

COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI

Company Appeal (AT) (Ins) No. 1069 of 2020

IN THE MATTER OF:

**Jitender Arora
Resolution Professional
M/s. Premia Projects Ltd.
209-211 A, 2nd Floor,
H-17/18, Laxmi Palace,
Laxmi Nagar, Vikas Marg,
Delhi-110092.**

.... Appellant

Vs.

**Tek Chand
U 182/A, Upadhyay Block,
Shakarpur, Vikas Marg,
Delhi-110092.**

... Respondent No.1

**M/s. Solitaire Infomedia Pvt. Ltd.,
Basement, J-4, Shop No.4,
Block J, Kirti Nagar,
Delhi – 110015.**

... Respondent No.2

Present:

For Appellant:-

**Mr. Jitender Arora (RP in-person) Mr.
Shikhil Suri and Ms. Nikita Thapar,
Advocates**

For Respondent:-

**Mr. Javed Khan and Mr. Harish Kumar,
Advocates for R-1.**

Judgment
(Date: 18.11.2021)
(Through Virtual Mode)

{Per: Dr. Alok Srivastava, Member (T)}

This Judgment relates to the appeal filed by Jitender Arora, Resolution Professional (RP) of the Corporate Debtor (CD) M/s Premia Projects Limited, who is aggrieved by the impugned order in I.A. No. 4132 of 2020 in CP (IB) No. 104/PB/2018, passed by the Adjudicating Authority (NCLT, Delhi) on 29.10.2020 (hereinafter called Impugned Order).

2. In brief, the facts of the case are that an application under section 7 of IBC was filed against the Corporate Debtor to initiate CIRP which was admitted vide order dated 30.5.2018 and an IRP was appointed. The Corporate Debtor, in an earlier proceeding before the Hon'ble Delhi High Court, had been sent in liquidation and a provisional liquidator was appointed in the matter. On finding that there was an order of the Hon'ble Delhi High Court, the Adjudicating Authority held in CP (IB) 104 (PB) of 2018 on 30.1.2019 that no proceedings under IBC can continue in view of proceedings before the Hon'ble Delhi High Court. This order of the Adjudicating Authority was recalled vide order dated 11.3.2019

and the admission order under section 7 of IBC was restored. Thereafter, the Hon'ble Delhi High Court transferred the proceedings pending before it with respect to the Corporate Debtor to the Adjudicating Authority vide order dated 30.9.2019 on transfer applications CA No. 984 of 2018, CA No. 918 of 2018 and CA No. 826 of 2018 in view of the fact that the proceedings before the Hon'ble Delhi High Court had not progressed much. The Adjudicating Authority thereafter, on application by the Resolution Professional, excluded the time spent on pursuing the transfer applications vide its order dated 18.12.2019 and the CIRP period was extended by 150 days.

3. It is stated by the Appellant that a plot of land was allotted by Greater Noida Industrial Development Authority(GNIDA in short) by allotment letter dated 11.3.2009 to the landowning company M/s Solitaire Infomedia Pvt. Ltd.(Respondent No.2). Thereafter, a Collaboration Agreement was entered into on 1.10.2012 by the Corporate Debtor Premia Projects Limited with Respondent No. 2, the landowning company. At this time Mr. Tarun Sheinh was the Director and major shareholder of the Corporate Debtor Company. Mr. Tarun Sheinh became a director in the Respondent No.2 company too, soon after executing the aforementioned Collaboration Agreement. In the landowning

company (Respondent No. 2), Tarun Sheinh and his wife Rekha Sheinh held a total of 98,000 equity shares of Rs. 10 each and, which accounted for 49% of the total share capital of Respondent No.2 company (refer Additional Affidavit of the Appellant filed vide diary No. 26753 dated 12.4.2021), and the Corporate Debtor Premia Projects Limited held 1,02,000 number of shares of Rs. 10 each accounting for 51% of the total share capital of Respondent No.2 landowning company. The transaction audit report dated 28.9.2019 submitted by the Appellant (pg. 279 of the Appeal Paperbook Vol II) mentions that the Corporate Debtor Premia Projects Limited purchased all the shares held by Tarun Sheinh and his wife Rekha Sheinh in R-2 company on 5.10.2015 and only 100 equity shares were retained by the Tarun Sheinh. Thus from 5.10.2015, Corporate Debtor M/s Premia Projects Limited started to hold 1,99,900 shares in Respondent No.2 company and only 100 shares were held by Tarun Sheinh. Thus, the Corporate Debtor Premia Projects Limited had almost total control over the Respondent No. 2 landowning company. Simultaneously, on 31.3.2015, Tarun Sheinh held 47,500 equity shares out of 50,000 shares in the Corporate Debtor Premia Projects Limited. Thus, he effectively controlled both the corporate debtor as well as Respondent No. 2 landowning company and he was director in both the companies.

4. The RP filed I.A. No. 4132 of 2020 before the Adjudicating Authority claiming that Tarun Sheinh, director in both the companies has, through the Collaboration Agreement dated 1.10.2012 entered into between the CD and the Respondent No. 2 landowning company and Memoranda of Understanding entered into with home-buyers for booking and sale of flats constructed on it, defrauded and cheated the home buyers who had booked flats in the project being developed by the Corporate Debtor. Through this IA No. 4132 of 2020, the RP sought the following directions from the Adjudicating Authority: –

- (i) Allow RP to take charge of assets of the subsidiary company M/s. Solitaire Infomedia Private Limited, or
- (ii) Allow RP of the Corporate Debtor to initiate joint CIRP of both the holding company and its subsidiary (i.e. the Corporate Debtor and its subsidiary Respondent No.2).

By the impugned order dated 29.10.2020 (attached at page 55 of the Appeal Paperbook) the Adjudicating Authority denied the prayed relief holding that there was no provision in the IBC to grant such relief.

