

NATIONAL COMPANY LAW TRIBUNAL
COURT-V, MUMBAI BENCH

3. IA/4504/2024 C.P. (IB)/380(MB)2021

IN THE MATTER OF

SBICAP Trustee Company Limited
VS
Radius Estate Projects Private Limited

U/s 7 of the Insolvency and Bankruptcy Code, 2016

Order Delivered on 10.10.2025

CORAM:

SH. MOHAN PRASAD TIWARI
MEMBER (J)

SH. CHARANJEET SINGH GULATI
MEMBER (T)

Appearance through VC/Physical/Hybrid Mode:

For the Petitioner:

For the Respondent:

ORDER

IA/4504/2024: The above IA is listed for pronouncement of the order. The same is pronounced in open court, vide a separate order.

Sd/-
CHARANJEET SINGH GULATI
Member (Technical)
//Rahul//

Sd/-
MOHAN PRASAD TIWARI
Member (Judicial)

**NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - V**

I.A. 4504/2024

IN

C.P. NO. 380(IB)/MB/2021

Under Section 43, 45 and 49 of the
Insolvency and Bankruptcy Code, 2016.

Mr. Vithal M. Dahake

**Resolution Professional of the Radius
Estate Projects Private Limited**

.... Applicant

Versus

1. Suraksha Realty Limited

Having registered address at:

3, Narayan Building 23, L.N. Road,
Dadar (E), Mumbai 400 014.

Email: paras.mehta@suraksharealty

2. Vistra ITCL (India) Limited

Having registered address at:

The IL&FS Financial Centre Plot No. C-
22, G Block, 3rd Floor, Bandra Kurla
Complex, Bandra (East), Mumbai –
400051.

Email: mumbai@vistra.com /
dipti.jain@vistra.com

3. Sanjay R Chhabria

The promoter and ex-director of
Corporate Debtor

Having address at:

Flat no. 13/14, 1st Floor, New Solitaire
CHS, Central Avenue Rd, Santacruz
West, Opp. Rose Manor High School,
Mumbai – 400054.

Email: sanjay@radiusdevelopers.com

4. Ritu S Chhabria

The promoter and ex-director of
Corporate Debtor

Having address at:

Flat no. 13/14, 1st Floor, New Solitaire
CHS, Central Avenue Rd, Santacruz
West, Opp. Rose Manor High School,
Mumbai – 400054.

Email: sanjay@radiusdevelopers.com

5. Anil Chhabria

The promoter and ex-director of
Corporate Debtor

Having address at:

C-103, Guruprasad CHS, 2nd Cross
Road, Lokhandwala Complex, Azad
Nagar, Andheri (West) Mumbai
Maharashtra, 400053.

Email: anilc@radiusdevelopers.com /
anilnchhabria@rediffmail.com

6. Sukant Mangal

The promoter and ex-director of
Corporate Debtor

Having address at:

C-147, Sushant Lok-II, Gurgaon Sector
56 S.O., Gurgaon, Haryana, 122011.

Email: sukant.mangal@gmail.com /
sukantm@radiusdevelopets.com

.... Respondents

In the matter between:

SBICAP Trustee Company Limited

.... Petitioner

Versus

Radius Estate Projects Private Limited

.... Respondent

Order Pronounced on: 10.10.2025

Coram:

Hon'ble Sh. Mohan Prasad Tiwari, Member (Judicial)

Hon'ble Sh. Charanjeet Singh Gulati, Member (Technical)

Appearances:

For Petitioner: Adv. Mulkit Salia (VC)

For RP: Adv. Rohit Gupta i/b Adv. Yash Jariwala (PH)

For Respondents: Adv. Atiksha Jain i/b HN Legal (R1) (VC)
Adv. Nanki Grewal, Adv. Manshi Joglekar i/b Wadia
Ghandy (PH)(R2)
Adv. Darshan Naik, Adv. Reshma Shrike (PH) (R3, 4 &5)

ORDER

I.A. NO. 4504/2024

1. The present application is being filed by the Applicant above named under the provisions of Sections 43, 45 and 49 of the Insolvency and Bankruptcy Code, 2016 (**'the Code'**), with following prayers:

