenture Holders and the Lender. The Debenture Holders is not only participating in the policy making process of the 'Corporate Debtor' but control each and every facet of the business of the 'Corporate Debtor'.

- As per Clauses 5.4 and 7 of the AoA, the Debenture Holders not only formulated the Business Plan of the 'Corporate Debtor' but also control the Sales of Inventory, Bank Account, Salary and Remuneration of the Key Managerial Personnel of the 'Corporate Debtor'. The 'control' is to such an extent that the 'Corporate Debtor' required the express approval of the Appellant before entering into any Builder Buyer Agreement with any prospective customer.
- Learned Counsel placed reliance on Clause 5.4 of the AoA and also Clause 24(4) of the sanctioned letter dated 13/06/2017 in support of his argument that ECL also had the power to execute Sale Deeds for all the units to be sold in the project being developed by the 'Corporate Debtor'.
- The Shareholders of the 'Corporate Debtor' have given an irrevocable Power of Attorney (PoA) to the Appellant for conducting all business activities on behalf of itself. ECL, the Debenture Holder is a selling partner of the 'Corporate Debtor' as it has the controlling power to appoint Real Estate Agents, on behalf of the 'Corporate Debtor' for sale of specific residential units/inventory totaling to 1,77,900 square fts. saleable areas in various projects of the 'Corporate Debtor'.

- As per the requirements of Section 5(24)(i) of the Code what has to be seen is only whether the person is in a position to control and there is no requirement under the law to verify if that person has actually exercised any control or not. Any person who can control the composition of the Board of Directors or corresponding governing body of the 'Corporate Debtor' will be a 'Related Party' and therefore the Debenture Holder and the Lenders by virtue of such control are 'Related Parties' of the 'Corporate Debtor'.
- Clause 24(23) and Clause 24(24) of the sanctioned letter, Clauses 7.1, 7.2 of the AoA and Clause 6.8 of the Facility Agreement evidence the control which the Appellant and ECL had over the functioning of the 'Corporate Debtor'.
- It is submitted that ECL had positive control over the 'Corporate Debtor' and in support of his contention, the Learned Counsel relied on Clause 21 of the sanctioned letter, Schedule 1 to Amendment 1 of the Debenture Trust Deed, Clauses 14(12) and Clause 14(34) of Schedule 1 to Amendment No. 1 dated 16/10/2017 to the Debenture Trust Deed, Clause 24 of the sanctioned letter, Clause 4.1 of the AoA and the PoA executed on 22/09/2017.
- The Appellants are a 'Related Party' under Section 5(24)(m)(iii) of the Code since the authorised signatory of the Appellant was an employee of Saha Infratech immediately prior to joining the services of the Appellant.
- As per the ratio of the Hon'ble Apex Court in *'Arcelor Mittal India Pvt. Ltd.' (Supra),* it was held that *'so long as a person or persons acting in concert, directly or indirectly can positively influence, in any manner,*

management or policy decisions, they could be said to be in control'. When the 'Corporate Debtor' itself was in dire need of funds to carry on the construction of 'Project Encore', yet it had transferred Rs.28Crores/- to 'Related Parties' of Saha Infratech at the instance of ECL. Such action demonstrates positive control apart from the fact that ECL had control over the entire Project Revenue Accounts including the payments made by the allottees of the 'Corporate Debtor' and the utilisation of revenue. ECL had sole control and the 'Corporate Debtor' itself did not have any signatories to such Bank Accounts. By virtue of the PoA, ECL had complete authority to represent the 'Corporate Debtor' and do anything on its behalf. ECL had the power to approve or modify and finalise the business Plans of the 'Corporate Debtor'. ECL had complete control over the appointment and removal of Key Managerial Personnel. All decisions of the Board of Directors of the 'Corporate Debtor' were to be held only in the presence of an observer of ECL or such Meetings were rendered invalid.

- Lastly it was submitted by the Learned Counsel that the 'Right to Payment' from the 'Corporate Debtor' did not accrue as admittedly the Guarantee Deed was not invoked prior to the CIRP date. Learned Counsel placed reliance on the Judgement of the Hon'ble Apex Court in *'Ghanshyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited', (2021) 9 SCC 657,* in support of his argument that there cannot be any invocation of guarantee post-commencement of CIRP and that of the coming into effect of the Order of Moratorium, or prior transactions entered into by the 'Corporate

Debtor' stand frozen and no fresh liability can be fastened. Hence it is argued that the Appellant cannot make a 'Claim' in the CIRP on the basis of the Guarantee Deed which was never involved prior to the commencement of the CIRP of the 'Corporate Debtor' on 27/01/2020. Admittedly no notice which was mandatory in terms of Clause 2.1(ii) of the Guarantee Deed was issued to the 'Corporate Debtor' by the Appellant for the amount claimed in Form-C.

- Learned Counsel also fairly conceded that the ratio of *'Anuj Jain (IRP of Jaypee Infratech Ltd.) (Supra)* may not be strictly applicable to the facts of this case as in the Guarantee Deed in almost all cases, the disbursement may not be directly to the 'Corporate Debtor'.
- Even after the Admission Order was passed, the Appellants were in collusion with the IRP. The Adjudicating Authority had clearly directed the erstwhile IRP to proceed with the CIRP vide Order dated 07/09/2020, however the said IRP refused to proceed till the Appellants would be made part of the CoC. It was strenuously contended that since the Appellants are perpetuators of fraud and are 'Related Parties' of the Promoters of the 'Corporate Debtor', their inclusion in the CoC would be illegal and detrimental to the interest of all the Homebuyers.
- Learned Counsel in support of his contention placed reliance on the following Judgements:

Sr. No.	***Judgements***
1.	*'Phoenix ARC Pvt. Ltd. Vs. Spade Financial Services Ltd. & Ors.', (2021) 3 SCC 475.*
2.	*'Ghanshyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited' (2021) 9 SCC 657.*

3. *'P. Mohanraj & Ors. Vs. Shah Brothers Ispat Private Limited', (2021) 6 SCC 258.*

4. *'Rajendra K. Bhutta Vs. Maharashtra Housing & Area Development Authority & Anr.', (2020) 13 SCC 208.*

9. Submissions of the Learned Counsel appearing on behalf of the second Respondent/IRP of the 'Corporate Debtor':

- It is submitted that vide Order dated 13/07/2021 Mr. Manoj Kumar Singh, the erstwhile IRP was removed on an Application preferred before the IBBI and the present IRP was appointed.
- It is submitted that on his appointment, the IRP observed that ECL Finance Limited and IBBI Trusteeship Services Limited (Appellant) were the Holders of Corporate Guarantee executed by the 'Corporate Debtor' for Financial Assistance rendered to Saha Infratech and on admitting these Appellants in the CoC, they would hold about 88% Voting Shares. It is submitted that for a 'Financial Creditor'/Guarantee Holder to claim against a Corporate Guarantor, the existence of default is a must. In the absence of any default on part of the Principal Borrower no liability can be fastened upon the Corporate Guarantor and placed reliance on the Judgment of the Hon'ble Supreme Court in *'Laxmi Pat Surana' (Supra).*

Assessment:

10. The main issues which arise in these Appeals are:

(a) Whether the Adjudicating Authority was right in applying the ratio of *'Anuj Jain (IRP of Jaypee Infratech Ltd.)' (Supra)* to the facts of the attendant case and holding that the Appellants are not 'Financial Creditors' in view of the fact that there was no 'direct disbursal' of amount to the 'Corporate Debtor'/Guarantor.

(b) Whether an individual Homebuyer has the locus to challenge the admission of a Claim of another Creditor/'Financial Creditor'. Whether the filing of the said Application had to be done through the 'Authorized Representative' (AR) only.

(c) Whether the Appellant can make a 'Claim' on the basis of the 'Guarantee Deed' which was never invoked pre-commencement of the CIRP, and remained uninvoked even as on the date of filing of the 'Claim', thereby meaning that 'Right to Payment' has not yet accrued.

(d) Whether the Appellants are 'Related Parties' of the 'Corporate Debtor'. Whether the Appellants were in a 'position' to 'control' the affairs of the 'Corporate Debtor', to fall within the ambit of the definition of 'Related Party' as defined under Section 5(24) of the Code.