5. The Collaboration Agreement provided that the Respondent No. 2 will hand over the possession of land to developer after receiving a valuable consideration, and the CD will develop the project and have exclusive right of sales and marketing of 90% of the constructed area and the owner of the land (Respondent No.2) will be entitled to ownership and right to sell 10% of the constructed area apart from receiving Rs. 4.5 Crores as cash both being part of consideration as contained in the Collaboration Agreement. The relevant portion regarding Consideration to be paid to the landowning company Respondent No. 2 by the CD is reproduced below:-

“CONSIDERATION:

- a. In consideration of the Owner granting the said Land with permissible F.S.I., exclusive rights of development to the Developer under this Agreement, the Developer has agreed to pay a sum of Rs. 4.5 crores as consideration to the Owner.*
- b. The Owner has handed over the possession of the said Land (as and where it is) at the time of execution to the Developer for smooth operations and activities relating to development and construction of the said Land.*
- c. It is agreed that after completion of construction of the Building/Tower/IT spaces as per the sanctioned plans / License / LOI / approvals from the competent authorities, the Developer shall be entitled to 90% (Ninety percentage) of the fully constructed area on the said Land. And besides required Power of Attorney(ies), the Owner shall execute the required documents/papers in favour of the Developer and/or ultimate buyers, who the said constructed area would be sold by the Developer.*

d. It is agreed that the Owner shall be entitled to 10% (Ten percentage) of the fully constructed area on the said Land, as consideration under the Agreement. The Owner will be free to do anything with its share of constructed area without any interference of the Developer and the Developer shall examine all required documents/papers, etc., in favour of the Owner/its buyers of the said constructed area of Owner's share. However, the Owner can empower the Developer to sell the constructed area of its share and also the Developer shall be bound to sell owner's constructed area. It is agreed that the Developer shall sell this area also at the same price or near thereof and on the same terms and conditions as applicable in the Developer's own share."

6. The Memoranda of Agreement (MOU) was executed by the CD with home-buyers and payments were collected by the CD from the home buyers. A sample MoU dated 23.7.2013, which was executed between Premia Projects Limited as the 'first party' and Alka Arora and nominee Mudit Adityaja as 'second party' (attached at pp.174-189 of Appeal Paperbook in Vol I). Clause (iii)(b) there in mentions the first party's rights and title in the said land. The MoU also mentions that the 'second party' has agreed, confirmed and acknowledged that it is satisfied in all respects as to the first party's (a) right, title, and interest in the said land and the complex; (b) authority to develop and construct the complex; (c) ability to operate and maintain the complex." Furthermore, the consideration to be paid by the 'second party' to the 'first party' is included in the MOU as follows (attached at page 178 of the Appeal

Paperbook in Vol I):

“2) CONSIDERATION

- a. *The Second party has opted for Down Payment Plan / Flexi Payment Plan / Installment Plan / SIP and has paid and/or shall pay amount(s) towards Unit sale consideration as per Annexure ‘B’ attached hereto. It is already explained and clarified by the First Party to the Second Party and hereby again expressly understood by the Second party, that the amount(s) paid and/or agreed to be paid by the Second Party under the Application Form and this MOU is/are only the basic sale price/consideration for the said Unit and the Second Party hereby assures and undertakes to pay to the First Party all other levy(s), charges, amount(s), taxes etc. as may be applicable for the said Unit including but not restricted to IDC/EDC/FFC/IFMS/EEG/Service Tax etc.*
- b. *The Second Party who has opted for the Flexi payment plan/installment plan hereby assures the First Party that the payment(s) as in Annexure ‘B’ shall be made on or before their due date.”*

7. The consideration as mentioned in the MOU executed between the CD and the home-buyer is the cost of the flat proposed to be constructed. The consideration is paid, either as a one-time lump sum amount or through the flexi-plan arrangement that is provided in the MOU. The cost of flat in a housing project of the CD, which is an apartment complex, comprises of two parts

—

- (i) Proportionate Cost of land (which relates to each flat).
- (ii) Cost of construction of the flat.

8. During the consideration of this appeal, M/s. Solitaire Infomedia Private Limited (Respondent No.2) was served notice for appearance through speed post, which could not be delivered as the door of the registered office of Respondent No. 2 was found locked. Thereafter, service was attempted by the Registry of this Tribunal through email, but email dated 11.2.2021 was undelivered as the domain premialtd.com was not found. Finally, vide order of this Tribunal dated 1.3.2021, public notices were published in two newspapers, namely Rashtriya Sahara (Hindi) and The Hindu (English) on 9.3.2021, both having wide circulation in Delhi region where the registered office of Respondent No.2 is situated. Despite the publication, Respondent No.2 did not appear before this Tribunal and hence, no reply or oral arguments could be received from Respondent No.2.

9. The Appellant filed an application under rule 11 of NCLT Rules, 2016 seeking permission for substitution and impleading Mr. Harish Kumar as Respondent No.1 in place of Shri Tek Chand, who was Respondent No.1 in the appeal and who died during the pendency of this appeal. This permission is granted.

10. The main issue in this appeal is whether the corporate

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debtor M/s. Premia Projects Limited and Respondent No.2 M/s. Solitaire Infomedia Limited should either be considered for joint CIRP so that the land can be considered as an asset in the joint CIRP of the Corporate Debtor and Respondent No. 2. This issue is significant because while the Corporate Debtor received the booking amounts from the home buyers, it is the allegation of the RP and home buyers that the ex-director of the CD Tarun Sheinh siphoned off the amounts so received in other companies controlled by Tarun Sheinh and hence no significant monies are available with the CD for its meaningful insolvency resolution. The issue assumes significance since the land on which the project was to be developed is an integral constituent of the project through which the flats were being constructed and this asset of land could be instrumental in insolvency resolution of CD if a joint CIRP for the CD and Respondent No. 2 is undertaken.