- i. This Hon'ble Adjudicating Authority be pleased to allow the present Application;*
- ii. This Hon'ble Adjudicating Authority be pleased to carve out the properties so mortgaged in favour of Suraksha vide the Mortgage Deed dated July 29, 2021 and release/dischARGE any such rights/interest created in favour of Suraksha;*
- iii. This Hon'ble Adjudicating Authority be pleased to reverse the mortgage so created in favour of Vistra and declare such transactions as null and void;*
- iv. This Hon'ble Adjudicating Authority be pleased to direct the ex-promoters of the Corporate Debtor to contribute such sums that have been routed through the Corporate Debtor under the garb of Salary Payments for its own benefit;*
- v. Declare that the Respondents have entered into transactions with the Corporate Debtor in terms of Sections 43, 45 and 49 and direct the Respondents to contribute such sums as*

highlighted in the Application in respect of benefits received by them from the Corporate Debtor;

vi. For costs.

vii. Any other order that this Hon'ble Tribunal may deem fit in the facts and circumstances of this case.

2. Brief Facts as per the Application:

2.1 It is submitted that one of the Financial Creditors of the Corporate Debtor had filed Company Petition (IB) No. 380 of 2021 against the Corporate Debtor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IBC**”) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. This Tribunal, by way of an order dated **06.09.2021**, admitted the said application for initiation of Corporate Insolvency Resolution Process (hereinafter referred to as the “**CIRP**”) of the Corporate Debtor.

2.2 The present application has been filed by the Resolution Professional under the provisions of Sections 43, 45 and 49 of the IBC, seeking directions against the Respondents to make such contributions to the assets of the Corporate Debtor as sought for, pursuant to a Transaction Audit report dated 26.03.2024 which inter alia, identified the preferential transactions, avoidable undervalued transactions, transactions defrauding creditors of the Corporate Debtor and fraudulent trading or wrongful trading transactions falling within the ambit of the Code.

2.3 The Applicant vide Written Submissions has submitted that the transactions concerning Respondent No. 2 have been consummated beyond the relevant look back period, therefore, the Applicant is not pressing any relief in respect of the prayer (iii)/ Vistra Transaction. It is also submitted that the Respondent no. 3 to 6 have been proceeded

ex-parte owing to their failure to file a reply. However, this Tribunal vide order dated 12.08.2025 has given liberty to either side to file written submissions, accordingly, Respondent No. 3, 4 and 5 have filed a collective Written Submission dated 19.09.2025.

2.4 Therefore, the only prayers sought are against Respondent No. 1 and Respondent No. 3 to 6 which are discussed in subsequent paragraphs.

3. **Submissions of the Applicant**

3.1 It is submitted that the Applicant has considered the Transaction Audit Report submitted by the Transaction Auditor and is of the opinion that the transactions highlighted in the Transaction Audit Report come within the preferential, avoidable undervalued, and transaction defrauding the creditors.

3.2 A summary of the Impugned Transaction relevant for the present petition are as follows:

Sr. No.	Particulars	Amount (Rs. in Cr.)
1.	Preferential Transaction as specified in section 43 of IBC 2016 with Suraksha	430.08
2.	Transaction defrauding creditors as specified in section 49 of IBC 2016	3.80

TRANSACTION WITH M/S SURAKSHA REALTY LIMITED

3.3 It is submitted that the Corporate Debtor has entered into a Debenture Subscription Agreement (DSA) dated 18.12.2014 with Suraksha, Radius Infra Holdings Pvt Ltd., Mr. Sanjay Chhabria, and Mrs. Ritu Sanjay Chhabria and the same is unregistered. As per the

DSA, Corporate Debtor has issued 225 Non-Convertible Debentures (NCD), each with detachable warrants, valued at Rs. 50.00 lakh each, summing up to Rs.112.50 Crores. These funds were intended for the acquisition of development rights related to the Avenue 54 Project. Each NCD carried the right to purchase 445 sq. ft. of fully constructed area from Corporate Debtor's entitlement at a rate of Rs.10,000 per sq. ft., which comes to approximately 100,125 sq. ft. of saleable area. Additionally, there was an allocation of 130 sq. ft. of land area priced at Rs.33,000 per sq. ft., totaling around 29,250 sq. ft. of land area. Furthermore, 300 sq. ft. of FSI area within Corporate Debtor was available at a rate of Rs.15,000 per sq. ft. per FSI area, equating to approximately 67,500 sq. ft. of FSI area.