11. At the outset, we address ourselves to the first issue raised by the Appellants that the Adjudicating Authority has erroneously relied on the Judgement of the Hon'ble Supreme Court in 'Anuj Jain' Case and held that there was no direct disbursal of amount by ECL to the 'Corporate Debtor' and hence the amount involved is not a 'Financial Debt' as defined under Section 5(8) of the Code. This Tribunal is of the considered view that ECL, being the original lender had disbursed the amount in terms of the Facility Agreement entered into and the disbursement of 'debt' is essentially to the Issuer/Borrower and not to the 'Corporate Guarantor' i.e., 'Palm Developers'. By providing Corporate Guarantee, 'Palm Developers' has agreed to incur the 'debt', if 'due and payable'. A Guarantee is included as one of the illustrations which specifies the definition of 'Financial Debt' under Section 5(8)(i) of the Code. This Tribunal in *'Ascot Realty Private Limited' (Supra)* has held that for initiation of Insolvency Proceedings against

the Corporate Guarantor, the element of disbursal for 'Time Value of Money' is not required. We are of the considered view that despite the fact that there was no direct disbursal of amount to the Corporate Guarantor, any amounts released to the Issuer/Principal Borrower and not to the Corporate Guarantor does constitute 'Financial Debt' as defined under Section 5(8) of the Code and it cannot be said that such amounts do not have consideration for 'Time Value of Money'. In the facts of the attendant case, it has to be only seen whether there was a 'default' and the amounts are 'due and payable' as on the date of filing of the 'Claim'.

12. Therefore, we hold that the ratio of *'Anuj Jain' (Supra)* is not applicable to the facts of the attendant case on hand.

Locus of the 'Individual Homebuyer'/'Financial Creditor' to challenge the constitution of the CoC:

13. Learned Sr. Counsel Mr. Gourav Mitra argued that a single Homebuyer cannot challenge whether the Appellants can be treated as 'Financial Creditors' or not. It was submitted that reliance cannot be placed on *'Phoenix Arc Pvt. Ltd.' Vs. 'Spade Financial Services Ltd. & Ors.' (2021) 3 SCC 475,* as the Hon'ble Supreme Court in that judgement has held that AAA & Spade are backdoor entrants and are to be removed from the CoC. That ratio cannot be applied in this case as the Appellants are not related parties and did not contemplate any backdoor entry. Mr. Mitra argued that a lone Homebuyer cannot challenge the constitution of the CoC and placed reliance on Sections 25(a) and 21(6)(a)(b) in support of his contention that only an 'Authorized Representative' should represent the Homebuyer. Merely because the inclusion of the Appellants would reduce the voting percent, a single Homebuyer cannot decide the status of the CoC.

It is argued that this would constitute a serious conflict of interest and that any such challenge by a single Homebuyer would open the Pandora's Box. Learned Sr. Counsel for IDBI, Dr. Singhvi also submitted that a single Homebuyer constituting miniscule voting share filed I.A. 1610/2020 and the Adjudicating Authority has ordered that the Appellant IDBI is not a 'Financial Creditor' and cannot be a member of the CoC. Learned Sr. Counsel Mr. Ramji Srinivasan appearing for ECL further contended that a single Homebuyer does not have the locus to challenge the constitution of the CoC.

14. Recently this Tribunal in *'Aashray Social Welfare Society & Ors.' Vs. 'Saha Infratech Pvt. Ltd. & Ors.', Comp. (AT) (Ins) No. 904 of 2021* has discussed in detail the role of 'Authorized Representative' ('AR') and whether the Homebuyers/Welfare Society representing the Homebuyers have a right to be heard/impleaded and observed as follows:

> *"12. The statutory scheme as is reflected from Section 21(6-A) and Section 25-A of the Code indicates that the Authorised Representative is chosen to represent the creditor in a class in the CoC. The Authorised Representative needs to attend the meeting of the CoC and vote on behalf of the Financial Creditor to the extent of voting share of the Financial Creditor. The Adjudicating Authority in its order has referred to Regulation 16A Subregulation (5) of the CIRP Regulations, 2016. Regulation 16A deals with the Authorised Representative. Regulation 16A provides for procedure of choosing an Authorised Representative of creditors of the respective class. The Sub-regulation 16A(5) contains a clarifications, which is to the following effect:-*
>
> > *"16A(5). The interim resolution professional or the resolution professional, as the case may be, shall provide an updated list of creditors in each class to the respective authorised representative as and when the list is updated. Clarification: The authorised representative shall have no role*

in receipt or verification of claims of creditors of the class he represents."

13. The clarification under Regulation 16A(5) is that the Authorised Representative shall have no role in receipt or verification of claims of creditors of the class he represents. The Authorised Representative is to be chosen after claims of Financial Creditors in a class is submitted in Form-CA. The stage of choosing an Authorised Representative of a creditor in a class is much after receipt of a claim under Chapter IV of the Regulation and after verification of a claim under Regulation 13. After verification of claim under Regulation 13, list of creditors is made available for inspection by the person who have submitted proof of claim and is available for inspection by others as enumerated under Regulation 13. The clarification appended to Regulation 16A(5) is only clarification to the statutory scheme delineated under the Regulations and the Code that the Authorised Representative has no role in respect of verification of claim of a creditor in class. Can it be said that the Authorised Representative has no role in respect of verification of claims of creditors, therefore, the Financial Creditors in a class themselves have also no right with regard to receipt or verification of claims. The answer is obviously no. The Financial Creditor in class have every right to submit their claim giving proof of verification.

14. The mere fact that the Authorised Representative of a creditor in a class have no role in receipt and verification of the claim of the creditors, it cannot be held to mean that creditors in a class have no right with regard to receipt and verification of their claim. The clarification as contained in Regulation 16A(5) has been read by the Adjudicating Authority to an extent which it never meant. The conclusion recorded by the Adjudicating Authority in paragraph 23 on the basis of erroneous interpretation of Regulation 16A(5) resulted in a wrong conclusion that the creditors in a class have no role in receipt or verification of claims of creditors.

15. The present is a case where the question for consideration is the right of impleadment of Appellants in Applications filed by Respondent No. 2 and 3 challenging the rejection of their claim as Financial Creditors. The Appellants are also Financial Creditors in a class and they represent majority of the Homebuyers in class, as has been pleaded by the

Appellants. The Financial Creditors in a class, who at present consist of 99.85% of CoC, have every right to be heard in the Applications filed by Respondent No. 2 and 3 whose claim has been partly and fully rejected, respectively by the IRP. The Authorised Representative under the statutory scheme as noticed above is to represent the Financial Creditors i.e., Homebuyers in a class for a limited purpose i.e., for attending meetings of the CoC and voting on behalf of the Financial Creditors in a class. It cannot be said that since the Authorised Representative has not came up before the Adjudicating Authority for filing the impleadment application, the Appellants who themselves are Homebuyers have no right to participate in the adjudication initiated by filing applications by Respondent No. 2 and 3."

(Emphasis Supplied)

15. Having regard to the aforenoted observations, the contention of the Appellants that the first Respondent/Homebuyer has only 4.43% of the Voting Share in the CoC and not represented through the Authorised Representative and hence has no locus to challenge the claim of the Appellants, is untenable. The Hon'ble Supreme Court in *'Phoenix Arc Pvt. Ltd.' Vs. 'Spade Financial Services Ltd. & Ors.' (2021) 3 SCC 475* has held that 'Financial Creditors' forming part of the CoC must be heard during proceedings which would establish the status of other 'Financial Creditors'. Keeping in view the principle laid down in *'Phoenix ARC Pvt. Ltd. (Supra)* and in *'Aashray Social Welfare Society & Ors.' (Supra)* we are of the considered view that the first Respondent/Homebuyer has every right to be heard and has the locus to challenge the Claim of the Appellants.

16. Having held so, now we address ourselves to the contention of the first Respondent/Homebuyer that there is no 'default' as on the date of initiation of CIRP as the Corporate Guarantee was not invoked as on the date of commencement of CIRP, as on the date of filing of the 'Claim'.