11. The Learned Counsels for both parties presented their respective arguments before us. The Learned Counsel for the Appellant has submitted that the Corporate Debtor had entered into the Collaboration Agreement with Respondent No. 2 Company and MoU with the home buyers. It was done to collect booking amounts by the Corporate Debtor which otherwise would have no assets. In the event of failure to construct the flats, the Corporate

Debtor would not have any asset to extinguish the liabilities of the home buyers. His submission is that the Corporate Debtor-Developer got the right to market the flats so that it could collect money from the home buyers. The money so collected was siphoned off by Tarun Sheinh and the Corporate Debtor was not left with any assets. Hence the financial creditors and other creditors would be left high and dry. Since the home buyers as creditors seek insolvency resolution of the CD, the present case is a fit one for lifting the corporate veil of the Corporate Debtor and that of its wholly-owned subsidiary (Respondent No. 2 company) so that their inter-twined nature of their businesses and assets becomes clear. He has contended that once the inter-twined nature of the businesses of the two companies becomes clear insofar as the housing development project in question is concerned, a joint CIRP of the CD and Respondent No. 2 company would result in effective resolution of the Corporate Debtor and taking care of the interests of the creditors of CD. In such a situation, the Ld. Counsel for the Appellant has requested for a joint CIRP order in respect of the CD and Respondent No. 2 company.

12. The Learned Counsel for the Appellant has cited the following cases in support of his contention: –

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- (i) **State Bank of India and Anr. vs Videocon Industries Limited and Ors [2019 SCC Online NCLT 745].**
- (ii) **Mrs. Mamatha vs AMB Infrabuild Private Limited and Others [Company Appeal (AT) (Ins) No. 155 of 2018].**
- (iii) **Arcelormittal India Private Limited vs Satish Kumar Gupta and Others [(2019) 2 SCC 1].**

13. The Learned Counsel for Appellant has also cited a **report of the Working Committee on Group Insolvency dated 23.9.2019** to provide the rationale for dealing with the insolvency of companies of a group. The Learned Counsel for Appellant has made a case for lifting the corporate veil of the Corporate Debtor and its wholly-owned subsidiary company M/s. Solitaire Infomedia Private Limited so that the malfeasance and actions of their common director Taurin Sheinh for defrauding the creditors of the Corporate Debtor become evident, and thereafter through a joint insolvency resolution process, the creditors are able to get their dues.

14. In his arguments, the Learned Counsel for the Respondent
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No. 1 has stated that as per the MoU dated 11.10.2013 entered between Respondent No.1 and M/s. Premia Projects Limited, it is clearly mentioned that M/s. Premia Projects Limited is the 'first party' therefore, the corporate debtor also includes its subsidiaries, in particular M/s. Solitaire Infomedia Limited. The Learned Counsel for Respondent No.1 has further claimed that Tarun Sheinh is the common Director of both the Corporate Debtor and M/s. Solitaire Infomedia Private Limited, who was instrumental in executing the Collaboration Agreement and MoUs with the nefarious objective of siphoning off money collected from home buyers and defrauding and cheating them. Therefore, he has agreed, that this is a fit case where the corporate veil of both the companies be lifted for the truth to come out, in order to understand the role of the two companies and their director Tarun Sheinh who collaborated for developing the land in question, constructing flats thereon, collecting money from home buyers and siphoning off collected monies, thereby defrauding the home buyers. He has cited the judgment of NCLAT in **Mrs. Mamtha versus AMB Infrabuild Pvt. Ltd.**(supra) to emphatically state that both the companies should be treated to be from same group of companies for the purpose of a joint Corporate Insolvency Resolution Process (CIRP).

15. The Appellant filed an affidavit vide Diary No. 26753 dated 12.4.2021 whereby it has submitted certain documents relevant to show the intricate connection between the Corporate Debtor and Respondent No. 2. With this affidavit, the Appellant has filed the following documents: –

- (i) Annual return of M/s Solitaire Infomedia Pvt. Limited (Respondent No. 2) in form MGT-7 for the year 2014-15
- (ii) List of shareholders of Premia Projects Limited (Corporate Debtor) and Solitaire Infomedia Private Limited (Respondent No.2) as on 31.3.2015
- (iii) Independent Auditors' report for FY 2015-16
- (iv) Balance Sheet of the Corporate Debtor for FY 2015-16.

16. The main ground on which the Appellant has claimed initiation of joint CIRP of the Corporate Debtor Respondent No.2 is that the Corporate Debtor is the main company and the landholding company M/s. Solitaire Infomedia Private Limited (Respondent No.2) is its subsidiary company. He has alluded to the common director Tarun Sheinh of both the companies and their major shareholding in both the companies in support of his claim that both the companies are held and controlled primarily by

the same person Tarun Sheinh. The Appellant has shown that the 'Collaboration Agreement' between the Corporate Debtor and Respondent No.2 entered into on 1.10.2012 for development of project at KP- (V), Greater Noida West, Uttar Pradesh was entered into after the appointment of Tarun Sheinh as Director in Solitaire Infomedia Limited (Respondent No.2) so he was the common director in both the companies. Later the CD (which was controlled by Taurun Sheinh) acquired equity shareholding in Solitaire Infomedia Pvt. Ltd. (Respondent No.2) and the intertwining of business of both companies was practically complete insofar as the housing project was concerned. The dates showing these events, as provided by the Appellant, are as follows:

- (i) Tarun Sheinh becomes Director of Respondent No.2 company before 1.10.2012
- (ii) Date of execution of Collaboration Agreement:
1.10.2012
- (iii) Corporate Debtor (Premia Projects Limited) acquires
controlling equity shares in Respondent No. 2
company-between 1.4.2015 and 31. 3. 2016.

