IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH COURT III

I.A. 3786/2024 & I.A. 3787/2024

In

C.P. No. (IB) 560/MB/C-III/2022

Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016

In the matter of

Asset Care and Reconstruction Enterprise Limited
Having office at:
14th floor, Eros Corporate Tower, Nehru Place, New Delhi - 110019

... Applicant

Vs.

Divyesh Desai

Resolution Professional of Rajesh Estates and Nirman Private Limited
Having office at:
Moore Singhi Advisors 402, Marathon Innova, 4th-Floor, Off Ganpatrao Kadam Marg, Lower Pare!, Mumbai, Maharashtra- 400013

... Respondent

In the matter of

1. **Clearwater Capital Partners Singapore Fund IV Private Limited**

2. **Clearwater Capital Partners Singapore Fund V Private Limited**

... Financial Creditors

Vs

Rajesh Estates and Nirman Private Limited
Registered Office: 139, Nagindas Master Road, 2nd Floor, Seksaria Chambers, Fort, Mumbai 400023
CIN Number: U28991MH1996PTC099089
… Corporate Debtor

Order pronounced on: 06.08.2024

Coram:
Ms. Lakshmi Gurung, Member *(Judicial)*
Sh. Hariharan Neelakanta Iyer, Member *(Technical)*

Appearances:

For the Applicant	:	Sr. Adv. Gaurav Joshi a/w Mr. Arnav Mohanty a/w Mr. Lokesh Rajoria a/w Adv. Shayan Dasgupta a/w Surya Ravikumar i/b Khaitan & Co.
For the Respondent	:	Adv. Ankit Lohia, Adv. Rishabh Chandra a/w Mr. Neel Mehta i/b Vaish Associates Mr. Divyesh Desai (RP in person)

Per: **Ms. Lakshmi Gurung, Member (*Judicial*)**

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1. I.A. No. 3786/2024 and I.A. No. 3787/2024 involve common set of facts and similar reliefs, hence, they were heard together and are being disposed of by this common order.

2. The captioned IAs have been filed by Asset Care and Reconstruction Private Limited (**ACRE/Applicant**) against Resolution Professional of M/s Rajesh Estates and Nirman Private Limited (**RP/ Respondent**), seeking direction to classify the claims of the Applicant in the category of 'secured financial creditor' under the Code.

3. Relevant facts case are summarised below:

(i) Altico Capital (India) Limited (hereinafter referred to as **Altico**) extended financial assistance to the following five entities forming part of the Rajesh Lifespaces Group (**Rajesh Group**):

a. Rajesh Estates and Nirman Private Limited (**Corporate Debtor**),
b. Rajesh Cityspaces Private Limited (**RCPL**),
c. Rajguru Developers Private Limited (**RDPL**),
d. Rajesh Buildspaces Private Limited (**RBPL**) and
e. Rajesh Landmarks Projects Private Limited (**RLPPL**).

(hereinafter the above five entities are collectively referred to as "**Borrowers**")

(ii) As per the Term Sheet dated 01.03.2018 Altico agreed to disburse loan up to Rs. 1135 crores to the Borrowers by way of subscription of Non-Convertible Debentures (NCDs) to be issued by the Borrowers. For the said purpose, five separate Debenture Trust Deeds (DTDs) were executed between Vistra ITCL (India) Limited (**Vistra**) as Debenture Trustee and each of the Borrowers as follows:

a. Debenture Trust Deed dated 19.03.2018 between Vistra and the Corporate Debtor;
b. Debenture Trust Deed dated 17.03.2018 between Vistra and RCPL;
c. Debenture Trust Deed dated 19.03.2018 between Vistra and RDPL;
d. Debenture Trust Deed dated 19.03.2018 between Vistra and RBPL;
e. Debenture Trust Deed dated 17.03.2018 between Vistra and RLPPL.

(iii) Under the said five DTDs, the Borrowers agreed to issue unrated, unlisted, secured, redeemable and non-convertible debentures on private placement basis, to Altico, as per details given below:

a. Corporate Debtor – 432 (Four hundred and thirty-two) debentures of nominal value of up to Rs. 1,00,00,000 (Rupees One Crore) each for an amount aggregating to Rs. 432,00,00,000 (Rupees Four Hundred and Thirty-Two Crores);

b. RCPL – 36 (Thirty-six) debentures of nominal value of up to Rs. 1,00,00,000 (Rupees One Crore) each for an amount aggregating to Rs. 36,00,00,000 (Rupees Thirty-six Crores);

c. RDPL – 370 (Three Hundred and Seventy) debentures of nominal value of up to Rs. 1,00,00,000 (Rupees One Crore) each for an amount aggregating to Rs. 370,00,00,000 (Rupees Three Hundred and Seventy Crores);

d. RBPL – 144 (One Hundred and Forty-Four) debentures of nominal value of up to Rs. 1,00,00,000 (Rupees One Crore) each for an amount aggregating to Rs. 144,00,00,000 (Rupees One Hundred and Forty-Four Crores);

e. RLPPL – 153 (One Hundred and Fifty-three) debentures of nominal value of up to Rs. 1,00,00,000 (Rupees One Crore) each for an amount aggregating to Rs. 153,00,00,000 (Rupees One Hundred and Fifty-three Crores).

(iv) First Supplemental Debenture Trust Deeds (SDTDs-1), all dated 19.03.2018 and Second Supplemental Debenture Trust Deeds (SDTDs-2), all dated 19.07.2018, were also executed.

(v) The disbursement details in accordance with the Term Sheet dated 01.03.2018 read with the DTDs, as provided in the application, are as follows:

(Rs. in Crore)

Entity	**Facility Limit (INR crores)**	**Principal disbursed under the Facility by Altico (net of partial sell down done in March 2019)**		
		Under NCDs owned by Altico	**Under NCDs owned by other investors**	**Total**
Corporate Debtor	432	198.76	152.00	350.76
RCPL	370	297.22	-	297.22
RDPL	153	76.56	18.00	94.56
RBPL	36	20.58	-	20.58
RLPPL	144	11.28	-	11.28
Total	**1135**	**604.40**	**170.00**	**774.40**

(vi) Thus, the Borrowers made a drawdown of approximately Rs. 774.40 crores out of the total agreed facility of Rs. 1135 crores.

(vii) Clause 4.3 provides of the Interest. It is stated that the *"interest shall accrue at the Interest Rate on the entire outstanding Debenture Amount from the relevant Deemed Date of Allotment."* It is further stated that the first interest period shall start from the relevant date of allotment and shall end on 30.06.2018, and all the subsequent interest period shall start on the first day of the calendar quarter and shall end on the last day of the calendar quarter. The details of the rate of interest is provided in sub-clause 4.3.3.