3.4 Further, it is submitted that the Corporate Debtor had executed a Mortgage Deed dated 29.07.2021 (i.e., 7 years after the DSA and **two months** before the initiation of CIRP of the Corporate Debtor - which matches the relevant timeline as prescribed under section 43 of the IBC) with Suraksha, and Sumer Radius Realty Private Limited (**SRRPL**). This Mortgage Deed covered the rights to 29 units with a total carpet area of 61,803 sq. ft. in Project Avenue 54, which was constructed on a 21,774.10 sq. ft. land plot, including both present and future constructions on the same property. It is submitted that although the DSA draws reference to a mortgage deed, however, the Mortgage Deed was executed after 7 years of the DSA, which is suspicious.

3.5 It is submitted that the charge so created pursuant to the Mortgage Deed is in addition to the charge created by Yes Bank Limited, and prior to creating a charge in favour of Suraksha, there was no "No Dues Certificate"/ "No Objection Certificate" procured to create a fresh charge from the Yes Bank Limited. Thus, the creation of a mortgage of 29 Flats (Rs. **430.08** Crores as per Claim Document) was made by giving preference to Suraksha over the Existing Creditors,

and it falls within the ambit of preferential transactions specified u/s 43 of IBC, 2016.

- 3.6 It is also submitted that there is an ongoing disagreement between Suraksha and the Applicant, where the Applicant has rejected the claim regarding the enforcement of detachable warrants.
- 3.7 The applicant has contended that Suraksha was provided an opportunity to provide its comments on the Transaction Audit Report, however, by failing to provide its comments in a timely manner the said right was waived, and the same was communicated to the representative of Suraksha. In addition to the same, during the 13th CoC Meeting, Suraksha requested to review the current application, however, the Applicant submits that he is not obligated to share the draft of such an application to the members of the CoC.

TRANSACTION DEFRAUDING CREDITORS (SALARY PAYABLE)

- 3.8 It is submitted that the Corporate Debtor has made payments of Rs. 3.80 Crores from ICICI Bank A/c - 6328 to multiple parties from the amount received from Radius Enterprises on the same day with the same denomination. The Corporate Debtor has categorized these payments as Salary Payments. However, the same was not routed through the Individual Staff salary ledger. Further, there is a Debit Balance of Rs. 3.80 Crores in the Staff Salary Ledger. Details of the same were given in the following table:

Year	Ledger	Amount (Rupees in Crore)
20-21	Staff Salary	2.15
21-22	Staff Salary	1.65
Total		3.80

- 3.9 It is contended that from the bank transactions and the nature of expense it can be construed that money was withdrawn from

Business and the Corporate Debtor has routed these transactions through employees account by disguising it as salary payment and absence of any details in the books of accounts or substantiating documents/justifications raises questions about the nature and legitimacy of these financial activities, indicating that these transactions to the tune of Rs. 3.80 Crores was done with the intention to defraud Creditors and therefore falls under section 49 of IBC, 2016.

3.10 In view of the abovementioned facts, the Applicant has filed the present Application, seeking appropriate orders from this Tribunal.

4. Reply on behalf of Respondent No. 1:

4.1 It is submitted that by terming the mortgage created by the Corporate Debtor in favour of Respondent No. 1 as preferential, the Applicant is seeking to repudiate the monetary claim of Respondent No. 1. This has the effect of removing Respondent No. 1 from the COC of the Corporate Debtor.

4.2 It is submitted that the Respondent No. 1 has preferred **Interlocutory Application No. 4596 of 2024**, which is presently pending adjudication before this Tribunal. Through this application, Respondent No. 1 has challenged the actions of the Applicant, namely, (i) changing the status of Respondent No. 1 from Secured Financial Creditor to Unsecured Financial Creditor; (ii) partially rejecting the claim of Respondent No. 1 to the tune of Rs. 3,28,02,73,973/- (Rupees Three Hundred and Twenty-Eight Crores Two Lakhs Seventy-Three Thousand Nine Hundred and Seventy-Three Only) and (iii) classifying the claim of Respondent No. 1 as a preferential transaction under section 43 of the Code. It is stated that the contents of the said Interlocutory Application be read as a part and parcel of the present Affidavit-in-Reply.