17. It is useful to peruse the Collaboration Agreement and its various clauses to understand the extent and nature of

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collaboration and intertwining of business the main company, the Corporate Debtor and its subsidiary landing holding company (Respondent No. 2). In the recital of the Collaboration Agreement (attached at pp 165 – 173 of Appeal Paperbook), the intent of the landowner and the developer in executing the said Collaboration Agreement is stated as follows:

“Whereas, the Owner is desirous of developing “the said Land” and to construct IT Spaces, ITes Spaces, commercial spaces and other constructions as allowed by the relevant authorities under the law (hereinafter called “DEVELOPMENT OF LAND”), and for this purpose, is willing to transfer the entire development rights of the said Land;

AND WHEREAS, the Developer on the request of the Owner and also on basis of representations and assurances of the Owner has agreed to develop the “said Land” and accept from the Owner the exclusive rights of development of the said Land on the terms and conditions as mutually agreed between the parties.”

18. The Covenants of the land owner and the Developer (attached at pp 168 -171 of Appeal Paperbook in Vol I.) of special note are sub-clauses (e) and (g) of the Owners Covenants which are reproduced below:

“e. The Owner shall not interfere with or obstruct in any manner with the execution and completion of work of development and construction of any building on the said Land. However, the Owner shall have a right to supervise and monitor the project either by himself or through its representative, particularly to satisfy himself about the progress and quality of construction as per specifications annexed and agreed by the parties.

g. The Owner and / or its nominee / transferees / assigns

shall be bound to comply with all the terms and conditions of the said Lease Deed or Building Bye Laws / License or any other rules / terms and conditions of the NOIDA Authority / department/ government pertaining to the said land.”

19. Clause 6, sub clause (a) of the Developer’s Covenants in the Collaboration Agreement gives the Developer the right to develop modern IT space, ITES space, commercial spaces and other IT enabled services with air-conditioned and power back-up on the said land entirely at its own cost, expenses and resources after procuring requisite permission, sanctions and approvals from all competent authorities. Sub clauses (c) and (d) of clause 6 of Developer’s Covenants are as follows: –

“c. The Developer shall have the exclusive right of sales and marketing of the constructed area / building / tower and has exclusive right to appoint sales and marketing agents / teams. The project would be sold in the name of the Developer under its Brand Name and the Developer would be at liberty to use its Brand Name and Logo on the said project.”

d. All the expenses relating to marketing brokerage, advertisement, payment of all contractors, labours, marketing agents, staff etc. during the course of development, promotion and marketing of the said Project and all other incidental expenses shall borne by the Developer.”

20. The above discussion also points strongly to the fact that in considering the CIRP of the Corporate Debtor – Developer, it is

necessary that all the assets form part of the housing project are considered.

21. From the above, it is abundantly clear that Tarun Sheinh, who controlled and was Director in the Corporate Debtor Premia Projects Limited became a Director in the Respondent No.2 company Solitaire Infomedia Limited, and thereafter, once he started to control both the companies viz. Corporate Debtor Premia Projects Limited and Respondent No.2 Solitaire Infomedia Limited, entered into a Collaboration Agreement on 1.10.2012 regarding development of the land owned by Respondent No.2 company by the Corporate Debtor. The Collaboration Agreement gave the Corporate Debtor, development rights at a valuable consideration of Rs. 4.5 crores as well as 10% of the fully constructed area on the said land. The developer, after completion of construction in the project, was to be entitled to 90% of the fully constructed area on the said land. Hence, it is clear that there was a valuable consideration given to the landowning company (Respondent No.2) by the developer company (Corporate Debtor). In turn, the Corporate Debtor was given the possession of land and the rights to develop the said land within a period of four years after obtaining necessary approvals and the rights to sell 90% of the constructed area on the said land. The MOU, a sample of which is

attached at pp 174 – 189 of the Appeal Paper book in Vol I, shows that the Corporate Debtor as ‘first party’ is entitled to develop the said land and the complex and receive monies from the home buyers/allottees as consideration.

22. It is therefore clear that Tarun Sheinh, who effectively controlled the landholding Respondent No.2 company (Solitaire Infomedia Limited) and the developer company - Corporate Debtor (Premia Projects Limited), made the dual instruments of Collaboration Agreement and MoU as a clever stratagem to give by one hand land to the developer and receive monies as the price of allotted flats in the other hand, all along claiming the right hand does not know what the left hand is doing as these acts were being done by two outwardly different companies. As has come out in the transaction audit report submitted by the RP through an affidavit (Diary No. 23898 of the Appeal Paperbook), huge amount of money has been siphoned off by Tarun Sheinh from the Corporate Debtor company. It is thus clear that Tarun Sheinh defrauded the homebuyers by collecting money from them through the Corporate Debtor, but not constructing and completing the projects promised under the Memoranda of Understanding entered into with various homebuyers. This circle of cheating was completed because the asset of land on which the project was to be developed and land

constructed was owned by another company. In this manner, he made a similar attempt to save his property from being auctioned even when he would not provide constructed flats to the homebuyers.

23. Therefore, if the home buyers who are financial creditors of Developer Company, are to receive their rightful dues and the insolvency resolution of the corporate debtor has to be carried out in an effective manner, piercing of corporate veil is necessary. Once the corporate veil of the two companies is taken off, the intricate business relationship between landowning company and the Corporate Debtor – Developer Company would become crystal clear. The role of the common director in both companies, Tarun Sheinh would become absolutely evident and clear in the clever execution of the back-to-back Collaboration Agreement and MoUs to get possession of the land, and collect monies from the home buyers through one company, siphoning them off for his personal benefit and leaving the corporate debtor bereft of any assets of meaningful value for effective and successful insolvency resolution of the Corporate Debtor. It stands to logic and reason that if the Corporate Debtor does not own any economically valuable assets, no resolution applicant will come forward for successful resolution of the Corporate Debtor. Later, if the Corporate Debtor were to go

into liquidation, there would be hardly any tangible assets available for liquidation, and hence the creditors would be left completely high and dry. What happens to the home-buyers who have sunk their hard-earned incomes, often their lifetime savings, in the booking and payment of instalments for the to-be-built flats is a question that has difficult answer. Hence for successful resolution of the Corporate Debtor ‘piercing of the corporate veil’ of the two companies – Corporate Debtor (Developer) and Landowning subsidiary company (Respondent No. 2) becomes absolutely necessary and imperative.