17. The Learned Adjudicating Authority has held that as the Guarantee was invoked on 07/04/2020 i.e., after the initiation of CIRP on 27/01/2020, the amount claimed by the Appellants cannot be admitted in terms of the Moratorium declared under Section 14 of the Code. It is the case of the first Respondent/Homebuyer that the Appellants did not have any 'Right to Payment' as post-commencement of CIRP, there cannot be any invocation of Guarantee. Learned Counsel Mr. Sinha placed reliance on the Judgements of the Hon'ble Supreme Court in *'Ghanshyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited' (2021) 9 SCC 657, 'P. Mohanraj & Ors. Vs. Shah Brothers Ispat Private Ltd. (2021) 6 SCC 258,* and *'Rajendra K. Bhutta Vs. Maharashtra Housing & Area Development Authority & Anr.' (2020) 13 SCC 208,* in support of his argument that, on the coming into effect of the Order of Moratorium, all prior transactions entered into by the 'Corporate Debtor' stand frozen and no liability can be fastened. It was also contended by the Counsel that the Appellants cannot have any valid claim in the CIRP of the 'Corporate Debtor' as the liability of the 'Corporate Debtor'/Corporate Guarantor can never be more than that of the Principal Borrower. In Column 4 of Form-C, the Appellant had filed a claim of Rs.1,26,96,88,698/-. The Appellant has also filed a claim of Rs.1,30,96,46,399.24/- in the CIRP of the Principal Borrower/M/s. Saha Infratech. It was also submitted that RP of Saha Infratech has not accepted the Claim of the Appellant and has held that the Appellant in fact owes Rs.12,60,77,970/- to Saha Infratech. Hence, even as per the Guarantee Deed, 'Palm Developers' being the Corporate Guarantor cannot have any liability if the Principal Borrower itself has no liability towards the Appellant. It was further contended that as per the Appellant's own calculation the

amounts due as on 28/01/2020 from the Principal Borrower is only Rs.9,16,66,666/-. As the CIRP commencement date of the Corporate Guarantor is 27/01/2020, the overdue amount from the Principal Borrower should be lesser than Rs.9,16,66,666/- as on such date.

18. A perusal of the documents on record evidence that the Appellants had recalled the entire redemption amount with respect to the Debentures on 25/03/2020 after the CIRP commencement date of Palm Developers (27/01/2020) and Saha Infratech (28/02/2020). It is also an admitted fact that no Notice in terms of Clause 2.1(ii) of the Guarantee Deed was ever issued to the 'Corporate Debtor' for an amount of Rs.1,26,96,88,698/- by the Appellants. Dr. Singhvi appearing for IDBI contended that it is misleading to say that Clause 9.16 of the Agreement refers to only a tranche amount. It is submitted that 'Financial Debt' in favour of the Appellant is essentially the liability/obligation in respect of the Appellant's claim arising from and upon the failure of Saha/Principal Borrower to comply with the payments to be made as per the Debenture Trust Deed and also evident from the several defaults in respect of the failure in the payment of the amounts in relation to the Non-Convertible Debentures (NCDs). In terms of Clause 2.3.2 of the Guarantee Deed, the Guarantee was irrevocable and not subject to any prior Notice to demand upon or act against the Principal Borrower or issue any prior Notice to the Corporate Guarantor with regard to any default made by the Principal Borrower.

19. Section 3(6) of the Code defines 'Claim' as hereunder:

> *"3(6) "claim" means—*
> *(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"

20. Dr. Singhvi drew our attention to Clause 14.1 of the Debenture Trust Deed dated 01/07/2016, wherein it is stated that occurrence of one or more of the following events shall constitute a 'Right Related Default':

"14. EVENT OF DEFAULT

14.1 Payment Related Default.

Occurrence of one or more of the following events shall constitute a "Payment Related Default":

(i) Default is committed in payment of the Interest, the Default Interest and, or, the Redemption Amounts ln accordance with this Deed;

(ii) If any amount paid under the Transaction Documents (including any payment on a Interest Payment Date and, or, a Redemption Date) cannot be remitted and is not paid at the place and in the currency in which it is expressed to be payable;

(iii) Failure to redeem all and not less than all the Tranche 1 Debentures and, or, the Tranche 2 Debentures on the expiry of the respective Tenor by payment of the Redemption Amounts, in full, in accordance with this Deed;

(iv) Non-payment of amounts reimbursements/ fees including the fees payable to the Debenture Trustee, the Debenture Holders' Representatives, the Depository and the depositories agent, the Utilization Escrow Agent and the Project Revenue Escrow Agents and the credit rating agency and reimbursements/ payments to be made to the Debenture Trustee under the terms of this Deed (including as set forth in Section 15.2 hereto); and, or,

(v) Any shortfall or failure to maintain the requisite amounts towards the DSRA."

21. Default means non-payment of debt when whole or any part or instalment of the amount of debt has become 'due and payable' and is not

paid by the Debtor or the 'Corporate Debtor' as the case maybe. The Learned Counsel relies on the letters dated 02/04/2019 and 26/09/2019 which communicate that there are amounts to be paid *by the Principal Borrower.* The issue which requires to be ascertained is whether these amounts were 'due and payable' as on the date of filing of the 'Claim' by the Appellants.

22. It is the case of the Respondents that despite multiple defaults on part of Saha, the Appellant/ECL continued to disburse further amounts and was evergreening the loans extended by it to Saha thereby facilitating payment of interest by Saha to itself so that loan account of Saha remains regular in its banks. The Respondent filed as statement to establish that an amount of Rs.84,25,00,000/- was disbursed by ECL even as on 24/10/2019 to Saha.

23. However, at this juncture, the moot question which falls for consideration is whether the 'Claims' of the Appellants can be admitted keeping in view that the Corporate Guarantee was never invoked pre-commencement of CIRP, or as on the date of filing of the Claim, especially having regard to the fact that the 'Corporate Debtor' is the 'Corporate Guarantor'. The fact which is to be kept in mind is that the Appellants have not preferred any Section 7 Applications, but have filed 'Claims' in the ongoing CIRP Proceedings of the Principal Borrower/Saha and the Corporate Guarantor/Palm Developers.

24. A few dates are also relevant here. Briefly put, the Section 9 Application preferred by an 'Operational Creditor' was admitted on 02/01/2020. The actual recall Notice was admittedly issued on 25/03/2020. The Public announcement was made on 31/01/2020. On 03/02/2020, a reminder letter was sent to Saha for payment of Rs.9,16,66,666/- against the NCDs. On 10/02/2020 ITSL and ECL

submitted Form C Claiming Rs.126,96,88,698/-, the debt incurred shown was when the NCDs were issued to Saha. The amount mentioned in the letter dated 16/12/2019 to 'Corporate Debtor' was Rs.9,16,66,666/-. On 17/02/2020, subsequent to CIRP commencement, Notice was issued by ECL and ITSL to Saha that as per RBI guidelines all accounts where loan repayment is overdue for more than 60 days, Appellants are required to disclose the same to RBI as 'Special Mention Account 2'. In their Reply dated 18/09/2020 to I.A. 1610/2020, ITSL and ECL took a stand that defaults were being committed since 2017 itself but that debentures were continued in good faith. On 16/05/2021 RP of Saha rejected the Appellants' claims and demanded that the Appellants owed Rs.12,60,77,970/- to Saha, the Principal Borrower. On 13/07/2021, on an Application filed by IBBI, I.A. 1742/2021, Adjudicating Authority has appointed Mr. Mishra as the new IRP who published the Forensic Audit Report on 12/03/2022.

25. Learned Counsel Dr. Singhvi has placed reliance on the Judgement of this Tribunal in *'Axis Bank Limited' Vs. 'Edu Smart Services Pvt. Ltd.', Comp. App. (AT) (Ins) No. 302 of 2017,* wherein this Tribunal has held as follows:

> *"54. Therefore, stand taken by the respondents that the claim has not been matured cannot be ground to reject the claim.*
>
> *55. Section 25 provides the duties of Resolution Professional. As per Section 25(2)(e), the Resolution Professional is required to maintain an updated list of all the claims. Aforesaid fact also suggests that the maturity of a claim or default of debt are not the guiding factors to be noticed for collating or updating the claims. The 111atter can be looked from another angle. It is only in case of 'debt' and 'default', a 'Financial Creditor' or 'Operational Creditor', may file applications under Section 7 or 9. The 'Corporate Applicant' has also right to file application under Section 10 for initiation of Corporate Insolvency Resolution Process against itself if it has defaulted to*