- 4.3 It is submitted that the Corporate Debtor needed funds for acquiring the development rights from Sumer and for making the requisite payments to the existing tenants of the Project. Hence, the Corporate Debtor had approached Respondent No. 1 in order to raise the funds by way of subscribing to its debentures.
- 4.4 Accordingly, a Debenture Subscription Agreement (DSA) dated 18.12.2014, was executed by and between the (i) Corporate Debtor (therein defined as Vishwaroop Realtors Pvt. Ltd.), (ii) Respondent No. 1, (iii) Sanjay Chhabria and Ritu Sanjay Chhabria (the guarantors / individual promoters) and (iv) Radius Infra Holdings Pvt. Ltd. (the corporate promoter). In furtherance of the DSA, Respondent No. 1 had advanced a sum of Rs. 1,12,50,00,000/- (Rupees One Hundred and Twelve Crores and Fifty Lakhs Only) to the Corporate Debtor by subscribing to 225 (Two Hundred and Twenty-Five) 18% Redeemable Secured Non-Convertible Debentures (having face value of Rs. 50,00,000/- each) ("NCDs") issued by the Corporate Debtor. By the DSA, the Corporate Debtor had, inter alia, created a **first charge** in favour of Respondent No. 1 over an area admeasuring 50000 square feet saleable area (forming part of the Corporate Debtor's entitlement) to secure the repayment of the principal amount of the NCDs and all other monies payable under the DSA. Though the first charge was created in favour of Respondent No. 1 qua 50000 square feet saleable area in the Corporate Debtor's entitlement by the DSA, the DSA required the Corporate Debtor to execute a formal deed of mortgage in favour of Respondent No. 1. The same can be borne out from Clause 1 of Schedule 7 of the DSA. Under Clause 1 thereof, the Corporate Debtor had undertaken to execute all such deeds and documents as Respondent No. 1 may require for perfecting the security created in favour of Respondent No. 1.

- 4.5 It is submitted that the Corporate Debtor was in need of additional funds and hence, approached Yes Bank Limited. The Yes Bank Limited had sought a first charge on the entire entitlement of the Corporate Debtor in the Project to secure the facilities to be availed by the Corporate Debtor. As the Corporate Debtor required the funds for the project, the corporate debtor executed a Deed of Mortgage dated 23.12.2015 as well as Deed of Mortgage dated 12.05.2016 read with Supplementary Deed dated 6.02.2018, in favour of Yes Bank Limited, thereby creating a **first charge** on its entire entitlement in the Project.
- 4.6 It is contended that as per **Clause 13 (f)** of Schedule 7 of the DSA, the Corporate Debtor had undertaken that it shall not create any charge, lien or encumbrance including mortgage over the Securities or any part thereof in favour of any person / bank / financial institution other than Respondent No. 1. Furthermore, as per **Clause 13 (h)** of Schedule 7 of the DSA, the Corporate Debtor had undertaken that it shall not sell, transfer, assign, mortgage, alienate or otherwise dispose off any of the assets of Corporate Debtor which are charged in favour of Respondent No. 1 without its approval. Accordingly, upon learning about the execution of the said deed of mortgage in favour of Yes Bank Limited, Respondent No. 1 had raised the issue that the said deed of mortgage was executed in favour of Yes Bank Limited without obtaining its prior approval. At the said time, the Corporate Debtor informed Respondent No. 1 that it was in urgent need of additional funds for the Project and assured to Respondent No. 1 that the Corporate Debtor would soon satisfy the facilities obtained from Yes Bank Limited and execute requisite deed of mortgage in favour of Respondent No. 1. Relying upon the representation of the Corporate Debtor, the Respondent No. 1 waited for Corporate Debtor to comply with its obligations under DSA.

- 4.7 It is submitted that the Respondent No. 1 was able to realize a sum of Rs. 99,00,00,000/- (Rupees Ninety-Nine Crores Only) from the Corporate Debtor. However, the Corporate Debtor failed to honour the Secured Obligations under the DSA. Accordingly, Respondent No. 1 approached the Corporate Debtor again and sought its explanation for the same. At the said time, the Corporate Debtor represented to Respondent No. 1 that the Project was delayed due to factors beyond its control and requested for additional time to comply with its obligations under the DSA. Accordingly, Respondent No. 1 waited for the Corporate Debtor to comply with its obligations under the DSA.
- 4.8 It is submitted that around July 2018, the joint venture of the Corporate Debtor and Sumer Radius Realty Private Limited (SRRPL) needed further funds for the Project. Accordingly, the Corporate Debtor and SRRPL had approached Dewan Housing Finance Corporation Limited (DHFL) for the same. To secure the said advance, DHFL wanted a first charge on the entire project, including the Corporate debtor's entitlement in the project and the Respondent No. 1 was aware of the said fact. Hence, to secure the Secured Obligations under the DSA, Respondent No. 1 had caused the Corporate Debtor to exclude an area admeasuring 61803 square feet carpet area from the Corporate Debtor's entitlement in the Project whilst creating a charge in favour of DHFL vide Deed of Mortgage dated 30.07.2018. Further, with regard to the Applicant's contention that the Mortgage Deed is executed in favour of Respondent No. 1 after a period of 7 years from the date of the execution of DSA, the Respondent No. 1 has submitted that it took the requisite steps to secure its interest and the same is evident from the fact that the area admeasuring 61803 square feet was excluded while executing a mortgage in favour of the DHFL.
- 4.9 Thereafter, Respondent No. 1 had approached the Corporate Debtor to execute a deed of mortgage in its favour with respect to the