24. The relevant definitions from IBC are reproduced below for ready reference:-

“Section 3(27) – “property” includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property.

Section 3(33) –“transaction” includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor.

Section 3(34) – “transfer” includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

Section 29. Preparation of information memorandum –

(1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a

resolution plan.

(2) The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes –

(a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(b) to protect any intellectual property of the corporate debtor it may have access to; and

(c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.

Explanation – For the purposes of this section, “relevant information” means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.”

Regulation 36 of the Insolvency and Bankruptcy Board of India

(Insolvency Resolution Process for Corporate Persons) Regulations,

2016 is reproduced below:-

“36. Information memorandum. *(1) Subject to sub-regulation (4), the resolution professional shall submit the information memorandum in electronic form to each member of the committee within two weeks of his appointment, but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier.*

(2) The information memorandum shall contain the following details of the corporate debtor –

(a) assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their value.

Explanation. – Description, includes the detail such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details;

(b) the latest annual financial statements;

XXXXXXXXXX

(4) The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29.”

On above reading of sections, Section 3(27) of the code defines property as one which includes present or future or vested or contingent interest arising out of, or incidental to, property. Section 3(33) of IBC covers transaction, which includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the Corporate Debtor. Section 3(34) of the IBC includes transfer of right, title and possession or lien of property. Section 29 of IBC and Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for the forming of a Information Memorandum, which contains the details of assets and liabilities with their description of the Corporate Debtor.

25. When we read the definitions of ‘property’, ‘transaction’, ‘transfer’ along with the provisions of section 29 (regarding provision of Information Memorandum) in a constructive manner

and consider meaning along with the spirit and letter of the IBC as contained in the preamble of IBC, it becomes clear that such assets, which are transferred to or from the Corporate Debtor, and which are germane to the insolvency resolution of the Corporate Debtor and are part of the assets of the Corporate Debtor, even if held by another company, such assets should be included in the Information Memorandum as well as insolvency resolution. It is only with such consideration and meaning of assets/property that the creditors of the Corporate Debtor can get their rightful dues as is required and provided under the IBC. Moreover, the Collaboration Agreement between the Corporate Debtor and its partly or statutory, the land owning company Respondent No. 2 transfers assets of land to the Corporate Debtor, whereby the Corporate Debtor on the strength of this asset is able to enter into MoUs with home buyers. Therefore, the Collaboration Agreement is very organic to the entire process of insolvency resolution of the Corporate Debtor, and the asset of land which is transferred and given in possession by the land owner company Respondent No. 2 also becomes an 'asset' of the Corporate Debtor.

26. The Learned Counsel for Appellant has referred to the report of the Working Group on Group Insolvency constituted by the Insolvency and Bankruptcy Board of India (supra). In particular *Company Appeal (AT) (Ins) No. 1069 of 2020*

the said report at page 65 states as follows:-

“The WG notes from the UNCITRAL Guide recommends that typically the separate legal identity of group companies should be respected, except

‘(a) Where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or

(b) Where the court is satisfied that the enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose and that substantive consolidation is essential to rectify that scheme or activity.’ “

27. Regarding the applicability of the proposed framework for substantive consolidation the report mentions as follows:-

“ 3.3.1. Applicability

Consistent with international practice, stakeholders consulted by the WG suggested that substantive consolidation should be applicable in limited circumstances.

*Some stakeholders consulted were of the view that the framework **should be applicable only in those cases where there is evidence of fraud or sham, or it would be just and equitable to order substantive consolidation.** Other stakeholders consulted were of the view that substantive consolidation may be provided for where **there is no real separation between group members, and it would not be economically feasible to separate the assets of different group members.** This may be ascertained using factors such as the profitability of consolidation at a single physical location, the co-mingling of assets and business functions leading to inter-dependency amongst the group companies, the unity of interests and ownership between the various corporate entities, the degree of difficulty in segregating and ascertaining individual assets and liability, the existence of parent and inter-corporate guarantees on loans, complex security structures, and the transfer of assets without formal observance of corporate*

formalities.”

28. The Insolvency and Bankruptcy Code, 2016 provides for the resolution of insolvent companies for the revival of those companies and for the benefit of financial and operational creditors. The preamble of the IBC states that the reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons is the prime objective of this legislation. Taking a cue from such an objective and the detailed framework provided under IBC, there is no gainsaying the fact that the interests of creditors which doing an effective resolution of an insolvent company are the primary objectives of the IBC. Therefore, if a Corporate Debtor has intricate financial relationship with another company which is controlled in an overwhelming manner by the same set of directors, as the corporate debtor and their businesses are inter-related, intertwined and interwoven, it stands to reason that such companies should be looked at jointly, for matters related to insolvency resolution, as the financial revival of one company will be closely linked to the financial health of the other company.