> *pay the 'debt'. It does not mean that the persons whose debt has not been matured cannot file claim. The 'Financial Creditors' or 'Operational Creditors' or 'secured or unsecured creditors' all are entitled to file claim.*
>
> *56. Therefore, we hold that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of claim pursuant to public announcement made under Section13(1)(b) r/w Section15(1)(c) or for collating the claim under Section 18(1)(b) or for updating claim under Section 25(2)(e). For the purpose of collating information relating to assets, finances and operations of Corporate Debtor or financial position of the Corporate Debtor, including the liabilities as on the date of initiation of the Resolution Process as per Section 18(1), it is the duty of the Resolution Professional to collate all the claims and to verify the same from the records of assets and liabilities maintained by the Corporate Debtor."*

26. It is pertinent to mention that the aforenoted Judgement *'Axis Bank Limited' (Supra)* relied heavily upon by the Appellants has been overruled by this Tribunal in the subsequent decision in the case of *'Edelweiss Asset Reconstruction Company Limited' Vs. 'Orissa Manganese and Minerals Ltd.', 2019 SCC OnLine NCLAT 764.* Even *'Andhra Bank Vs. M/s. F.M. Hammerle Textiles Ltd.', (Supra)* is not applicable in view of the subsequent decision. The Hon'ble Supreme Court in *'Ghanshyam Mishra and Sons Private Limited' Vs. 'Edelweiss Asset Reconstruction Company Limited', (2021) 9 SCC 657, (Supra),* has addressed to this issue. It is pertinent to reproduce the relevant paras with respect to invocation of Corporate Guarantee as hereunder:

> *"110. NCLT found that by email dated 6-1-2018 EARC had submitted its claim in Form "C" for an amount of Rs 648,89,62,395. In response to the said email, RP sought a clarification as to whether the corporate guarantee had been invoked by the applicant. RP had not received any response till 21-2-2018 from EARC. Despite repeated requests made by RP, EARC did not respond to the query made by RP.* ***From the record placed before NCLT, it was***

clear that EARC had not invoked the corporate guarantee. NCLT therefore posed a question to itself, as to whether an uninvoked corporate guarantee could be considered as matured claim of the applicant. *NCLT found that once the moratorium was applied under Section 14 of the I&B Code, EARC was prevented from invoking the corporate guarantee. NCLT further found that the OMML's guarantee had not been invoked by EARC till the date of completion of CIRP process and once the moratorium was imposed, it could not invoke the corporate guarantee. NCLT therefore found that there is no illegality or irregularity in not admitting the claim of EARC.*

.....

124. Shri Bhushan, learned counsel appearing on behalf of EARC, strongly relying on the judgment of NCLAT dated 14-8-2018 passed in Export Import Bank of India v. JEKPL (P) Ltd. Resolution Professional, submits that NCLAT itself in the said case had held that invocation of corporate guarantee has no nexus with filing of the claim pursuant to public announcement made under Section 13(1)(b) read with Section 15(1)(c) of the I&B Code and also for collating the claim under Section 18(1)(b) or for updating claim under Section 25(2)(e). He submits that civil appeal challenging the said judgment and order has been dismissed by this Court vide order dated 23-1-2019.

125. He submits that NCLAT itself in the said Export Import Bank of India case had directed EXIM Bank and Axis Bank to be treated as "financial creditors" and had further directed them to be given representation on CoC. He submits that, however, in the present case, NCLAT has taken a contrary view. He therefore submits that in the alternative this Court should direct RP/CoC to treat EARC as a "financial creditor" and give it representation on CoC and take a decision in accordance with law.

126. We find that the said case, on facts, would not be applicable to the case at hand. No doubt that the appeal filed against the judgment and order of NCLAT dated 14-8-2018 has been dismissed by this Court on 23-1-2019. However, it is a settled law that dismissal of a special leave petition/appeal does not amount to affirmation of the view taken in the judgment impugned in the special leave petition/appeal. It will

also be relevant to refer to the order passed by this Court dated 23-1-2019 while dismissing the appeal, which reads thus:
(Atyant Capital India Fund I case, SCC OnLine SC paras 3-5)
"Civil Appeal No. 10134 of 2018

3. We have heard the learned counsel for the parties and perused the relevant material on record.

4. The civil appeal is dismissed.
5. It will be open for the appellant to urge all points as may be available to it in law before the appropriate forum, if so advised."

It will thus be clearly seen that this Court in Atyant Capital Fund I case while dismissing the appeal has reserved the liberty to the appellant to urge all points as may be available to it in law before the appropriate forum.

127. It is to be noted that in the appeal before NCLAT, EXIM Bank as well as Axis Bank had taken steps immediately after the claim of the said Banks on the basis of corporate guarantee came to be rejected by RP/CoC. After rejection of the claim, the said Banks had filed an application under Section 60(5) before NCLT. On NCLT rejecting the said claim, those Banks had approached NCLAT in appeals which were allowed and the order, as stated hereinabove, was passed.

……..

133. We are therefore of the considered view that the appeal deserves to be allowed by expunging SCC OnLine NCLAT paras 28, 42, 43, 51 and 52 from the judgement of NCLAT dated 23-4-2019. It is ordered accordingly. The judgement and order passed by NCLT dated 22-6-2018 is upheld. No costs."

(Emphasis Supplied)

27. It is seen from the aforenoted Judgement that an uninvoked Corporate Guarantee cannot be considered as a 'Matured Claim'. In para 133 of the aforenoted Judgement the Hon'ble Supreme Court has upheld the finding of the Adjudicating Authority that once the moratorium was applied

under Section 14 of the Code, a Corporate Guarantee cannot be invoked. Though this is a case where the Resolution Plan has been approved, the fact remains that the Principle that a Corporate Guarantee cannot be invoked once the CIRP has commenced and that an uninvoked Corporate Guarantee as on date of filing of the Claim, cannot be considered as 'Matured Claim' has been laid down by the Hon'ble Supreme Court.

28. We also place reliance on the observations of the Hon'ble Supreme Court in para 38 of *'Swiss Ribbons Pvt. Ltd. & Anr.' Vs. 'Union of India & Ors.', (2019) 4 SCC 17,* in which it is stated as follows:

> *"38. In this context, it is important to differentiate between "claim", "debt» and default». Each of these terms is separately defined as follows:-*
>
> *3. Definitions- in this Code, unless the context otherwise requires- xxx*
>
> *(6) "claim" means –*
>
> *(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*
>
> *(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured; xxxxxxx*
>
> *(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt:*
>
> *(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be; xxxxx*
>
> *Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor. It is for the reason that a financial creditor has*

> *to prove "default" as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors Under Section 7 and by operational creditors Under Sections 8 and 9 of the Code becomes clear."*
>
> *(Emphasis Supplied)*

29. It is clear from the observations made by the Hon'ble Supreme Court in the aforenoted Judgement *'Swiss Ribbons Pvt. Ltd. & Anr.' (Supra)* that a 'Claim' gives rise to a debt only when it becomes due. A 'Claim' is wider in its scope then debt. A claim may be due or may not be due, but a debt must be a claim which is due. A complete mechanism has been provided in IBC, 2016 as to how and when claims become 'due and payable' and debt owed. In the instant case, the CIRP commencement date of the 'Corporate Debtor' is 27/01/2020 and the Appellant had recalled the entire redemption amount with respect to debentures on 25/03/2020 subsequent to the initiation of CIRP. The Adjudicating Authority recorded that the Corporate Guarantee was invoked on 07/04/2020. **The claims were filed by the Appellants on 10/02/2020.** This Tribunal is of the earnest view that the Appellants cannot Claim the amounts in the CIRP of the 'Corporate Debtor' who is a 'Corporate Guarantor' on the basis of the Deed of Guarantee which was never invoked as on the date of filing of the Claims. The record also does not show that any Notice in terms of Clause 2.1(ii) of the Deed of Guarantee was ever issued to the 'Corporate Debtor'. We do not find any substance in the argument of the Appellant Counsel that no such Notice is required to be issued as invocation of Guarantee is not a pre-condition to file

a 'Claim'. The Deed of Guarantee stipulates such a notice to be issued which was never sent as the Deed was never invoked prior to CIRP filing of Form C.