excluded area of 61803 square feet carpet area forming part of the Corporate Debtor's entitlement in the Project. At the said time, the Corporate Debtor had assured Respondent No. 1 that it would soon discharge the facilities availed from Yes Bank Limited, after which the Corporate Debtor shall execute the deed of mortgage in favour of Respondent No. 1. Accordingly, Respondent No. 1 waited for the Corporate Debtor to execute the deed of mortgage in its favour vis a vis the excluded area of 61803 square feet carpet area forming part of the Corporate Debtor's entitlement in the Project.

4.10 It is submitted that by virtue of the Deed of Mortgage dated 23.12.2015 and Deed of Mortgage dated 12.05.2016, read with the Supplementary Deed dated 06.02.2018, the Corporate Debtor had already created a first charge in favour of Yes Bank Limited on its entitlement in the Project. Thereafter, another first charge was created by the Deed of Mortgage dated 30.07.2018, in favour of DHFL qua the entire Project (including the Corporate Debtor's entitlement in the Project), excluding an area aggregating to 61803 square feet carpet area forming part of the Corporate Debtor's entitlement.

4.11 It is submitted that Yes Bank Limited issued a Conditional No Objection Certificate (NOC) on 27.07.2018 for creating a first charge in favour of DHFL, subject to the Corporate Debtor repaying its outstanding dues by 10.08.2018. The NOC stated that failure to make the payment would result in automatic revocation of the NOC. As the Corporate Debtor failed to repay the dues, the Conditional NOC stood revoked. Therefore, it is contended that no valid NOC existed to create a charge in favour of DHFL over the entire Project. It is further contended that the Applicant has admitted the claim of DHFL in whose favour a mortgage has been created without the NOC of Yes Bank Limited. However, the Applicant has been constantly insisting on the NOC of Yes Bank Limited from Respondent No. 1 and

in the absence of such NOC, has termed the transaction of Respondent No. 1 and the Corporate Debtor as preferential.

4.12 It is contended that, the Corporate Debtor was to execute a deed of mortgage in favour of Respondent No. 1 (for 61803 sq ft) after discharging the facilities availed by it from Yes Bank Limited. However, the Corporate Debtor had **not** discharged the said facilities availed from Yes Bank Limited. Accordingly, the Corporate Debtor executed a registered Deed of Mortgage dated **29.07.2021**, thereby creating a **second charge** in favour of the Respondent No. 1 over an area aggregating to 61803 square feet carpet area comprised in 29 identified units forming part of the Corporate Debtor's entitlement in the Project (the said secured units are identified in Schedule 1 of the Deed of Mortgage) with the condition that the same shall be upgraded to first and exclusive charge in favour of Respondent No. 1 once the facilities advanced by Yes Bank Limited were satisfied by the Corporate Debtor. Respondent No. 1 stated that the charge created in its favour was subject to the first charge of Yes Bank Limited, which is similar to the charge created in favour of DHFL. Respondent No. 1 further states that the second charge created in its favour did not in any manner prejudice the charge created in favour of Yes Bank Limited and it remains subordinate to Yes Bank's charge. Further, the Respondent No. 1 contends that under Section 48 of the Transfer of Property Act, 1882, multiple charges can exist subject to priority, and the Applicant has failed to prove how the second charge is preferential. It is submitted that the Respondent No. 1 lost the first charge it initially held under the DSA over 50,000 sq. ft. of saleable area and had to settle for a second charge due to subsequent events. Further, the Secured Units mortgaged to Respondent No. 1 were carved out from the area mortgaged to DHFL. Therefore, the mortgage did not give Respondent No. 1 any undue advantage and does not meet the conditions of Section 43(2).