(viii) Clause 9 of the DTDs describes the 'Events of Default' wherein it is stated that non-payment of amount on any due date or otherwise, when due, in relation to the debentures or under any of the Transaction Documents in accordance with the terms thereof, constitutes an 'event of default'.

(ix) As the corporate debtor defaulted in payment, Altico issued separate Notices dated 07.11.2019 calling upon the Borrowers to make the overdue interest payment.

(x) On 04.03.2021, a Deed of Assignment was entered into between Altico and ACRE whereby all the debentures of the Borrower companies subscribed by Altico, stood assigned to the Applicant. Pursuant thereof, the Applicant issued separate Facility Acceleration and Enforcement Notices, all dated 31.05.2021, to the Borrowers calling upon them to pay the outstanding dues.

(xi) Subsequently, the Corporate Debtor was admitted to Corporate Insolvency Resolution Process (CIRP) vide order dated **24.03.2023** and public announcement inviting claims from creditors was made on 30.03.2023. The Applicant by email dated 11.04.2023, submitted the following claims:

(a) Claim of Rs. 4,02,86,32,911/- as financial creditor of the Corporate Debtor under the DTD executed by the Corporate Debtor, under which, the amount was disbursed to the Corporate Debtor.

(b) Claim of Rs. 42,55,54,119/- as financial creditor of the Corporate Debtor in view of the undertaking by the Corporate Debtor under clause 3.7 of the DTD executed by RCPL, a group company of corporate debtor, wherein Corporate Debtor is Security Provider.

(c) Claim of Rs. 4,12,28,04,407/- as financial creditor of the Corporate Debtor in view of the undertaking of the Corporate Debtor under Clause 3.7 of the DTD executed by RDPL , a group company of corporate debtor, wherein Corporate Debtor is Security Provider.

(d) Claim of Rs. 23,41,25,996/- as financial creditor of the Corporate Debtor in view of the undertaking of the Corporate Debtor under Clause 3.7 of the DTD executed by RBPL, a group company of corporate debtor, wherein Corporate Debtor is Security Provider.

(e) Claim of Rs. 1,54,25,65,127/- as financial creditor of the Corporate Debtor in view of the undertaking of the Corporate Debtor under Clause 3.7 of the DTD executed by RLPPL, a group company of corporate debtor, wherein Corporate Debtor is Security Provider.

(xii) However, RP admitted the claims of the applicant as secured financial creditor to the extent of Rs. 4,02,86,32,911/- only which is the amount due under the DTD executed by the Corporate Debtor and communicated its decision by email dated 02.06.2023.

(xiii) In the meantime, an appeal bearing no. CA (AT) (Ins) No. 460/2023 was preferred before the Hon'ble National Company Law Appellate Tribunal (**Appellate Tribunal**) challenging the admission order dated 24.03.2023. The Appellate Tribunal vide order dated 20.04.2023 directed the RP not to constitute the Committee of Creditors (**CoC**) of the Corporate Debtor. Finally, the appeal stood dismissed vide order dated 21.12.2023.

(xiv) RP rejected applicant's claims as secured financial creditors under DTDs of RCPL, RBPL, RDPL and RLPPL and communicated its decision by email dated 01.02.2024. The Applicant was however suggested to file fresh claims under the aforesaid DTDs in Form F in the category of 'other creditors'.

(xv) Subsequently, the Applicant submitted its claims in Form F as 'other creditor' by email dated 05.04.2024 without prejudice to exercise its

legal remedies against the rejection of Applicant's claims as financial creditor. On 17.04.2024, the RP admitted the claims of the Applicant under the RCPL, RBPL, RDPL and RLPPL DTDs as 'secured creditors' but not as 'other creditors' while taking a note that the said claims in Form F were submitted under protest.

(xvi) In the aforesaid factual backdrop, the Applicant has filed IA/3786/2024 challenging the RP's rejection of the Applicant's claim as financial creditor under DTDs of RCPL, RBPL and RLPPL whereas IA/3787/2024 is filed challenging the RP's rejection of the Applicant's claim as financial creditor under the DTD of RDPL. The prayers sought in the above applications are as follows:

Prayers in IA/3786/2024

a) Pass appropriate orders directing the Respondent to admit the Applicant's claim as a secured financial creditor under the Insolvency and Bankruptcy Code 2016 in the corporate insolvency resolution process of Rajesh Estates and Nirman Private Limited arising out of the RDPL DTD;

b) Pass any other order/orders that this Tribunal deems fit in the interest of justice.

Prayers in IA/3787/2024

a) Pass appropriate orders directing the Respondent to admit the Applicant's claims as a secured financial creditor under the Insolvency and Bankruptcy Code 2016 in the corporate insolvency resolution process of Rajesh Estates and Nirman Private Limited arising out of the RCPL DTD, RLPPL DTD and RBPL DTD;

b) Pass any other order/orders that this Tribunal deems fit in the interest of justice.

Submissions of the Parties

4. **Submissions of the Applicant**

4.1 The Applicant had sent four demand notices dated 09.08.2021 (prior to commencement of CIRP of CD) invoking the Corporate Debtor's undertaking to pay under the four DTDs. The Corporate Debtor did not deny its liability in relation to the amount due and payable under the four DTDs. In fact, the liability in relation to the amounts payable under the DTDs has been acknowledged as a financial liability in the financial statements of the Corporate Debtor for financial year ending 31.03.2019.

4.2 As per **Clause 3.7 – Undertaking to Pay** contained in all the four DTDs, the corporate debtor has irrevocably and unconditionally undertaken to pay all monies payable by the Issuer including any Shortfall amount remaining unpaid after enforcing the secured assets and it is specifically mentioned that such obligation of the corporate debtor shall constitute financial debt under the Code. Thus, the 'undertaking to pay' under Clause 3.7 of the DTDs has to be interpreted as a guarantee within the meaning of section 126 of the Indian Contract Act, 1872.

4.3 It is submitted that without prejudice to the above, the understanding of the borrowing arrangement as reflected in the Term Sheet dated 01.03.2018 was always that the borrowings were of Rajesh Group as a whole and that the debt was being provided by Altico to each Rajesh Group entity on the basis of the clear and undisputable '*Undertaking to pay'* provided by other group entities and all entities offering their cumulative assets as security in one common pool.

5. **Submissions of the Resolution Professional**

5.1 The applicant is merely as security provider and not a guarantor. A third-party security provider is not a financial creditor under the Code. Reliance is placed on the following judgments:

i) Anuj Jain, IRP for Jaypee Infratech Ltd. vs. Axis Bank Ltd. & Ors [(2020) 8 SCC 4011];

ii) Edelweiss Asset Reconstruction Company Limited v. Mr. Anuj Jain, Resolution Professional of Ballardpur Industries Limited [Company Appeal (AT) (Insolvency) No.517 & 518 of 2023]; and

iii) Doha Bank Q.P.S.C. and Others Versus Anish Nanavaty and Others [(2022) SCC OnLine NCLAT 4239].