29. There is no provision in the IBC for a joint CIRP. In **State**

Bank of India and Anr. versus Videocon Industries Limited and Others (supra), a consolidated CIRP has been ordered in view of the fact that there are admission orders for insolvency resolution against 15 companies that has already been given, and prayer was made for undertaking consolidated CIRP since the assets of all the 15 companies were inter-linked and interwoven. The Adjudicating Authority has given a 14 point test in para 80 of this judgment for deciding whether consolidation of individual CIRPs should be done to yield maximum benefits to stakeholders. Para 80 of **State Bank of India and Anr. versus Videocon Industries Limited and Ors** (supra) gives the essential ingredients of the 14 point test which is reproduced hereunder:-

80. Henceforward Summum bonum, is that the UK / USA courts have dealt with the process of consolidation along with the jurisdiction of the Authority by pronouncing that equity and fairness ought to be a yardstick by lifting the corporate veil. Consolidation is to be utilized as a mechanism to maximise the value of financially stressed group of companies. Economic benefit ought to be the sole BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH MA 1306/2018, MA 1416/2018, MA 393/2019, MA 115/2019, MA 1574/2019, MA 774 /2019, MA 778/2019, MA 1583/2018 Page 45 of 52 purpose and for that a preliminary searching enquiry is suggested which would yield benefit to stakeholders by off-setting any harm, if inflicted, if not consolidated. On due reading of all these judgements, one proposition of law emerges that the motion of 'consolidation' depends upon the facts and circumstances of each debtor/debtors. It is appropriate and suitable to give a ruling at this occasion that there is no single yardstick or measurement on the basis of which a motion of consolidation can or cannot be approved. With humility, this Bench herein below sets-out a list of examples, based upon reading the

history of 'group insolvency', so that the presence of them can lead to a decisive conclusion of triggering of 'consolidation' of Insolvency process. Undisputedly, and also laid down by the courts, before ordering consolidation, a preliminary searching inquiry be ensured that whether consolidation yields benefits to stakeholders by offsetting the harm if not consolidated. Areas of inquisition and our finding on the facts of this case are:-

i) Common Control : These companies are promoted by Dhoot Family.

ii) Common directors : The family members of V.N. Dhoot are directors in all the Videocon group companies.

iii) Common assets : There are many instances of interdependency between the group companies and the assets are common to such an extent that, for instance, one company has leased its land to another group company to carry on manufacturing.

iv) Common liabilities : The clauses of the VTL and RTL Agreements have demonstrated that "all guarantees thereof executed by one or more of the other Corporate Debtors are deemed to be one obligations of all the Corporate Debtors. "The company along with 12 other affiliates/entities (collectively referred to as "Obligors" and individually referred to as "Borrower") executed facility agreement with consortium of existing domestic rupee term lenders, in the obligor/co-obligor structure, wherein all the Rupee Term Loans of the obligors are pooled together....".

v) Inter-dependence :Some corporate debtors are engaged in manufacturing, assembling and distribution of comprehensive range of consumer electronic and home appliances. Also manufacturing set top boxes, Colour Televisions, DVD Players Etc. by some Units/subsidiaries in Aurangabad. This is stated to be India's Largest Electronics Retail chain. The uniqueness stated to be that all are marketed under single license of "Videocon Trademark".

vi) Inter-lacing of finance :Pursuant to the RTL Agreement, a consortium of banks and financial institutions including SBI had agreed to grant 'Rupee Terms Loans' to the RTL obligors under an obligor/co-obligor structure. The Rupee Term Loans under the RTL Agreement were to be utilised for the purposes of refinancing of existing rupee debt of the RTL obligors, funding the capital expenditure in relation to the 'Ravva Field' and the capital expenditure in relation to the consumer electronics and home appliances BEFORE THE NATIONAL

COMPANY LAW TRIBUNAL, MUMBAI BENCH MA 1306/2018, MA 1416/2018, MA 393/2019, MA 115/2019, MA 1574/2019, MA 774 /2019, MA 778/2019, MA 1583/2018 Page 46 of 52 business of the RTL obligors and such other end users as permitted by the facility agent under the RTL Agreement. Recital C of the RTL Agreement states that: “ The Rupee Term loan has been sanctioned by the lenders for the purposes of refinancing of existing Rupee debt of the obligors, funding the capital expenditure in relation to the consumer electronics and home appliances business of the obligors and such other end uses permitted by the Facility Agent”. (Emphasis Supplied).

vii) Pooling of resources: Facts and evidences have demonstrated that there was common pooling of human resources, liaising and funding. Undisputedly, the directors are common using their contacts and relationship to run all the subsidiaries for which common office staff, accountants, and other human resources are mobilised to manage the affairs collectively. Further, common arrangement of capital/funds is an accepted position in Videocon group.

viii) Co-existence for survival : An interlinked chain of business operations is also evident in this group case. Electronic gadgets/home appliances are manufactured by a unit. However, distribution and market chain is controlled by another entity. Interdependence upon each other is a unique feature visible in Videocon group.

ix) Intricate link of subsidiaries : Consolidated accounts, pooling of resources, commingling of assets and business functions are the examples of intricate link among subsidiaries.

x) Inter-twined accounts : The consolidated accounts of 15 months is one of the evidence to demonstrate that on demand by the lenders, all the subsidiaries have prepared a common position of their assets and liabilities, thereafter, prepared consolidated accounts, stated to be duly approved by an auditor.

xi) Inter-looping of debts : On perusal of the agreements, it is evidenced that the clauses have made a provision of securing the debts owed by subsidiaries of Videocon group. For example, Clause 2.4 of the RTL Agreement states about the Utilisation of the proceeds i.e.: "(i) the obligors hereby agree that the proceeds of the Rupee Term Loan shall be utilized for the following purposes:

(a) Capital expenditure in relation to the Ravva Field and the capital expenditure in relation to the consumer electronics and

home appliances business of the obligors, for an amount not exceeding Rs.684 Crores incurred or to be incurred by the Obligors between the current year 2012 and till 2014;

(b) Refinancing of existing Rupee Loans listed in part A of schedule 9 for an amount not exceeding Rs.19,511 Crores; and