4.13 It is submitted that by order dated **06.09.2021**, CIRP was initiated against the Corporate Debtor. Respondent No. 1 submitted its claim in Form 'C' on 28.10.2021, claiming Rs. 430,08,00,000/- based on a 2014 DSA executed between the Corporate Debtor and Respondent No. 1. The claim also stated that the secured obligations were backed by a registered Deed of Mortgage, creating a second charge over the Secured Units. In response, the Applicant on 01.12.2021, informed Respondent No. 1 that the claim of Rs. 98,35,38,914/- crore had been provisionally admitted and that the balance amount of the claim has been kept under verification. In light of the pendency of appeals and applications filed against the Admission Order, the CIRP could not be proceeded with until January 2023, Subsequently, in January of 2023, the CIRP of the Corporate Debtor had recommenced. The Applicant constituted the COC and inducted Respondent No. 1 (as Secured Financial Creditor) in the COC with 3.74% voting rights. On 14.04.2023, the Applicant appointed M/s. Bagchi & Gupta, Chartered Accountants as the transactional auditor, for undertaking the transactional audit of the Corporate Debtor and the auditor has submitted the report dated 26.03.2024.

4.14 It is submitted that the Respondent No. 1 vide letter dated 18.01.2024, referred to several clauses of the DSA viz. Cl. 13 (e), (f), (h), (i), (v), (w), and (x) of schedule 7 to state that the Corporate Debtor could not have created any charge, lien or encumbrance vis a vis the mortgaged properties contemplated under the DSA without the prior consent of Respondent No. 1. Respondent No. 1 further states that it was Yes Bank who should have obtained the NOC from Respondent No. 1 since as per the terms of the DSA, all subsequent loans/mortgages created without the prior approval/consent of Respondent No. 1 were void ab initio.

4.15 It is contended that the Mortgage Deed was executed by the Corporate Debtor in the ordinary course of its business and was

executed in the course of the same transaction which originated in the year 2014 (upon execution of the DSA). The Corporate Debtor was obligated to discharge the Security Obligations in terms of the DSA. The claim of Rs. 430.08 Crores is derived from the DSA. Thus, merely because the Mortgage Deed had been executed in July of 2021, does not make the transaction (which originated and arose from the DSA in 2014) to be preferential in nature. Furthermore, it does not even disentitle Respondent No. 1 from recovering the outstanding amounts from the Corporate Debtor in its CIRP. Further, the process of perfecting the security commenced in the year 2018, and the same falls outside the look-back period.

4.16 Against the contention of the Applicant that the security created in favour of Respondent No. 1 vide Mortgage Deed is different from the mortgaged properties as provided in the DSA, it is submitted that, the DSA had, inter alia, contemplated a formal deed of mortgage to be executed in favour of Respondent No. 1 qua the said 50000 square feet saleable area. However, the Corporate Debtor failed to execute the said deed of mortgage. In the interregnum, the Corporate Debtor created a first charge on its entitlement in the Project in favour of Yes Bank Limited. That included the area of 50000 square feet saleable area whereupon Respondent No. 1 had a first charge. At the same time, the Corporate Debtor delayed in discharging the Secured Obligations under the DSA. As a result, the amount of the Secured Obligations kept on escalating with time. Moreover, the charge created in favour of Yes Bank Limited was not fully satisfied and the Corporate Debtor was in a position to create only a second charge in favour of Respondent No. 1. It was in light of the aforesaid factors, that the Corporate Debtor and Respondent No. 1 had agreed to create a second charge over an area aggregating to 61803 square feet carpet area forming part of the Corporate Debtor's entitlement in the Project. Therefore, the change in security did not put Respondent No. 1 to any advantage. Accordingly, the Applicant's reliance on the ground

that the security created in favour of Respondent No. 1 vide the Mortgage Deed is different from the mortgaged properties as provided in the DSA, does not come in any aid to the Applicant. It is submitted that by way of the DSA, a preliminary charge was created in favour of Respondent No. 1. Thus, Respondent No. 1 was always a secured financial creditor of the Corporate Debtor. By execution of the Mortgage Deed, the Respondent No. 1 has not been placed in a beneficial position.

5. **Written Submissions on behalf of Respondent No. 3 to 5:**

Each of the Respondents has filed separate written submissions, however, all such submissions are identical in content. In the interest of brevity and to avoid unnecessary repetition, the individual submissions are not reproduced herein. Instead, the collective submissions made by the Respondents are extracted herein as below:

- 5.1 It is contended that the audit report relied on by the Applicant does not give a true reflection of the facts of the accounts of the Corporate Debtor and the auditors have never approached the Corporate Debtor to ask for any of the details and / or clarification of any transactions, accounts, trial balance, books of accounts, entries etc.