5.2 The language of Clause 3.7 of the DTDs does not use the word 'guarantee'. A financial debt is a statutorily defined term under Section 5(8) of the Code and mere stipulation in an agreement that a particular debt is a financial debt does not make it a financial debt.

5.3 For ascertaining the true intent of the parties, a document has to be read as a whole and not merely one clause in isolation. The DTD itself provides the definitions of various terms and and distinguishes between the 'Security Providers' and 'Guarantors'. That is why separate types of board resolutions have been provided by the group companies in case of security providers and in case of guarantors. Therefore the parties intent was clear that security providers were different from guarantors.

5.4 As per the latest audited financials of the Corporate Debtor for the Financial Year 2018-19, the liabilities in respect of the claims in question have been classified as contingent liability in view of security offered by the Corporate Debtor for the debenture transactions pertaining to other group companies. Furthermore,

these liabilities are not stated as Contingent Liability as Corporate Guarantee.

5.5 To prove its point, RP has filed affidavit dated 13.11.2024 placing on record a copy of the Supplemental Deed to the Debenture Trust Deed (DTD) (vernacular pages removed) executed between Rajesh Cityspaces Private Limited (RCPL) (as the Issuer) and Vistra ITCL (India) Limited (as a Debenture Trustee). It is stated that the Supplemental Deed to the DTDs executed between the other Rajesh Group entities i.e. RBPL, RDPL and RLPPL contain similar contents and therefore, for sake of brevity/to avoid bulky pleadings, the same are not annexed. RP's detailed arguments are captured in subsequent paragraphs and are dealt with.

Analysis & Findings

6. Heard Ld. Counsel for the parties and perused the record. Lengthy submissions were made by the parties on both sides which continued for few days. The submissions of Mr. Gaurav Joshi, Ld. Sr. Counsel for the Applicant can be summarized as under:

6.1 Clause 3.7 of the DTDs provides '*Undertaking to pay'* whereby the Corporate Debtor has provided irrevocable and unconditional obligation to pay, upon demand, in the event of default by the Borrower including any shortfall amount remaining unpaid after enforcement of the secured assets.

6.2 The said Clause 3.7 reflects the intention of the parties to treat the undertaking given thereunder as a *'guarantee'* and the clause satisfies the elements of a guarantee under section 126 of the Indian Contract Act, 1872. Therefore, the liability of the Corporate Debtor is joint and several with that of the Borrowers under the DTD as per the judgment of ***Laxmi Pat Surana vs. Union Bank of India [(2021) 8 SCC 481]***.

6.3 He also referred to the following judgments to substantiate his submission that a shortfall undertaking constitutes a guarantee within the meaning of section 126 of the Indian Contract Act, 1872:

i. Union Bank of India v. Era Infra Engineering Pvt. Ltd., C.A. No. 997(PB)/2018 in C.P. (IB) No. 190/PB/2017

ii. IL&FS Infrastructure Debt Fund v. McLeod Russel India Limited, CP (IB) No. 1986/KB/2019

iii. Intesa Sanpaolo S.P.A. vs. Videocon Industries Ltd. [2013 SCC OnLine Bom 1910]

iv. Vandana Global Limited vs. IL&FS Financial Services Limited [2018 SCC OnLine Bom 337]

v. ICICI Bank Limited vs. Supreme Housing and Hospitality Pvt. Ltd. [2024 SCC OnLine NCLT 953

6.4 The definition of 'Security Provider' in the Supplemental Deed means collectively the Issuer, the Mortgagors, the Pledgors and the Guarantors. The definition of 'Guarantee' under the Supplemental Deed is not exhaustive. The Corporate Debtor is referred to as 'Security Provider'. Therefore, as per the above definitions, the Corporate Debtor in the present case is both a mortgagor as well as a guarantor and that there is no legal bar preventing a party to act as a mortgagor and a guarantor.

6.5 The explicit terms of a contract are always the final word as regards the intention of the parties and a multi-clause contract is required to be understood and interpreted in a manner that any view on a particular clause of the contract should not do violence to another part of the contract. Reference is made to ***Nabha Power Limited vs. Punjab State Power Corporation [(2018) 11 SCC 508]*** and ***IFCI Limited vs. Sutanu Sinha & Ors. [(2024)248 Comp Cas 217]***.

7. Refuting the above submissions, Mr. Ankit Lohia, Ld. Counsel for the RP, made following submissions:

7.1 Clause 3.7 of the DTD is a general clause, however, there are special clauses in the DTDs and Supplemental Deeds which override the general clause. Reference is made to the definition of 'Mortgagors' in the DTDs which includes the Corporate Debtor and definition of Guarantor which does not include the Corporate Debtor. Reference is also made to Clause 1.1 (Definitions) of the DTDs which states that *"all capitalised terms used but not defined in the deed shall have the meaning given to them under the Supplemental Deed"*.

7.2 It is contended that a mortgagor cannot be intertwingled with a guarantor since the parties have expressly defined the role and obligation of each and every security provider in the transaction documents.

7.3 It is submitted that the term "Security Provider" covers four categories viz. Issuers, Mortgagors, Pledgors and Guarantors and that each of these terms is expressly defined in the DTDs. The definition of the terms "Guarantee" and "Guarantors" reads as follows:

> *"**'Guarantee'** means the deed of guarantee, dated on or about the date of the Debenture Trust Deed, executed inter alia by the Corporate Guarantor and Personal Guarantors in favour of the Debenture Trustee in relation to the Debentures.*
> ***'Guarantors'** means the Corporate Guarantor and the Personal Guarantors."*

7.4 It is further submitted that the terms covered under the definition of "Security Provider" shows that the parties never intended to use them in the general loose sense. To buttress this argument, he referred to Recital H of the DTD which states as follows:

> *"(H) Further, the Guarantors have agreed to guarantee the discharge of the Secured Obligations by providing the Guarantee for the benefit of the Security Parties to credit-enhance the obligations of the Issuer under this Deed."*

7.5 It is submitted that different words used in the agreements should be given different meaning and therefore, different interpretation. He submits that there are separate recitals for each of the security providers and that the parties intended that it is only those persons who are specifically covered under the term 'Guarantors' have agreed and undertaken to provide guarantee. Therefore, only one M/s Rajesh Construction Company Private Limited (RCCPL) which provided corporate guarantee towards the debt shall be the corporate guarantor and the Corporate Debtor cannot be a guarantor under the DTDs and Supplemental Deeds.

7.6 As per Clause 7.12 of the Supplemental Deed in the event of any inconsistency between the Supplemental Deed and the DTD or other transaction documents, the Supplemental Deed shall prevail.