(c) Such other end use as may be permitted by the lenders in writing. " BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH MA 1306/2018, MA 1416/2018, MA 393/2019, MA 115/2019, MA 1574/2019, MA 774/2019, MA 778/2019, MA 1583/2018 Page 47 of 52

xii) Singleness of economics of units : *The group is known by its brand name "Videocon". Therefore, the entire economics of the group revolve around this brand name either for the purposes of procuring raw material or finally selling the appliances manufactured. The group as a whole is therefore, has a common economic feature to sustain and promote the business operations.*

xiii) Common Financial Creditors : *As per two Agreements viz. RTL & VTL the lenders are members of 'consortium of banks' which is common for all. Because the impugned Insolvency Petitions were filed by SBI for itself and also on behalf of the said Joint Lenders Forum, already listed above, the names of all the banks forming consortium thus substantiate the fact that the financial creditors are common for the 15 debtor entities.*

xiv) Common group of Corporate Debtors: *As per the said two agreements the Debtors are combined together for the purpose of availing various loan facility. Therefore, this is a case where all the Debtors are independently as well as jointly liable for the repayment of loans facilities availed.*

We find that in the instant appeal, the two companies – Corporate Debtor Premia Projects Ltd. and the Respondent No. 2 landowning company M/s Solitaire Infomedia Private Limited broadly satisfy the points enumerated in the 14-point test.

30. In the matter of **Mrs. Mamatha versus AMB Infrabuild**

Private Limited and Ors. (supra), the NCLAT has held that the developer and the land owner should be treated jointly for the purpose of initiation of CIRP against them. Hence, the Appellant remitted to the Adjudicating Authority for admission of the case after notice to the parties. The important point to note in this matter is that an application for initiation of CIRP jointly against ‘developer’ and the ‘landowners’ was filed, which was rejected by the Adjudicating Authority. In the instant appeal the initiation of CIRP has been ordered only against the Corporate Debtor (developer) but at this stage there is neither any application for initiation of CIRP against the landowner/ landholder nor there is any order regarding initiation of the CIRP against the landowning company M/s Solitaire Infomedia Pvt. Ltd.

31. In the situation as obtains in the matter related to the present appeal, a joint CIRP would be possible only if there is an application for admission of CIRP under the IBC against the landowning entity and there is a strong case for undertaking joint CIRP. We have found, upon piercing of corporate veil, that both the Corporate Debtor and Respondent No.2 have common Director Tarun Sheinh and their assets are intricately interwoven in their business operations. In addition, we have also seen that the corporate debtor. M/s. Premia Projects Limited has controlling

shares in the landowning company (Respondent no.2). Thus, it is quite clear that their assets have been taken together for the development of the housing project. Therefore, there appears to be a strong case for considering the assets of both the companies jointly.

32. The Hon'ble Supreme Court, in the matter of **Jaypee Kensington Boulevard Apartments Welfare Association and Ors. versus NBCC (India) Limited and Ors (2021 SCC Online SC 253)** has among other issues looked at the assets of a 100% subsidiary Jaypee Healthcare Limited (JHL) of the corporate debtor Jaypee Infratech Limited (JIL) for a proper resolution and taking care of resolution of the Corporate Debtor in order to take care of the interests of the creditors of the Corporate Debtor, who are among others homebuyers allotted flats by the Corporate Debtor. The relevant portion of this judgment is reproduced below -

“137. Indisputably, the corporate debtor JIL owns 100% equity shareholding in JHL which is having three operational hospitals in the State of Uttar Pradesh.....

Xxxxxxxx

142. In view of the above, we do not consider it necessary to render any other finding in this point for determination except the observation that the resolution plan essentially deals with the assets of the corporate debtor JIL and not that of its subsidiary JHL. Differently put, what the resolution plan deals with are the shares in JHL, which are regarded as assets of the corporate debtor JIL. As

observed, no further comments are required and we leave this aspect of the matter at that only.”

Viewed from the angle clarified in the above mentioned paragraph, the shareholding of the Corporate debtor in the Respondent No. 2 Company, is over 97% in the asset of the Corporate Debtor and should therefore be part of Information Memorandum. Thus there exists a cogent case of undertaking joint CIRP.

33. As is evident from the above referred portions of the Jaypee Kensington (supra) judgment the asset of the Corporate Debtor JIL were considered in the resolution plan. Inter- alia the 100% shares held by the corporate debtor JIL in JHL were also considered, wherein a lender of JHL Yes Bank raised objection about its interests being harmed in case the shareholding of the Corporate Debtor JIL is considered as an asset in the overall corporate insolvency resolution of JIL. The Hon'ble Supreme Court has taken note of the objection and held that the shares of JIL and JHL, which are regarded as assets of the Corporate Debtor JIL would be considered in the resolution plan, of course after giving due consideration to the lenders of JHL, to whom the share of JIL have been pledged. In the instant case, the shares of the Corporate Debtor in the Respondent No. 2 company are not shown as pledged or secured with any creditor. But the basic point is that the shares of the Corporate Debtor in Respondent No.2 company

should be considered as part of total assets of Corporate Debtor in the Resolution Plan.

34. The basis for considering land as a necessary asset in the insolvency resolution of the corporate debtor is evident from the manner of costing of a flat in an apartment complex. Since IBC does not provide any indication about costing of flats in a housing project, we turn our attention to the Real Estate (Regulations and Development) Act, 2016 which relates to real estate projects and connected matters. As the project is located in Uttar Pradesh we consider the Uttar Pradesh Real Estate Regulatory Authority (General) Regulations, 2019 (hereinafter called 'Regulations'). The costing of the flat is covered in the Section 4(l)(D) of the Real Estate (Regulation and Development) Act, 2016, whereby the developer is required to submit in Form 3 provided in the Regulations through a Chartered Account. Clause 3 in the Regulations is as follows:

“Formats of Certificates of Architect, Engineer and Chartered Accountant

3. The certificates, issued by the project architect, project engineer, chartered accountant and submitted to the banks for getting release of money from the designated separate account of the project shall be in Forms REG-1, 2 and 3 respectively. The certificate issued by the project architect on completion of each of the building/wing of the real estate project shall be in Form REG-4.”