TRANSACTION WITH M/S SURAKSHA REALTY LIMITED

- 5.2 It is submitted that the Debenture Subscription Agreement was executed on 18.12.2014 and the repayment of the same was to start after 36 months from the date of execution of the same on a quarterly basis i.e. the first instalment of the loan would start on 18.01.2018 as per the terms and conditions of the Debenture Subscription Agreement.
- 5.3 It is further submitted that the clause no. 10.2 of the Debenture Subscription Agreement states that, "***the issuer shall redeem the debentures on or before 37 months from the date of the***

investment of the First Tranche Amount (Redemption date) considering the interest to be payable as mentioned in this DSA and detachable warrants in case of early redemption will continue for the period of 37 months from the date of the investment of first tranche. The detachable warrants and rights attached to detachable warrants can be exercised by the investor after the period of 37 months from the date of investment of first tranche”.

- 5.4 It is submitted that due to the spread of covid pandemic in 2021 the corporate debtor was unable to repay the amounts availed as loan by issuance of NCD's to Suraksha and was forced to mortgage the units as mentioned in the mortgage deed and pay off the loan in accordance with the Debenture Subscription Agreement.
- 5.5 It is further submitted that the loan from Suraksha was availed for acquiring 50% rights in the project known as Avenue 54 and the plan for the development of the project wasn't even passed at that time so the execution of mortgage deed at that time of execution of the Debenture Subscription Agreement was out of question. The plans of the project were also not approved so it is evident that the mortgage deed could not be executed at that point of time as the Corporate Debtor neither had any units to mortgage nor did it have the rights to acquire the project.
- 5.6 It is further submitted that Clause H of the Debenture Subscription Agreement states that, "Each detachable warrant to each NCD will carry right to purchase 445 sq. ft. fully constructed saleable area with amenities in the issuer' entitlement in the project at a price of Rs. 10,000/- per sq. ft. saleable area aggregating to approx. 1,00,125 sq. ft. saleable area / 130 sq. ft. of land area in the issuer' entitlement at a price of Rs. 33,000/- per sq. ft. pf land area aggregating to approx. 29,250 sq. ft. land area /300 sq. ft. FSI area in the issuer' entitlement

at a price of Rs. 15,000/- per sq. ft. per FSI area aggregating to approx. 67,500 sq. ft. area (Warrant Premises). Thus, the mortgage deed couldn't be executed until the failure on behalf of the Corporate Debtor to perform the terms and conditions of the Debenture Subscription Agreement.

- 5.7 It is further submitted that creation of second charge without obtaining the No Objection Certificate is not a condition precedent to invalidate the second charge.
- 5.8 It is further submitted that the Hon'ble Mumbai bench of NCLT vide order dated 08.10.2024 passed in **Bank of Baroda vs. Ajit Kumar & Ors. 3/2024 and CP (IB) 1738/MB/of 2017**, have observed that creation of the second charge without obtaining the No Dues Certificate / No Objection Certificate from the holder of the first charge even when the first charge upon the same property subsists does not invalidate the second charge nor does it term the same as void ab initio. The order passed is enumerated for ease of reference which is as follows;

“In view of the foregoing discussions, we are of the view that non-obtaining of NOC from the Applicant does not ipso facto invalidate the security documents executed in favour of the Respondents no. 2 & 3. Further, considering the fact that security documents have not been declared void by a court / authority of competent jurisdiction and the charges created thereunder have been duly registered with the RoC / MCA portal in accordance with the provisions of the Companies Act, 2013, we are of the view that the decision of Respondent no. 1 to classify the claim of the Respondents no. 2 & 3 as secured financial debt is just and proper, and not ought to be interfered with.”

Hence, there subsists no sort of illegality or preferentiality in the transaction executed, and the charge is legally valid and subsisting.

5.9 It is further submitted that Mr. Sanjay Rajkumar Chhabria and Mrs. Ritu Sanjay Chhabria have, in Clause 8.5 of the Debenture Subscription Agreement, given personal guarantee in their individual capacity as individual promoters of the Corporate Debtor, which is without prejudice and in addition to any other security, which further proves the legitimacy of the Mortgage Deed. It is submitted that even personal guarantees can be executed by promoters of the Corporate Debtor and could be considered as a security interest according to Section 5(22), which is defined under the IBC, 2016, thus, further proving the legitimacy of the Debenture Subscription Agreement and Mortgage Deed executed by and between the Corporate Debtor and Suraksha.