7.7 The Board of Directors of the Corporate Debtor has passed a Board Resolution dated 28.02.2018 whereby it is stated that the consent of Board of directors of the Corporate Debtor is hereby accorded to provide security in the ordinary course of business of the Corporate Debtor. Ld. Counsel submits that based on the Board Resolution passed by the Corporate Debtor, the Corporate debtor has provided security only in the form of mortgage/charge in respect of the debentures issued by the other Borrowers and that if it was intended to provide a guarantee, it ought to have expressly resolved in the board resolution to that effect as section 186(2)(b) of the Companies Act, 2013 uses both these terms 'guarantee' and 'security' separately and not interchangeably.

7.8 The claim forms submitted by the Applicant in Form C as financial creditor qua the Corporate Debtor, under clause 6, as against the 'details of claim if it is made in respect of financial debt covered under clauses (h) and (i) of section 5(8) of the Code', the Applicant has stated as 'Not Applicable'.

7.9 The Corporate Debtor's financial statements only disclosed contingent liabilities up to the value of the mortgaged property, not for the full debt and that these liabilities are not stated as contingent with any corporate guarantee. It is submitted that therefore, the Corporate Debtor did not consider itself to have any repayment or guarantee obligation.

7.10 A similar legal submission as made by present applicant was made before the Hon'ble Supreme Court in the case of ***Anuj Jain, IRP for Jaypee Infratech Ltd. v. Axis Bank Ltd. & Ors. [2020 8 SCC 401]***, however, after considering the arguments, the Hon'ble Supreme Court rejected the submissions and has held that such lenders who were provided with third-party security by the Corporate Debtor are not financial creditors qua the Corporate Debtor.

7.11 Reliance is also placed on the order passed by this Tribunal in ***J.C. Flowers Asset Reconstruction Private Limited vs. Mr. Abhay Narayan Manudhane & Ors. [IA/2285/2022 in CP/27/2019]***, *decided on 24.10.2024*, wherein this Bench rejected the claim of JC Flowers as financial creditor.

8. Per contra, Mr. Gaurav Joshi, Ld. Sr. Counsel for the Applicant submitted as follows:

8.1 The judgment of ***Jaypee Infratech Ltd*** *(supra)* is inapplicable to cases involving guarantees. Reliance is placed on ***Ascot Realty Private Limited vs. Ajay Kumar Agarwal [2020 SCC OnLine NCLAT 732].***

8.2 The ***JC Flowers*** *(supra)* judgment is distinguishable from the present case on the ground that in ***JC Flowers*** *(supra)*, the relevant deeds did not constitute a guarantee and no liability had crystallised

prior to the commencement of CIRP whereas in the present case, both conditions stand satisfied.

8.3 The guarantees which find mention in the Supplemental Deeds are in addition to the personal guarantees provided by the Personal Guarantors as well as the unequivocal guarantees provided by the Security Providers, and therefore, the same does not dilute the guarantee provided at clause 3.7 of the DTDs which remains intact.

8.4 As regards the Recital H, it is submitted that the recitals do not create or determine the rights and obligations of parties when the substantive clauses of the agreement are explicit and unambiguous. It is contended that the binding obligations arise from the operative provisions and not from the prefatory language. Reliance is placed on ***Bharti Televentures Limited vs. Crystal Technology Private Limited [2011 (126) DRJ 611 (DB)]***.

8.5 Clause 7.12 of the Supplemental Deed is not relevant to the present case since there is no inconsistency between the DTD and the SDTD. The key distinction between the Guarantors defined in the Supplemental Deed and the Security Providers under the DTD is that the latter have offered collateral in the nature of mortgages thereby securing the obligations of the Borrowers whereas the Guarantors under the Supplemental Deed have not provided any such collateral but only undertook to pay.

8.6 Besides the approval for mortgaging of the Corporate Debtor's immoveable property, the Board of Directors of the Corporate Debtor had also approved the draft of the DTDs which also includes Clause 3.7 which indicates that the Board has also approved Clause 3.7 of the DTD. Further, under the Doctrine of Indoor Management, any external party entering into a transaction with a company is entitled to presume that the company has complied with all internal and

procedural requirements under the law. Ld. Counsel refers to an order passed by NCLT in the matter of ***Indiabulls Commercial Credit Limited vs. Koshika Bioscience P. limited [(2024) SCC OnLine NCLT 2090]***.

8.7 With respect to Claim Form C, it is submitted that mere entry in the Claim Form (Form C) that section 5(8)(i) of the Code is 'N/A' (Not Applicable) does not negate the validity of the Applicant's claim as a financial creditor. It is further submitted that Entry 5 of the Claim Form explicitly pertains to the claims as a 'guarantor/mortgagor'.

8.8 In response to the RP's contentions about the Corporate Debtor's financial statements, it is submitted that the said Financial Statement recorded contingent liability for the entire debt, not merely the mortgaged property which confirms that the Corporate Debtor recognised the possibility of broader repayment liability, consistent with a guarantee. He relies on the Hon'ble Supreme Court judgment of ***Kedarnath Jute MFG Co Ltd vs. Commissioner of Income Tax (Central) Calcutta [1972 (3) SCC 252]*** wherein in the context of a tax assessee claiming certain deductions, it was held that existence or absence of entries in books of account of a company cannot be decisive or conclusive in the matter.

9. We have given our thoughtful and anxious consideration to the submissions and the records placed before us.

10. The RP in email dated 01.02.2024, while rejecting the claims of the Applicant arising out of the RCPL, RDPL, RBPL and RLPPL DTDs, gave detailed reasons and suggested the Applicant to submit the said claims in Form 'F' under the category of 'other creditors'. It would be appropriate to refer the said email dated 01.02.2024 reproduced below:

*"**From**: Divyesh Desai*
***Sent**: Thursday, February 1, 2024 3:05 PM*
***To**: Manish Manav <mk.manav@acreindia.in>*

***Cc**: Divyesh Desai <divyeshdesai@singhico.com>; Amit Kedia <anut.kedia@acreindia.in>; gaurharipal@singhico.com; Kairavi Desai <kairavidesai@singhico.com>*
***Subject**: Rajesh Estates and Nirman Private Limited - Claims submitted for debentures issued to Rajguru Developers, Rajesh Buildspaces, Rajesh Landmark and Rajesh Cityspaces*

Dear Sir,

This has reference to claim form dated April 11, 2023 submitted by Assets Care and Reconstruction Enterprise Limited (acting in its capacity as Trustee of India Real Estate 2021 Trust) ("Assets Care") in the Corporate Insolvency Resolution Process (CIRP) of Rajesh Estates and Nirman Private Limited (Corporate Debtor).

Assets Care has submitted the claim in Form C (Submission of Claim by Financial Creditors) under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations"). However, the undersigned would like to apprise you that basis perusal of the aforesaid claim form and supporting documents, Assets Care does not fall within the purview of Financial Creditor in terms of the applicable provisions of IBC, 2016 for the reasons as set out in hereinafter.