30. In *'SBI' Vs. 'Orrisa Manganese & Minerals Ltd.'* dated 22/06/2018, EARC (Edelweiss Asset Reconstruction Co. Ltd.) filed an Application before the Adjudicating Authority, (NCLT) Kolkata in CA(IB) 470/KB/2018 in CP (IB) No. 371/KB/2017 challenging the decision of the RP in not admitting the claim of the Applicant. In this case, the 'Corporate Debtor' had executed a guarantee securing loan received by APNRL which has been given by India Infrastructure Finance Company Ltd. (IIFCL). The Corporate Guarantee executed by the 'Corporate Debtor' was in favour of IIFCL, which assigned its rights to the Applicant, who filed their Form C *but have not invoked the Corporate Guarantee.* The Adjudicating Authority has categorically held that the Applicant was prevented from invoking Corporate Guarantee during Moratorium and that RP has rightly rejected the Claim as the Corporate Guarantee was not invoked. In an Appeal preferred by Edelweiss Asset Reconstruction Company Ltd. (EARC), NCLAT reversed its decision passed in *'Axis Bank' (Supra)* and has held that on declaration of moratorium, it was not open to EARC to invoke the Corporate Guarantee and held that the IRP has rightly not accepted the claim of the Appellant/EARC. As the Resolution Plan was already approved in that case, the Hon'ble Supreme Court in *'Ghanshyam Mishra and Sons Private Limited' (Supra)* in paragraph 133 has also closed the right of EARC in terms of taking any further action. Therefore, we are of the view that the ratio of the Hon'ble Supreme Court in *'Ghanshyam Mishra and Sons Private Limited' (Supra),* is squarely applicable to the facts of this case and hence we are of the considered view that when the 'Corporate Debtor' is a 'Guarantor' and when the 'Corporate Guarantee'

has never been invoked prior to the commencement of the CIRP, as on the date of filing of the Claims, the 'Right to Payment' has not accrued.

31. Additionally, IBBI vide Order dated 08/04/2022, in the matter of Erstwhile IRP, suspended his services for two years and made observations in its 'Analysis & Findings' in paras 4.10 and 4.13 and finally held that the IRP failed to conduct the CIRP as per the provisions of the Code. It was observed that *'since the Corporate Guarantees were not invoked yet and the two Corporate Guarantors were not eligible to join the CoC, a CoC could have been constituted with the remaining members and claims of homebuyers verified, but the IRP took advantage of his own mistake wrongly including the two Corporate Guarantor in the CoC and delayed the CIRP by 309 days'.*

32. It is the further case of the first Respondent that the RP of the Principal Borrower has not admitted the claims of the Appellants. A perusal of the email dated 16/05/2021 addressed by the IRP of the Principal Borrower to IDBI *shows rejection of the Claim of IDBI on the ground of being a 'Related Party' and that an amount of Rs.12,60,77,970/- is recoverable from them. When the Appellants' Claim has been rejected in the CIRP of the Principal Borrower,* the onus is on the Appellants to substantiate how their claims can be 'admitted' in the CIRP of the 'Corporate Guarantor' when they have not even invoked the Guarantee prior to CIRP commencement, or as on the date of filing of Form C, which they have failed to discharge.

Issue of 'Related Party':

33. Now we address to the contention raised by the Learned Counsel Mr. Sinha that the Appellants are 'related Parties' of the 'Corporate Debtor' as defined under Section 5(24) of the Code.

34. It is submitted by Dr. Singhvi that the power contingent upon occurrence of 'Event of Default' was never exercised by the Appellant in the present case and as such the Appellant could not in any manner be said to be a 'Related Party' under Section 5(24) of the Code. Learned Counsel placed reliance on the ratio of the Hon'ble Supreme Court in in *'Arcelor Mittal India Pvt. Ltd.' (Supra),* to buttress his contention that 'control' would only include 'positive control' and does not include mere 'Power to Restrict'. In the instant case, Restrictive Clauses in the AoA are only to ensure that the Borrowing Company does not attempt to siphon off in any way the assets based on which the loan was advanced. Though we find force in the submissions of Dr. Singhvi that Clause 9 refers to 'Event of Default' and the occurrences thereunder, it is relevant to peruse the other Clauses of **all** the Agreements to understand the nature and scope of 'Control' which the Appellants can exercise over the 'Corporate Debtor'.

35. Learned Counsel Mr. Ramji Srinivasan strongly contended that there is absolutely no evidence available on record that the Appellants had participated in the policy making process; that the erstwhile IRP sought legal opinion from Ms. Dua Associates and only then admitted the Claims of the Appellant; that the Clauses in the AoA are Restrictive Covenants included as a mean to protect and preserve the huge amounts of loans advance to Saha Infratech; Clause 5.4 of the AoA clearly demonstrates that the Appellants do not have any power over the constitution of the Board of Directors.

36. Learned Sr. Counsel Mr. Ramji Srinivasan contended that mere management of an Escrow Account does not construe 'control'. Every Bank has an Escrow Account only to ensure that amounts are not siphoned off

mortgager releasing the mortgage on the production of an NOC is only to ensure the recovery of money lent. The right to nominate a Director does not mean positive control of the Board but can be interpreted only as some sort of 'Financial Discipline'.

37. It is the main case of the first Respondent/Homebuyer that the Appellants are 'related Parties' of the 'Corporate Debtor' as defined under Section 5(24)(m)(h)(i) of the Code on account of their controlling powers over the operations of the 'Corporate Debtor' in the following manner:

- Control over the decisions of the Board of Directors.
- Final say in any decision at a Board Meeting or at a shareholders meeting or on any other matter in the event of a deadlock.
- Control over the appointment and removal of key managerial personnel of the 'Corporate Debtor'.
- Control over the approval and modifications of the business plans of the 'Corporate Debtor'.
- Control over the modalities of sale of units in the projects.
- Control over the sale of units to prospective customers and registration of units before the Registrar.
- Control over all revenue and other accounts of the 'Corporate Debtor'.
- Selling partner of the 'Corporate Debtor'.

38. It is strenuously contended that as per the requirements of Section 5(24) of the Code, what has to be seen is only whether the person is in a 'position' to control and there is no requirement under the law to verify if that person has actually exercised control or not. Learned Counsel argued that the observations made by the Hon'ble Supreme Court in *'Arcelor Mittal*

India Pvt. Ltd.' Vs. 'Satish Kumar Gupta & Ors.' (2019) 2 SCC 1 that *'so long as a person or persons acting in concert, directly or indirectly, can positively influence, in any manner, management or policy decisions, they could said to be in control'* is applicable to the facts of this case and hence it is not necessary to show whether or not the entity exercised actual control or not.

39. It is contended that the Appellant was not merely a lender, but also the Debenture Holder and a selling partner of the 'Corporate Debtor' having the controlling power to appoint Real Estate Agents/Distribution Agents on behalf of the 'Corporate Debtor' for sale of specific residential units totaling to 1,77,900 sq. ft. saleable area in various projects of the Promoters of the 'Corporate Debtor' ECL had the power to decide the manner in which the 'Corporate Debtor' would sell its units and the power to appoint a developer/contractor of its choice if the 'Corporate Debtor' has failed to meet its deadlines. ECL had control not only over the Escrow accounts but also over the project revenue amounts including the payments made by the allottees.

40. At this juncture, we find it fit to reproduce Section 5(24) of the Code, which relates to the definition of 'Related Party' under the Code:

> *"5(24) "related party", in relation to a corporate debtor, means—*
>
> *(a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;*
>
> *(b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;*
>
> *(c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;*

(d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;

(e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid-up share capital;

(f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;

(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;

(k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;

(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;

(m) any person who is associated with the corporate debtor on account of—

(i) participation in policy making processes of the corporate debtor; or

(ii) having more than two directors in common between the corporate debtor and such person; or

(iii) interchange of managerial personnel between the corporate debtor and such person; or

(iv) provision of essential technical information to, or from, the corporate debtor;....."

(Emphasis Supplied)

41. The Hon'ble Supreme Court in *'Arcelor Mittal India Pvt. Ltd. Vs. Satish Kumar Gupta & Ors.', (2019) 2 SCC 1* has discussed in detail and made the following observations with respect to 'control' and the 'power' to direct the management and policies of a person or entity, whether through ownership of Voting Securities, by contract, or otherwise:

***"48.** The expression "management" would refer to the de jure management of a corporate debtor. The de jure management of a corporate debtor would ordinarily vest in a Board of Directors, and would include, in accord with the definitions of "manager" *managing director" and officer" in Sections 2(53), 2(54) and 2(59) respectively of the Companies Act, 2013, the persons mentioned therein.*

***49.** The expression "control" is defined in Section 2(27) of the Companies Act, 2013 as follows:*

> ***"2. (27)** "control" shall include the right to appoint majority of the Directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner;"*

***50.** The expression "control" is therefore defined in two parts. The first part refers to de jure control, which includes the right to appoint a majority of the Directors of a company. The second part refers to de facto control. So long as a person or persons acting in concert, directly or indirectly, can positively influence, in any manner, management or policy decisions, they could be said to be "in control". A management*

decision is a decision to be taken as to how the corporate body is to be run in its day-to-day affairs. A policy decision would be a decision that would be beyond running day-to-day affairs i.e. long-term decisions. So long as management or policy decisions can be, or are in fact, taken by virtue of shareholding, management rights, shareholders agreements, voting agreements or otherwise, control can be said to exist.