FORM-3

CHARTERED ACCOUNTANT'S CERTIFICATE (On Letter Head)(FOR REGISTRATION OF A PROJECT AND SUBSEQUENT WITHDRAWAL OF MONEY)

Cost of Real Estate Project _____
KRERA Registration Number _____

Sl. No	Particulars	Estimated Amt in Rs.	Incurred Amt in Rs.
1	i. Land Cost: a. The cost incurred by the promoter for the acquisition of ownership and title of the land parcels for the project as an outright purchase lease etc. b. Amount paid for Acquisition/ purchase of TDR (if any) c. Amount paid to the competent Authority for project approval, No Objection Certificates, stamp duty, transfer charges, registration charges, conversion charges, change, taxes, statutory payments to state and Central Government.		
	Sub – Total of Land Cost		
	ii. Development Cost/ Cost of Construction: a. (i) Estimated Cost of Construction as certified by Engineer (ii) Actual Cost of construction incurred as per the books of accounts as verified by the CA Note: (for adding to total cost of construction incurred, minimum of (i) or (ii) is to be considered) (iii) On-site expenditure for development of entire project excluding cost of construction as per (i) or (ii) above, i.e. salaries, consultants fees, site overheads, development works, cost of services (including water, electricity, sewerage, drainage, layout roads etc.) cost of machineries and equipment including its hire and maintenance costs, consumables etc. all costs directly incurred to complete the construction of the entire phase of the project registered. b. Payment of Taxes, cess, fees, charges, premiums, interest etc to any statutory Authority. c. Principal sum and interest payable to financial institutions, scheduled banks, non- banking financial institution (NBFC) or money lenders on construction funding or money borrowed for construction;		
	Sub – Total of Development Cost		

2.	Total Estimated Cost of the Real Estate Project [1(i) +1(ii)] of estimated Column.	Rs
3.	Total Cost Incurred of the Real Estate Project [1(i) + 1(ii)] of Incurred Column.	Rs
4.	Percentage completion of construction work (as per Project Architect's Certificate)	%
5.	Proportion of the Cost incurred on Land Cost to the Total Estimated Cost.	%
6.	Proportion of the Cost incurred on Construction Cost to the Total Estimated Cost.	%
7.	Amount which can be withdrawn from Designated Account (Total Estimated Cost as * Proportion of cost incurred as per (2 & 5)	Rs
8.	Less : Amount withdrawn till date of this certificate as per the Books of Accounts and Bank Statement.	Rs
9.	Net Amount which can be withdrawn from the Designated Bank Account under this certificate.	Rs

This certificate is being issued for the project with RERA Registration No. in compliance of the provisions of section 4(2) (1) (D) of the Act and based on the records and documents produced before me and explanations provided to me by the management of the company.

Yours Faithfully,
Signature of the Chartered Accountant
(Membership Number)
Name
Address
Contact Details

35. As is evident from the Form 3 extracted above, the cost of the project includes cost of land and cost of development. This total cost of the project forms the basis of the cost of each flat. Each home buyer pays for the proportionate share of land alongwith the cost of development and construction. Therefore, in considering their rightful interest in the resolution of the corporate debtor company, it is reasonable and logical to factor in the connected land parcel in the total assets base.

36. In view of the aforementioned discussion, we consider it just, fair and proper that the land held by Respondent No.2 M/s. Solitaire Infomedia Pvt. Ltd., is an integral part of the housing development project, and should be considered as a part of the total asset base for the insolvency resolution of the Corporate Debtor M/s. Premia Projects Limited. The inter-woven nature of the assets of the two companies is amply clear from the provisions of the 'Collaboration Agreement' and the 'MOU' respectively. The Corporate Debtor has provided valuable consideration to Respondent No.2 and also taken possession of the land in question for developing the housing project through the Corporate Debtor. Hence, the asset of land is effectively transferred to the Corporate Debtor, on whose strength it has entered into Memoranda of Understanding with various homebuyers. On the basis of these

MOUs the CD has collected monies from the home buyers. Moreover, in the costing of flats offered to homebuyers, the cost of land that proportionately is attached with each flat is a part of the total cost of each flat. In such a situation, it would not be fair and just to the creditors of the Corporate Debtor, which include the homebuyers, if the land in question is considered as part of the overall CIRP process and included in the information memorandum. In such a situation, a meaningful resolution plan could be proposed by an applicant.

37. In the instant matter the CIRP of the corporate debtor M/s Premia Projects Ltd. is under consideration. The landowning company M/s Solitaire Infomedia Pvt. Ltd. is not under CIRP, hence it would not be possible to include in the CIRP of the Corporate Debtor the asset of land on which the Corporate Debtor is developing the housing project but which is owned by the Respondent No. 2 company without following the due procedure as enumerated in law. We, therefore, direct that the matter be remanded to the Adjudicating Authority with further direction that an admission application for the landowning company M/s. Solitaire Infomedia Pvt. Ltd. be considered by the Adjudicating Authority, and a consolidation of CIRP be thereafter considered so that the combined assets of land and flats may be considered

together to provide fair, just and proper relief to the creditors of the Corporate Debtor Premia Projects Limited.

38. With these directions, the matter is remanded to the Adjudicating Authority to complete the process as directed above at an early date, preferably within two months, and pass appropriate orders. No order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

New Delhi

18th November, 2021

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