Basis perusal of the Claim Form and supporting documents, Altice Capital India Limited ("ACIL") had subscribed to the debentures issued by Rajguru Developers Private Limited ("RDPL") by debenture trust deed dated March 19, 2018. These debentures are secured by assets of Rajesh Estates and Nirman Private Limited as one of the Mortgagor.

Thereafter, by way of Deed of Assignment executed on March 4, 2021 between ACIL and Assets Care, the aforesaid loan facility together with all rights, title, benefits and interests was assigned from ACIL in favour of Assets Care.

Hence, in order to secure the debentures issued by RDPL to ACIL (now Assets Care being the lender by virtue of assignment), Corporate Debtor had extended security by virtue of creatin mortgage over its rights, title and interest in the mortgaged property in favour of ACIL.

The undersigned wishes to draw your attention to following relevant judicial pronouncements on the subject matter:

Supreme Court: Anu; Jain, Interim Resolution Professional for Jaypee lnfratech Ltd. vs. Axis Bank Ltd. & Ors ., (2020/ 8 sec 401" ("JIL Judgment")

Para 50.2. "Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third party securities), even if falling within the description o/ 'secured creditor' by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of 'financial creditors' as per the definitions contained in subsections (7) and (8) of Section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts as a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of 'debt' under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a 'financial debt' within the meaning of Section 5(8) of the Code."

"The respondent mortgagees are not the financial creditors of corporate debtor JIL."

Para 51. "Indisputably, the debts in question are in the form of third party security; said to have been given by the corporate debtor JIL so as to secure the loans/advances/facilities obtained by JAL from the respondent-lenders. Such a 'debt' is not and cannot be a 'financial debt' within the meaning of Section 5(8) of the Code; and hence, the respondent-lenders, the mortgagees, are not the 'financial creditors' of the corporate debtor JIL."

Further, the above-mentioned observation made in the matter of JIL Judgment has been observed by the Hon'ble National Company Law Appellate Tribunal, New Delhi in the matter of Edelweiss Asset Reconstruction Company Limited v. Mr. Anuj Jain, Resolution Professional of Ballardpur Industries Limited [Company Appeal (AT) (Insolvency) No.517 & 518 of 2023] (in paragraph 16).

In view of the above, ***Assets Care may consider submitting a fresh claim in Form F (Proof of Claim by Creditors other than Financial Creditors and Operational Creditors) under Regulation 9A of the CIRP Regulations.***

Best regards,
Divyesh Desai
Resolution Professional - Rajesh Estates and Nirman Private Limited
IBBI/IPA-001/IP-P0016912017-18/10338"

11. Pursuant to this email, the Applicant sent its claims in Form F as 'other creditor' albeit under protest on 05.04.2024. The said claims were admitted by the RP on 17.04.2024 as "other secured creditors".

12. Thus, there is no dispute by either of the parties on the execution of the DTDs and other documents relating to the financial assistance as well as on the disbursement of monies and the default. The neat legal question that arises for determination is:

> *Whether in the given facts and circumstances, the claim of the Applicant arising under the DTDs executed by RCPL, RDPL, RBPL and RLPPL fall under the category of 'financial debt' under section 5(8)(i) of the Code?*

13. Before going further, we would like to clarify that the issue in the present case is arising from the Debenture Trustee Deeds (DTDs), First Supplemental Deeds and Second Supplemented Deeds executed by RCPL, RDPL, RBPL and RLPPL which contain identical clauses and it would be suffice to refer to any one of them.

14. Section 5(8) of the Code gives meaning to ***"financial debt"*** and then expands the definition to make it inclusive definition by including clauses (a) to (i). Clause (c) includes any amount raised by issue of debentures and clause (i) includes amount of any liability in respect of any of the **guarantee or indemnity** for any of the items referred to in sub-clauses (a) to (h) of Section 5(8).

15. As can be seen from above, Section 5(8) of the Code that defines 'financial debt' includes a guarantee for liabilities incurred under clause (c) therein. According to Mr. Joshi, Ld. Counsel for the Applicant, Clause 3.7 of the DTDs that provides "undertaking to pay" clearly recorded that the Corporate Debtor as Security Provider under the DTDs has an irrevocable and unconditional obligation to pay, upon demand, in the event of default

by the Borrower, and therefore, the same constitutes a guarantee and attracts clause (i) of section 5(8) of the Code.

16. Mr. Lohia, Ld. Counsel for the RP, has relied on the ***Jaypee Infratech Ltd*** *(supra)* judgment, to contend a security provider cannot be treated as a 'financial creditor' under the Code. In that case considering the fact that the security provided by the third party was restricted to the assets so provided as security and not the entire debt value, the Hon'ble Supreme Court held that such a mortgage cannot be treated as a guarantee. No clause remotely similar to clause 3.7 of the DTDs, which is under consideration in the present case, has been discussed in that case. Hence we need to examine clause 3.7 whether it constitutes a guarantee to qualify as financial debt.

17. Clause 3.7 of the Debenture Trustee Deeds is reproduced below:

> *"**3.7 Undertaking to Pay***
>
> *(a) Subject to paragraphs (c) below, each Security Provider (other than the Issue) irrevocably and unconditionally and severally covenants, undertakes and agrees that it has the obligation to, and shall promptly upon a demand from the Debenture Trustee, pay all the monies payable by the Issuer (including but not limited to the Debenture Amount, Interest, any Default Interest, Prepayment Premium, fees and costs and expenses and other Secured Obligations) to the Debenture Trustee and the Debenture Holders in accordance with the terms of the Debenture Documents (to the extent such Secured Obligations has not already been irrevocably paid by any other Obligor).*
>
> *(b) If upon a demand being made by the Debenture Trustee:*
>
> *(i) The Security Provider (other than the Issuer) do not pay the Secured Obligations in accordance with paragraph 9a) above to the satisfaction of the Debenture Trustee within the time prescribed; and*

(ii) The Secured Obligations has not already been irrevocably paid by any other Obligor or otherwise remains unpaid; and

*(iii) The aggregate amount recovered or realized by the Secured Parties pursuant to enforcement of their rights or remedies in relation to the Secured Assets is less than the Secured Obligations, (such difference the **"Shortfall Amount**"),*

then each of the Security Provider shall severally continue to remain liable to pay an amount equal to the Shortfall Amount to the Secured Parties.