51. *Thus, the expression "control", in Section 29-N(c), denotes only positive control, which means that the mere power to block special resolutions of a company cannot amount to control. "Control" here, as contrasted with "management", means de facto control of actual management or policy decisions that can be or are in fact taken. A judgment of the Securities Appellate Tribunal in* ***Subhkam Ventures (I) (P) Ltd. v. SEBI,*** *made the following observations qua "control" under the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, wherein "control" is defined in Regulation 2(1)(e) in similar terms as in Section 2(27) of the Companies Act, 2013. The Securities Appellate Tribunal held: (SCC OnLine SAT para 6)*

> *"6…The term control has been defined in Regulation 2(1)(c) of the Takeover Code to "include the right to appoint majority of the Directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their Shareholding or management rights or Shareholders agreements or voting agreements or in any other manner". This definition is an inclusive one and not exhaustive and it has two distinct and separate features: (i) the right to appoint majority of Directors or, (ii) the ability to control the management or policy decisions by various means referred to in the definition. This control of management or policy decisions could be by virtue of shareholding or management rights or shareholders agreement or voting agreements or in any other manner. This definition appears to be similar to the one as given in Black's Law Dictionary (Eighth Edn.) at p. 353 where this term has been defined as under:*
>
> > *'Control--The direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting*

securities, by contract, or otherwise; the power or authority to manage, direct, or oversee.

Control, according to the definition, is a proactive and not a reactive power. It is a power by which an acquirer can command the target company to do what he wants it to do. Control really means creating or controlling a situation by taking the initiative. Power by which an acquirer can only prevent a company from doing what the latter wants to do is by itself not control. In that event, the acquirer is only reacting rather than taking the initiative. It is a positive power and not a negative power. In a board managed company, it is the board of Directors that is in control. It an acquirer were to have power to appoint majority of Directors, it is obvious that he would be in control of the company but that is not the only way to be in control. If an acquirer were to control the management or policy decisions of a company, he would be in control. This could happen by virtue of his shareholding or management nights or by reason of shareholders agreements or voting agreements or in any other manner. The test really is whether the acquirer is in the driving seat. To extend the metaphor further, the question would be whether he controls the steering, accelerator, the gears and the brakes. If the answer to these questions is in the affirmative, then alone would he be in control of the company. In other words, the question to be asked in each case would be whether the acquirer is the driving force behind the company and whether he is the one providing motion to the organization. If yes, he is in control but not otherwise. In short control means effective control."

52. *We think that these observations are apposite, and apply to the expression "control" in Section 29-A(c).*

53. *Section 29-A(c) speaks of a corporate debtor " under the management or control of such person". The expression "under" would seem to suggest positive or proactive control, as opposed to mere negative or reactive control. This becomes even clearer when clause (g) of Section 29-A is read, wherein the expression used is "in the management or control of a corporate debtor" as, entering into preferential, undervalued, extortionate credit, or fraudulent transactions. It is thus clear that in the expression "management or control", the two words take colour from each other, in which case the principle of noscitur a sociis must also be held to apply. Thus viewed, what is referred to in clauses (c) and (g) is de*

*jure or de facto proactive or positive control, and not mere negative control which may Now from an expansive reading of the definition of the word *control" contained in Section 2(27) of the Companies Act, 2013, which is inclusive and not exhaustive in nature.*

***54.** In a recent judgment delivered by one of us (Nariman, J.) in Chintalapati Srinivasa Raju v. SEBI, this Court after referring to the definition of "control" in the SEBI Regulations, held on facts that an executive Director, on a fixed monthly salary, post-resignation, cannot be held to be a person exercising "control" within the meaning of the SEBI Regulations. This Court referred to with approval the following test laid down in SEBI v. Kishore R. Ajmera: (SCC p. 383. para 26)*

> *"26. It is a fundamental principle of law that proof of an allegation levelled against a person may be in the form of direct substantive evidence or, as in many cases, such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled. While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the courts cannot be helpless. It is the judicial duty to take note of the immediate and proximate acts and circumstances surrounding the events on which the charges allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion."*
>
> *(Emphasis Supplied)*

42. On the touchstone of the aforenoted observations of the Hon'ble Supreme Court and the definition of 'Related Party' as defined under Section 5(24) of the Code, this Tribunal finds it relevant to peruse the Clauses of the 'Sanction letter', the 'Articles of Association', the 'Facility Agreement' and that of the 'Builder Buyer Agreement' to assess the true nature of relationship between the parties and if there was any 'positive control' by the Appellants over the affairs of the 'Corporate Debtor'.

43. Clauses 23 & 24 of the Sanction letter read as follows:

> ***"Special Conditions***
> *23. The Lender shall have absolute right to appoint a director on the Board of the Borrower and/or the other Security Provider(s) any time, and such Nominee Director shall not incur any liability and shall be indemnified by the Borrower. Such nominee director shall be member of all the committees appointed by the Board of Directors of the Borrower/Security Provider(s).*
>
> *24 The Lender shall have right to appoint an Observer on the Board of Borrower and/or management of the Security Providers. The Borrower and/or Security Providers shall forward a copy of all the notices/resolution/agenda of the respective Board meetings to such Observer."*
>
> *(Emphasis Supplied)*

44. Clause 7.1 of the Articles of Association (AoA) refers to the powers of the Appellant/ECL Finance to resolve any deadlock in the Board/Shareholder Meetings, if required:

> *"7.1 Without prejudice to the other rights of the Debenture Holders and the lenders under these Articles and the loan documentation and debenture trust deed and under applicable Laws, the Debenture Holders and/or the lenders shall upon occurrence of an event of default have the right to appoint a nominee director on the Board of the Company. The Promoters of the Company shall take all necessary steps, including passing necessary resolutions at the Board and Shareholder meetings and filing necessary forms with the RoC, to enable the Debenture Holders and/or the lenders to exercise the aforesaid right. Notwithstanding anything contained in these Articles and, or, in the Transaction Documents, the Promoters and the Company shall in the event there is a deadlock on any matter/decision at a board meeting and, or, at a shareholders meeting amongst the directors or the Promoters, such matter/decision shall be referred to the nominee director of the Debenture Holders and/or the lenders and, or, to the Debenture Holders or the lenders for final decision. Any decision by such director of the Debenture Holders and/or the lenders and, or, the Debenture Holders and/or the*

lenders shall be final and binding on the Promoters of the Company."

45. Regarding the contention of Learned Counsel Mr. Sinha that ECL had complete control over the appointment and removal of Key Managerial personnel, it is pertinent to see the relevant clauses of the 'Facility Agreement' which are detailed as hereunder:

"6.8 MANAGEMENT

6.8.12 Unless the Lender otherwise agree in writing the Borrower and the Obligors shall not remove any person, by whatever name called, exercising substantial powers of management of the affairs of the Borrower and/or Obligators at the time of execution of the Facility Agreement.

6.8.13 The Borrower and the Obligors shall, as and when required by the Lender appoint and change to the satisfaction of the Lender, suitable technical, financial and executive staff of proper qualifications and experience for the key posts, in case the Borrower and the Obligors fail to adhere to Business Plan and meet the requirement of Project Milestone as provided in this Agreement. The terms of such appointments, including any changes therein, shall be subject to prior approval of the Lender.

6.8.14 The Lender shall have the right to appoint, whenever they consider necessary, any person, firm, company or association of persons engaged in technical, management or any other consultancy business to inspect and examine the working of the Borrower and/or Obligors and projects and to report to the Lender. The Lender shall have the right to appoint, whenever it consider necessary, any chartered accounts/cost accountants as auditors for carrying out any specific assignment(s) or to examine the financial or cost accounting system and procedures adopted by the Borrower and/or Obligors for its/their working or as concurrent or for conducting a special audit of the Borrower. The costs, charges and expenses including professional fees and travelling and other expenses of such consultants or auditors shall be payable by the Borrower and/or Obligors."

46. It is vehemently contended by the first Respondent Counsel that the power of ECL is stretched to such a vast extent that finalization of all 'Business Plans' had to be only with the approval of ECL.

47. The Debenture Trust Deed was amended on 16/10/2017 and Schedule I of the first Amendment reads as hereunder:

> ***"10. Business Plan, Project Cost and Quarterly Budget Approval Mechanism***
> *5) The Debenture Trustee/ Monitoring Agent may approve the Quarterly Construction Budget or may advise the Issuer and/ or Security Providers to make modification as mutually decided. The Issuer and/ or Security Providers will revise/ modify the respective Quarterly Construction Budget if so advised by the Debenture Trustee/ Monitoring Agent. The Quarterly Construction Budget once approved by the Debenture Trustee/ Monitoring Agent ("Approved Quarterly Construction Budget") shall be applicable to for the quarter for which the same is approved and the amount from the Escrow Account to meet the construction cost shall during such quarter will be released as per the Approved Quarterly Construction Budget subject to availability of the amount in the Escrow Accounts. The Debenture Trustee/ Monitoring Agent may in suitable circumstances and at the request of the Issuer and/or Security Providers approve such modification/ revisions in the respective Approved Quarterly Construction Budget as may be deemed necessary by the Debenture Trustee/ Monitoring Agent."*

48. It is seen from Clause 21 of the Sanction Letter that ECL had the controlling power to appoint Real Estate Agent/Distribution Agent on behalf of the 'Corporate Debtor' for sale of specific residential units/inventory totaling to 1,77,9000 sq. ft. saleable area in various projects of the promoters. Clause 21 of the Sanction Letter reads as follows:

> *"21 Pre-disbursement Conditions x The Borrower and Security Providers shall have executed distribution agreement for appointment of real estate agent/distribution agent with an entity recommended by the Lender for sale of specific residential units/inventory total admeasuring 1,77,900 sq. ft.*

saleable area (spread across projects, as per the provision of RERA and for compliance thereof."

49. Further, the Power of Attorney executed on 22/09/2017, rendered ECL the following powers:

"1. To deal with all the government authorities including Greater NOIDA Industrial Development Authority/local authority involved in the constructions of the Project on our behalf;
2. To give instructions to the Escrow Agent/Bank with respect to deposits pertaining to various receivables of the Project;
3. To communicate with the purchasers and give instructions to the purchasers with respect to the deposit of payment/s to be made to the Company in respect of the units/flats in the Project, in the escrow accounts with the Escrow Bank/Agent;
4. To deal with the matters related to the construction of the Project i.e. raw materials, payment of the suppliers, obtaining clearances from the appropriate authorities, appointing labors for the construction of the Project etc. on our behalf;
5. To construct and to deal with the construction of the Project or to assign someone for the completion of the Project on our behalf;
6. To file or to defend any suit in the court of law or any other appropriate forum on our behalf;
7. To appoint any Advocate, Chartered Accountant or any other professional as may be on our behalf;
8. To deal with all the banks and to open any bank account as maybe required on our behalf;
9. To sign, execute and deliver the letters and all other deeds and document in respect of the flats and give/receive all documents on our behalf as we would have done;
10. To apply to any competent/relevant authority, if necessary, for obtaining and/or renewal of the permissions, pertaining to the said property/said flats and for the purpose to sign, execute, affirm declare such applications, forms, declarations and papers as may be from time to time be required;
11. To appear either personally or through an Advocate or Chartered Accountant to make representations if required before any such authority to obtain its permission;
12. To deal with the purchasers of the said flats, both existing and future;
13. To deal with the contractors, suppliers etc. to the Project, by whatever name called, for any matter

whatsoever, the Attorney deems fit, for giving effect to these presents;
14. To apply for and obtain Income Tax Certificate under the provisions of the Income Tax Act for registration of any document(s) executed by the said Attorney pursuant to these presents if required;
15. To commence and prosecute or appear in and defend all suits, actions and proceedings arising out of or in respect of all or any of the matters aforesaid and if the said Attorney shall think fit to compromise, conclude and submit to Arbitration all and every or any differences or disputes which shall or may arise in reference to the mater aforesaid;
16. To do or cause to be done or execute or cause to be executed all other acts, deeds and things which may be deemed to be necessary or proper or expedient for purposes of the said flats;
17. To appoint from time to time one or more Attorneys or Attorney under him with the same or limited powers and remove such substitute or substitutes at our discretion; and
18. To sub-delegate the power given to them by this Power of Attorney to any individual or organization as may deem fit."

(Emphasis Supplied)

50. It is vehemently contended by Learned Counsel Mr. Sinha that the Forensic Audit Report in its findings has reported that the 'Corporate Debtor'/'Corporate Guarantor' was fraudulently used as a vehicle to transfer funds from Saha Infratech to Abet Buildcon Pvt. Ltd. and Elicit Real Tech Pvt. Ltd. which are companies controlled by the Promoters of the 'Corporate Debtor' and over which ECL has complete charge of their Assets, Project Revenue, Land etc. In their Rejoinder to the Counter Affidavit filed by the second Respondent, relevant portions of the Report have been extracted and is strongly relied upon by the first Respondent and the same is being reproduced as hereunder:

"We have observed that SIPL had used PDPL as an intermediary for transferring funds to Elicit Realtech Pvt. Ltd. and Abet Buildcon Pvt. Ltd. The amount of funds received from SIPL is Rs. 2800.00 Lakhs which

has been shown as "Unsecured Loan" in books of PDPL and PDPL has given these funds to Abet Buildcon Pvt Ltd. and Elicit Realtech Pvt. Ltd. amounting to Rs. 1400.00 Lakhs each and have shown it as Loans and Advances in the books of accounts. These amounts were never going to be received by the company and have not been received back by the company (Refer section 9.0 of Banking for detailed discussion). RP should file application for Rs. 2800.00 Lakhs to recover this amount of Rs. 1400.00 Lakhs each from Abet Buildcon Pvt. Ltd. and Elicit Realtech Pvt. Ltd.

It has been observed that companies i.e. Palm Developers Pvt. Ltd. assets were mortgaged for the purpose of loan taken by Saha Infratech Private Limited. However, no loan has been received for the project of PDPL. PDPL has just been used as an intermediary to transfer the funds from Saha Infratech Private Limited to its related parties. This is a clear case of Fraudulent Transaction as company never had the intention to complete the project of "Meghdutam Encore", it had started the project only for the purpose of defrauding the home buyers and mortgaging it for taking loan from financial creditors in the name of Saha Infratech Private Limited which would then be used in its related parties just to rotate the funds and not to use it for construction of the project. This is the reason projects were shut down incomplete. RP should file application in NCLT for cancelling this mortgage. The amount of mortgage created by the company amounts to Rs. 25000.00 Lakhs for loan for its related parties. (Rs. 16000.00 Lakhs relates to IDBI Trusteeship Services Limited and Rs. 9000.00 Lakhs relates to ECL Finance Limited).

So, RP should file application in NCLT totaling Rs. 28322.50 Lakhs under section 66 "Fraudulent Trading and Wrongful doing" as per IBC 2016."

(Emphasis Supplied)

51. In the terms and conditions of the Facility Agreement, under the caption 'Special Conditions' Clause 24(4) it is clearly stated that 'The Borrower shall execute *irrevocable Power of Attorney* authorizing representatives of Lender to execute the sale deed and represent on behalf of

the Borrower and Security Providers before the Registrar on its behalf to register the Sale Deed for units to be sold in each of its Projects'.

52. On a pointed query from the bench, Learned Sr. Counsel Dr. Singhvi submitted that the Appellant had never exercised this power and was never a participant in the execution of Sale Deeds of the Homebuyers. Be that as it may, the fact to be seen is whether the Appellants have the 'ability to control' and are in a 'position to Control'.