(c) Each Security Provider (other than the Issuer) further acknowledges, undertakes, confirms and agrees that:

*(i) its obligation to pay the Obligations and the Shortfall Amount in accordance with paragraphs (a) and (b) above_ constitutes financial debt (as defined under the Insolvency and Bankruptcy Code, 2016 ("**Insolvency Code**"); and*

(ii) notwithstanding anything to the contrary contained in this Deed or in any of the other Transaction Documents, its obligation to pay the Obligations and the Shortfall Amount, and the amount of Obligations being secured by the Secured Assets, shall be determined by reference to the amount of Obligations due under the Debenture Documents without giving effect to any reductions or haircuts that may be imposed or sought to be imposed in respect of the obligations of the Issuer or any other Obligor whether pursuant to the Insolvency Code, or any mechanism as provided for in guidelines of the RBI or otherwise."

18. It is pertinent to note that while the present applications were pending, the case of ***China Development Bank vs. Doha Bank Q.P.S.C. & Ors. [2024 SCC OnLine SC 3829]***, came to be decided by the Hon'ble Supreme (*judgment dated: 20.12.2024*). Relying upon the said judgment, Mr. Gaurav Joshi submits that the law is now settled that a clear and unequivocal

financial commitment undertaken by the Corporate Debtor under an agreement/deed qualifies as Financial Debt under the Code when it aligns with the ingredients of a contract of guarantee.

19. We are guided by the judgment in ***China Development Bank (supra)*** in which the Hon'ble Supreme Court was called upon to analyse and interpret Clause (5) of the Deed of Hypothecation (DoH) wherein each of the Chargors (mortgagors) undertook to give possession of the Charged Property to the Security Trustee within 7 Days of a notice of demand and each of the Chargors further undertook to pay on demand any shortfall thereby. After eaxamining the said clause (5) and the contract of guarantee under the Indian Contract Act, the Apex Court has concluded that the undertaking to pay the shortfall amount falls under 'guarantee'. We deem it appropriate to refer to the relevant paragraphs which are extracted below:

> *"45. Clause 5 contains the Chargor's covenants, representations and warranties. Sub-clause (iii) of Clause 5 is material, which reads thus:*
>
> > *"**5. Chargor's Covenants, Representations and Warranties***
> >
> > *.. .. ..*
> > *(iii) In the event that an Event of Default has occurred under a Facility Document the Security Trustee or its nominees shall, on receiving instructions from the Secured Lender/s, in accordance with Section 4 of the Security Trustee Agreement and after providing 7 (seven) Business Days notice to any of the Chargors and without assigning any reasons and at the risk and expense of the Chargors and if necessary as attorney for and in the name of the Chargors, be entitled to take charge and/or possession of, seize, recover, receive and remove them and/or sell by public auction or by private contract, dispatch or consign for realisation or otherwise dispose of or deal with all or any part of the Hypothecated Property (including by way or through the exercise of its powers and rights specified in Section 6 hereof) and to enforce, realise, settle, compromise and deal with any rights or claims relating thereto, without being bound to exercise any of these powers or be*

liable for any losses in the exercise or non-exercise thereof and without prejudice to the Security Trustee's rights and remedies of suit or otherwise. Notwithstanding any pending suit or other proceeding, each of the Chargors undertakes to give possession to the Security Trustee or its nominees or the Receiver within 7 (seven) Business Days of a notice of demand from the Security Trustee and/ or the Receiver the Charged Property and to transfer and to deliver to Security Trustee and/ or the Receiver all related bills, contracts and securities. Each of the Chargors further agrees to accept the Security Trustee's account of sales and realisations as sufficient proof of amounts realised and relative expenses and ***to pay on demand by the Security Trustee and/ or the Receiver any shortfall or deficiency thereby shown.***

Provided however, the Security Trustee Or the Receiver shall not be in any way liable or responsible for any loss, damage or depreciation that the Hypothecated Property may suffer or sustain on any account whatsoever whilst the same are in possession of the Security Trustee or the Receiver or by reason of exercise or non-exercise of rights and remedies available to the Security Trustee or the Receiver as aforesaid and that all such loss, damage or depreciation shall be wholly debited to the account of the relevant Chargor howsoever the same may have been caused, except where such loss, damage or depreciation is caused by any negligence or wilful default of the Security Trustee or the Receiver."

(emphasis added)

In these appeals, we are called upon to interpret clause 5(iii) of the DoH and decide whether the clause creates any guarantee in favour of the appellants. Therefore, we need to analyse the said clause.

49. *The appellants are claiming that their case is covered by clause (i) of sub-section (8) of Section 5 of the IBC. Under clause (i), the amount of any liability in respect of any guarantee of the items referred to in clauses (a) to (h) becomes a financial debt. Therefore, when clause (i) of Section 5(8) is applicable, it is not*

necessary that the Financial Creditor actually tenders any amount to the Corporate Debtor. In this case, the appellants are claiming that the amount of liability covered by clause (i) is in respect of money borrowed by the RCom entities (excluding the Corporate Debtor) against payment of interest under the facility agreements. There is no dispute that facilities were granted by the appellants to RCom entities. The amount of any liability in respect of any of the guarantees for money borrowed against the payment of interest is a financial debt under Section 5(8) of the IBC.

50. *"Guarantee" is defined under Section 126 of the Contract Act, which reads thus:*

> ***"126. "Contract of guarantee", "surety", "principal debtor" and "creditor".—*** *A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written."*

A contract becomes a guarantee when the contract is to perform the promise or discharge the liability of a third person in case of default. Thus, when a person enters into a contract to perform or discharge the liability of a third party, the contract becomes a contract of guarantee.

51. Section 127 of the Contract Act reads thus:

> *"**127. Consideration for guarantee.**- Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.*

Hence, any promise made or anything done for the benefit of principal debtor may be sufficient consideration to the surety for giving guarantee.

EFFECT OF CLAUSE 5(iii) OF DOH READ WITH MSTA
Relevance of nomenclature of DoH

52. If we go by the title, DoH is a Document creating hypothecation. In short, hypothecation means the process of using an asset as collateral for a loan. It acts as a protection to the lender when the borrower does not repay the loan.

53. Only the title of a document cannot be a decisive factor in deciding the nature of the document or the transactions affected by the document. ... .
*As held in the case of **B.K. Muniraju v. State of Karnataka & Ors.**, a sentence or a term in a contract does not determine the real nature of the contract. It is true that the Courts should not rewrite the contract while making an attempt to interpret it. However, in the case of **D.N. Revri & Co.**, in paragraph 7, this Court held thus:*

> *"7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. **The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation.***
> *.. .. .."*
> *(emphasis added)*

Therefore, the name of the document is not a decisive factor. Only because the title of the document contains the word hypothecation, we cannot conclude that guarantee is not a part of this document.

***57.** Sub-clause (i) of clause 3 of the DoH is a clause which is normally found in hypothecation agreements. Then comes sub-clause (iii) of clause 5 of the DoH, which we have already quoted. It provides that in the event of default committed by the borrowers (in the case of the appellants, the borrowers are RCom and RTL), the Security Trustee is entitled to take charge and/or possession of, seize, recover, receive and remove the hypothecated goods and/or sell by public auction or private contract, dispatch or consign for realisation or otherwise dispose of or deal with any part of the hypothecated property. It is obvious that this action of realisation is to be done by the Security Trustee in terms of sub-clause (c) of clause 2.2.1 of the MSTA. Thus, the security of hypothecation can be enforced by the Security Trustee on behalf of the appellants.*

> ***58.*** *Sub-clause (iii) of clause 5 of the DoH further provides that each of the Chargors agree to accept the Security Trustee's account of sales and realisation as sufficient proof of the amount realised and relative expenses and to pay on demand by the Security Trustee and/or receiver any shortfall or deficiency thereby shown. Under the DoH, even the Corporate Debtor hypothecated its goods. The last part of sub-clause (iii) of clause 5 means that if after the sale of hypothecated assets, there is any shortfall in the discharge of the liabilities of RCom or RTL, the Corporate Debtor is under an obligation to pay the shortfall or deficiency.* ***Therefore, the latter part of clause 5(iii) of the DoH indicates that RITL-Corporate Debtor, who is not the borrower of the appellants, agreed to discharge the liability of the third parties (RCom and RTL) to the appellants in the case of default of RCom or RTL. Therefore, the second part of clause 5(iii) of the DoH amounts to a guarantee provided by the Corporate Debtor to the appellants in terms of Section 126 of the Contract Act."***
>
> ***(Emphasis provided)***

20. In the above case, (DoH) contained clause 5(iii) similar to clause 3.7 of DTD in the present case. The Hon'ble Apex Court, analyzed clause 5(iii) of DoH and held the later part of 5(iii) creates liability on the mortgager – corporate debtor to discharge the liability of third party by paying the shortfall, which amounts to a guarantee provided by the corporate debtor in terms of section 126 of the Indian Contract Act. The law has been authoritatively laid down by the Hon'ble Supreme Court.

21. Mr. Lohia sought to distinguish the judgment of ***China Development Bank*** *(supra)* on the ground that in that case the primary document governing the obligations of the parties was only Deed of Hypothecation and there was no other documents like separate deed of guarantee by guarantors nor any party was expressly defined as guarantor unlike the present case at hand. He submitted that the Hon'ble Supreme Court in the same very judgment has observed that a document/agreement has to be read as a whole.

22. He has taken us through various definitions contained in the Supplemental Agreement, deed of guarantees executed by parties defined as guarantors,

separate board resolutions to show that a security provider in the present case cannot be treated as a guarantor.

23. The phrasing of clause 3.7 of DTD demonstrates the intention of the parties to treat the Corporate Debtor/Security Provide also as a Guarantor for the shortfall amount. More particularly, the terms *"irrevocably and unconditionally and severally covenants, undertakes and agrees that it has the obligation to, and shall promptly upon a demand from the Debenture Trustee, pay all the monies payable by the Issuer"* and *"each of the Security Provider shall severally continue to remain liable to pay an amount equal to the* ***Shortfall Amount to the Secured Parties****"*, emphasizes that the Corporate Debtor besides being a Security Provider also has a liability towards the entire dues and to pay any shortfall upon demand. It is trite law that for ascertaining the true character of a transaction, substance over form has to be examined and mere title of a document cannot be a decisive factor in deciding the nature of the document or the transactions.

24. Though clause 3.7 is contained in Debenture Trust Deed executed by the Issuer and the Security Provider, drawing strength from the interpretation given by the Hon'ble Supreme Court in ***China Development Bank*** **(supra)** to clause 5(iii) of Deed of Hypothecation, we have no hesitation in concluding that under the DTDs, the Corporate Debtor has provided a guarantee to the Applicant to repay the dues owed by the Borrowers.

25. Mr. Lohia made another contention that as per Clause 7.12 of the Supplemental Deed in the event of any inconsistency between the Supplemental Deed and the DTD or other transaction documents, the Supplemental Deed shall prevail. Supplemental Deeds defined Guarantors and Mortgagors separately, therefore, Mortgagors cannot be a guarantor and Clause 3.7 of DTDs being inconsistent to Supplemental Deed cannot be interpreted to be providing 'guarantee'. However, we do not find any inconsistency.

26. We note from the DTDs that the Corporate Debtor is defined as 'Security Provider'. The Supplemental Deeds to the DTDs defines the term 'Security Provider' as follows:

> ***"Security Provider(s)"*** *means collectively:*
> *i. The Issuer;*
> *ii. The Mortgagors;*
> *iii. The Pledgors; and*
> *iv. The Guarantors."*

27. Thus, on a conjoint reading of the DTDs and the Supplemental Deeds, it can be understood that the parties had executed the documents to give a wider scope to Security Providers and accordingly, the Corporate Debtor can be both a mortgagor as well as a guarantor. Further, there is no legal bar that a mortgagor cannot be a guarantor at the same time for the shortfall amount after handing over/sale of the mortgaged property. Therefore, based on the DTDs, the Corporate Debtor is a mortgagor beyond doubt. However, considering Clause 3.7 of the DTDs, the Corporate Debtor is also a Guarantor as the ingredients of contract of guarantee as per section 126 of the Indian Contract Act, 1872, are clearly found in Clause 3.7 of the DTDs and supported by ***China Development Bank*** *(supra)* judgment.

28. In view of our observations above, we hold that the Applicant is a mortgagor as well as a guarantor under the DTDs and the claims of the Applicant under the aforesaid four DTDs are liable to be admitted by the RP under section 5(8)(i) of the Code as "secured financial debt".

29. At this juncture, we deem it appropriate to mention here that the order of this Tribunal in ***JC Flowers*** *(supra)* relied upon by the RP was passed prior to the decision of ***China Development Bank*** *(supra)* and as such does not come in aid of the RP.

30. As regards the non-compliance or otherwise of section 186(2) of the Companies Act, 2013, we are of the view that such compliances are merely a procedural requirement and non-compliance of the same cannot

prejudice the claim of the Applicant as a financial creditor due to the applicability of doctrine of 'indoor management'.