53. Clause 4.1 of the AoA shows that the Project revenue including the payments made by the allottees of the 'Corporate Debtor' is in direct and complete control of the Appellant/ECL:

> *"4.1 PDPL Revenue Escrow Accounts and PDPL Operating Accounts*
>
> *SIPL shall ensure that:*
>
> *(i) all Encore Designated Cash Flows shall be directly deposited into an escrow account of the Company ("PDPL Revenue Escrow Account")*
>
> *(ii) the PDPL Revenue Escrow Account shall at all times be operated with the instructions of the Debenture Trustee (acting on the instructions of the Debenture Holders). SIPL and, or, the Promoters shall not have any signatory or any other right to give instructions to the PDPL Revenue Escrow Agents in any manner whatsoever."*
>
> *(Emphasis Supplied)*

54. This Clause 4.1 of the AoA refers to 'PDPL Revenue Escrow Accounts and PDPL operating Accounts' establishes that ECL had control over the entire Project Revenue Accounts and therefore the submission of the Learned Appellant Counsels that Appellants had no positive control but only a Restrictive one is unsustainable. Controlling the Revenue Escrow Accounts to involvement in the execution of sale deeds of the sale of units to

allottees show that the Debenture Holders were in a 'position to control'. The requirements under Section 5(24) under the provisions of the Code does not anywhere provide that such control should actually be *exercised.* Even otherwise, the Forensic Audit Report filed, specifically notes that the 'Corporate Debtor' was transferring amounts received from Saha to other related parties of Saha.

55. Being in charge of the Escrow Accounts, empowered under Clause 1.1 of AoA whereby and whereunder, the Revenue Escrow Account shall be *operated* with the instructions of the Debenture Trustee (acting on the instructions of the Debenture Holders) and having executed an irrevocable Power of Attorney to deal with all Banks etc., it cannot be said that the Appellants were neither in the knowledge of the transfers nor were they exercising any 'control'. Viewed from any angle, the AoA and the aforenoted powers conferred under Clause 4.1 of the AoA, cannot be only 'Restrictive Powers'. The Hon'ble Supreme Court in *'Arcelor Mittal India Pvt. Ltd.' (Supra),* has referred to the definitions of 'Control' as defined in Black' Law Dictionary – 'Control is the direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise. The power or authority to manage, direct or oversee.'

56. The first part of the term 'Control' refers to *'de jure'* control, which includes the right to appoint directors of the Company. The second part of the expression 'Control' refers to *'de facto'* control, whereby, person/body corporate directly or indirectly can positively influence in any manner, the management or policy decisions. Any decision which has a long term effect, for formulation of Business Plans, comes within the purview of policy

making. The argument that the Clauses with respect to 'Business Plans' and any substantial/important charges requiring the approval of the Debenture Holders, is only 'restrictive' and does not construe 'positive control' is untenable. We are of the view that the irrevocable PoA executed in favour of the Debenture Holders suggests Positive and proactive control as the Appellants are in a position to take proactive decisions regarding the rights of the 'Corporate Debtor'.

57. Additionally, Clause 7.2 of the Articles of Association specifies that all decisions of the Board of Directors of the 'Corporate Debtor' are subject to the approval of the Debenture Holder as can be seen from Clause 7.2 of the Articles of Association:

> *"7.2 The Promoters shall and shall cause the Company to provide the Debenture Holders with the notice for all the meetings of the Board and the Shareholders of the Company including for the adjourned meetings with the same notice period as provided to the Board and the Shareholders of the Company along with the agenda anti all other documents/ details as provided to the Board and the Shareholders of the Company. The Debenture Holders shall have the right to appoint an observer who shall be entitled to attend the meetings of the Board and the Shareholders. In the event any of the meetings are held or any resolutions are passed by the Board and the Shareholders in the absence of the observer appointed by the Debenture Holders, except where a leave of absence by the observer was obtained and noted and save and except where prior written consent of the Debenture Holders has been obtained for the matter to be discussed during the meetings, the said meeting shall be deemed to be invalidly held and the resolution passed by the Board and the Shareholders shall be held to be invalid and shall not be implemented by the Company. Further, if a resolution of the Board and the Shareholders is approved through postal ballot or without a physical meeting the resolution shall not be valid unless the same has been approved in writing by the Debenture Holders."*
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> *(Emphasis Supplied)*

58. This shows that meetings held in the absence of the observer appointed by the Debenture holder, would be rendered invalid. Clause 6.8, 6.8.12, 6.8.13, 6.1.14 of the Facility Agreement further fortifies that the Appellants had the power and position to control the appointment and removal of marginal personnel. Though some of the Clauses relied upon by the Learned Counsel Mr. Sinha, are to be exercised in the event of default, the fact remains that the terms and conditions and clauses of the Sanction letter, Facility Agreement, Article of Association, the amended Debenture Trust Deed, read together, all establish that the Appellants had the 'Ability and the Power and Position to Control'.

59. The Adjudicating Authority has reproduced the said Clause 5.4 of the Articles of Association of the 'Corporate Debtor' in the Impugned Order and observed that Part II of the AoA overrides Part I and that Part II specifies that a Director or Manager cannot take any decision without the written approval of the Debenture Holders which construes that they have a role in the policy making process and that whether the nominee Director was actually appointed or not (the Appellants have the power to appoint a Nominee Director) is immaterial, as the definitions of 'Related Party' is only to see whether a person is in a position to control the composition of Board of Directors and is not necessary that he/she/they are actually the directors of the 'Corporate Debtor'.

60. We are of the view that the Articles of Association point out that decisions regarding important matters ought to be taken only by the affirmative role of the Appellants. The Adjudicating Authority has gone through the Articles of Association as well as the conduct of the

management of the 'Corporate Debtor' and held that the ECL and IDBI are related parties of the 'Corporate Debtor' by virtue of their *inter se* management participation. Examining the influence and inter-relationship between the parties, we are of the considered view that the Appellants have the trappings of 'Related Party' on account of the various clauses of the Agreements and AoA, which gives them a participatory role in the Corporate Debtor's policies. The purpose of excluding a related party of a 'Corporate Debtor' from the CoC is to obviate conflicts of interest which are likely to arise in the event that a related party is allowed to become a part of the CoC. The Hon'ble Supreme Court has held in a catena of Judgements that exclusion under the first proviso to Section 21(2) of the Code was related not to the debt itself, but to the relationship existing between the related party 'Financial Creditor' & 'Corporate Debtor'. The contention of Dr. Singhvi that the Appellants constitute more than 80% Voting Share of the CoC and hence injustice would be done, if they are not included has to be decided within the framework of the provisions of the Code and the material on record evidences that the Appellant falls within the ambit of the definition of 'Related Party' and according to Section 21(2) of the Code, a Related Party even if it is a 'Financial Creditor' of the 'Corporate Debtor', will have no right of representation, participation or voting in a meeting of CoC. Further, the question of 'Voting Share' arises only when the Appellants are declared 'Financial Creditors' and made part of the CoC.

61. The RP in his Affidavit stated that the CoC has been constituted and the Report filed with the Adjudicating Authority on 18/02/2022 and that all 'Claims' have been verified and admitted. Last date for submission as per EoI was 17/12/2021 and the last date for submission of the Resolution Plan was 04/02/2022 which was extended to 18/02/2022 after approval of CoC. It is stated that Plans from four Proposed Resolution Applicants were received which were tabled before the CoC in their ninth Meeting dated 11/03/2022 and the proposed Resolution Applicants have presented their Plans to the CoC.

62. Keeping in view the Clauses of the Sanction Letter, the Facility Agreement, the amended Debenture Trust Deed, the AoA, this Tribunal is of the earnest view that the ratio of the Hon'ble Supreme Court in in *'Arcelor Mittal India Pvt. Ltd.' (Supra),* regarding 'Control' is squarely applicable to the facts of this case, as we hold that the Appellants do have 'Positive Powers' and are in a position to directly and indirectly Control the management and the policy decisions of the 'Corporate Debtor' and hence we do not find any illegality in the Impugned Order passed by the Adjudicating Authority affirming the decision of the RP in deleting the Appellants from being part of the CoC as stipulated for under Section 21(2) of the Code.

63. Though we do not agree with the Learned Adjudicating Authority regarding the applicability of the ratio of *'Anuj Jain' (Supra)* to the facts of this case, for all the other aforenoted reasons, these Appeals are dismissed. No order as to costs.

64. I.A. No. 1118 of 2022 in *Comp. App. (AT) (Ins) No. 356 of 2022,* preferred by three allottees in the Project 'Meghdutam Encore' developed by the 'Corporate Debtor', seeking impleadment in the subject Appeals, is dismissed accordingly.

[Justice Ashok Bhushan]
Chairperson

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
12th July, 2022
Himanshu