31. We refer to the judgment of Hon'ble Allahabad High Court in ***Lakshmi Ratan Cotton Mills Co. Ltd. vs. J.K. Jute Mills Co. Ltd. [AIR 1957 All 311]*** wherein it was observed as follows:

> *"8. ...The only point that survived for contest between the parties was point No. 3. The result was that the only plea that was left open to the defendant to plead was that the loan could not be held to be binding on the defendant as no resolution sanctioning the said loan was passed by the Board of Directors. The defendant could therefore, contest the suit only on the ground that even though Sri Gulab Chand Jain acted on behalf of the defendant the loan could not be binding on them because of the want of a resolution of the Board of Directors making him competent to enter into such a transaction. On this point, therefore, the Court framed a fresh issue being issue No. 4 which related to the question of competency of Sri Gulab Chand Jain to borrow the money on behalf of the defendant company.*
> *As stated above, the only ground of his incompetency pleaded by the defendant was the want of a resolution authorising him to borrow the money. The burden of proving that no such resolution was actually passed by the Board of Directors lay on the defendant. They have not produced their minute book, nor has Sri Gulab Chand Jain come in the witness-box to state that no such resolution was actually passed by the Board of Directors. The defendant having failed to produce any evidence in support of the only plea that had survived, the plea must be taken to have failed for want of evidence.*
>
> *9. Even if, however, the matter is approached from the legal stand point,* ***we are of opinion that the defendant's plea in this regard cannot be sustained, as the plaintiff would be protected by the legal doctrine of internal management****."*

32. We also refer to the following observations of the Appellate Tribunal in the case of ***Sarveshwar Creations Pvt Ltd vs. Union of India*** **[Company Appeal AT (Ins) No. 1003 of 2020]**:

> *"5. The ld. Counsel for the Resolution Professional (RP)/Liquidator/Corporate Debtor (CD) has submitted that the lenders of the Holding Company could not be treated as Secured Financial Creditor in the CIRP of the subsidiary company since they didn't directly advance any facility to the CD and hence it could not be said that the CD owed them any financial debt in terms of the law laid down in the Code.*
> *It was also submitted by Ld. Counsel for the RP that lender is to demonstrate that the security document relating to the loan transaction are legally valid and enforceable and further the mortgage was created validly in favour of the lender by the subsidiary of the Principal Borrower. It was also mentioned that the claim of the Bank as a secured financial creditor on the basis of corporate guarantee dated 06th May, 2017 is untenable on the ground that it has not complied with the provisions of Section 185 & 186 of the Companies Act, 2013 (the Act) though then prevailing in 2017. The Ld. Counsel also submitted that the constitutional courts have held that if there is a clear breach of a provision of a statute then the Doctrine of Indoor Management" under the Act or any other Act cannot be enforced.*
> *xxx*
> *7. .. ..*
> *l. As far as the issue of contravention of provision of Section 185 of the Act prevailing as on that date (pre -07.05.2018 amendment to the Act) is concerned, it is very much clear that this is the provision which the company has to comply internally and if they fail to comply the necessary punishment is available in the same section i.e. Section 185, both monetary penalty and /or imprisonment. As far as bank is concerned, they have been provided time to time the Board Resolution showing the approval of the Board. Hence, if there is any irregularity then for that the Members of the Board are responsible. If the official of the bank have committed some irregularity, then it is the Bank who has to prosecute these officers against the provisions laid down under the law applicable to them. Bank is required to investigate internally. However, as far as the public fund with the public sector*

> *bank is concerned, the "Doctrine of Indoor Management" will be wholly and exclusively applicable."*

33. Further, we refer to the Latin maxim *commodum ex injuria sua nemo habere debet* which means that no party can take advantage of its own wrong. In the present case, after signing the DTDs which includes clause 3.7 whereby an undertaking is given by the Corporate Debtor to discharge the entire liability of the Issuers, it cannot be thereafter argued that the Board Resolution signed by its directors does not authorize the same and the Corporate Debtor cannot wriggle out of its liability under the DTD on any ground of anomaly or violation of provisions of the Companies Act, 2013 or any other applicable law. Hence, the submissions of the RP in this regard are rejected.

34. As regards the discrepancy in the Claim Form submitted by the Applicant, we refer to the judgment of Hon'ble Supreme Court in ***Greater Noida Industrial Development Authority vs. Prabhjit Singh Soni & Anr. [Civil Appeal Nos. 7590-7591 of 2023]*** wherein it has been categorically held:

> *"22. As it could be noticed from the CIRP Regulations, 2016, on submission of a claim with proof, the IRP or the RP, as the case may be, has to verify the claim and prepare a list of creditors containing names of creditors along with the amount claimed by them and security interest, if any, the logical conclusion derivable from the provisions analysed above would be that the Form in which a claim is to be submitted under the CIRP Regulations 2016 is directory and not mandatory. What is important is, the claim must be supported by proof."*

35. We are of the view that once the it is satisfied that a claim falls under a particular category under the Code, then a mere mentioning/non-mentioning in the Claim Form of the applicable category cannot be a ground to reject a valid claim. Thus, the RP's submission in this regard is liable to be rejected.

36. We further note that neither the execution of the documents nor the liability of the Corporate Debtor thereunder are disputed. The only dispute was with

respect to the interpretation of the clauses thereunder. As we have already held that clause 3.7 unambiguously and clearly indicates that the Corporate Debtor undertook to repay the debt amount which includes the **shortfall amount** beyond the value of its security interest, there is no need to deal with other contention relating to presentation in the Financial Statement of the Corporate Debtor.

Corporate Debtor as a co-borrower of the financial assistance

37. Mr. Joshi also submitted that in the present case, the borrowing arrangement between the Rajesh group and Altico was for the entire Rajesh Group as a whole and therefore the amount was disbursed by Altico to each Rajesh Group Entity on the understanding that the other Rajesh Group Entities would undertake to pay. It is also emphasized that the collective assets of the group were offered as security which clearly establishes that the Corporate Debtor, besides being a Guarantor, is also a co-borrower and is equally liable to repay the loan under the four DTDs, just like the respective principal borrowers therein. Reliance is placed on ***Maitreya Doshi vs. Anand Rathi Global Finance Ltd. [Company Appeal (AT) (Ins) No. 191/2021]***.

38. In ***Maitreya Doshi*** *(supra),* the Appellate Tribunal had distinguished the judgment of ***Jaypee Infratech Ltd.*** *(supra)* on the ground that for cases whether the documents executed between the parties, apart from the pledging of shares, a party entered into agreement with the creditor as a co-borrower and as the co-borrower a loan was received, the judgment of ***Jaypee Infratech Ltd.*** *(supra)* would not apply.

39. Since we have already held that in view of clause 3.7 of the DTDs, the undertaking to pay the shortfall amounts to providing a guarantee, there is no need to deal with above submission.

40. In the result, from the conjoint reading of the DTDs and the Supplemental Deeds together with the irrevocable and unconditional undertaking given by the Corporate Debtor under clause 3.7 of the DTDs, we conclude that

the Corporate Debtor has provided guarantee to the Applicant and the Applicant is a 'financial creditor' under section 5(8)(i) of the Code and also a 'secured creditor' by virtue of the security interest. Thus, we direct the RP to consider the claim of the Applicant in the category of secured financial creditor.

41. With the above observations and directions, the applications no. IA/3786/2024 and IA/3787/2024 are **allowed** and stand **disposed of**.

Sd/-
Hariharan Neelakanta Iyer
Member (Technical)

Sd/-
Lakshmi Gurung
Member (Judicial)

Uma, LRA