5.10 It is further submitted that it is implied in the clause 4 of the Mortgage Deed that, due to distress market conditions the mortgagor have not been able to fully discharge the secured obligations towards the mortgagee and thus the Mortgage Deed came to be executed.

5.11 It is further submitted that according to the Clause 5.3 of the Mortgage Deed the Corporate Debtor had represented to Suraksha that, "the charge over specific identified units created in favour of/for the benefit of HDFC and SBICAP NCD holders in their respective facilities does not include any units/flats/area comprised in the security units mentioned in the Mortgage Deed".

5.12 It is reiterated that the said transaction has been carried out in the ordinary course of business in accordance with Section 43 (3) (a) of the IBC, 2016, and, hence, cannot be defined or brought under the purview of Section 43 and cannot be termed as a preferential transaction according to the provisions of IBC, 2016.

Transaction Defrauding Creditors (Salary Payable)

- 5.13 It is submitted that the Applicant has contended that the Corporate Debtor has made payments to the tune of Rs. 3.60 Crores to multiple parties received from Radius Enterprises and that the same were classified as salary payments though the same wasn't routed through the individual staff salary ledger.
- 5.14 It is submitted that Radius Enterprises is a partnership firm and one of the group companies of Radius group and the staff salary ledger shows a debit balance of Rs. 3.80 Crores. Further, the salary paid by the Corporate Debtor was paid but was not expensed out due to the covid-19 pandemic and unavailability of office staff due to lockdown.
- 5.15 It is further submitted that soon after the lockdown was lifted and the regular routine business operations started, Mr. Vitthal Dahake was appointed as Interim Resolution Professional on 06.09.2021 in respect of the Corporate Debtor, and the whole control and management of the company was handed over to the Interim Resolution Professional, i.e, the Applicant herein this Interlocutory Application.
- 5.16 It is further submitted that owing to the above facts and circumstances, the suspended Directors of the Corporate Debtor were unable to update the data and accounts, which is reflected in the audit report.
- 5.17 It is further argued that the list of documents is filed separately to show the working of the salary account, along with these written submissions which shows that the audit report is devoid of facts.
- 5.18 In view of the above, it is submitted that the present Application deserves to be dismissed.

Analysis and Findings

6. We have heard the Ld. Counsels of the parties and perused the documents available on record.
7. It is the case of the Applicant that the Mortgage Deed dated 29.07.2021, executed between the Corporate Debtor and Respondent No. 1, thereby creating a security in favour of the Respondent No. 1, falls under the purview of preferential transactions under section 43 of the IBC, 2016 and the payments of Rs. 3.80 Crores made by the Corporate Debtor under the head of staff salary, were made with the intention to defraud Creditors and therefore falls under section 49 of IBC, 2016. Per contra, it is the case of the Respondent that the transaction was made in the ordinary course of business and the transactions cannot be classified as preferential.
8. The transactions in question as submitted by the Applicant are detailed as under:

Transaction with M/s Suraksha Realty Limited

It is submitted that the Corporate Debtor has entered into a Debenture Subscription Agreement (DSA) dated 18.12.2014 which is unregistered and pursuant to the DSA executed a Mortgage Deed dated 29.07.2021 i.e., 7 years after the DSA and two months before the initiation of CIRP of the Corporate Debtor - which matches the relevant timeline as prescribed under section 43 of the IBC. The said Mortgage Deed created rights with respect to 29 units with a total carpet area of 61,803 sq. ft. in Project Avenue 54 in favour of the Respondent No. 1.

Transaction Defrauding Creditors

It is submitted that the Corporate Debtor has made payments of Rs. 3.80 Crores and categorized these payments as Salary Payments. However, the same was not routed through the Individual Staff salary ledger. Further, there is a Debit Balance of Rs. 3.80 Crores in the Staff

Salary Ledger. It is contended that the absence of substantiating documents/justifications raises questions about the nature and legitimacy of these financial activities, indicating that these transactions to the tune of Rs. 3.80 Crores was done with the intention to defraud Creditors and therefore falls under section 49 of IBC, 2016.

9. Based on the facts of the case and rival contentions of the parties, the issues that arise for consideration in the present case are:
- i. Whether the mortgage deed creates interest in favour of the Respondent No.1 and whether such creation of interest puts the Respondent No. 1 in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53?
 - ii. Whether the Mortgage Deed executed between the Corporate Debtor and Respondent No. 1 comes under the 'Ordinary Course of Business' as stipulated under Section 43(3)?
 - iii. Whether the transaction falls under look back period as Stipulated under Section 43(4)
 - iv. Whether the payments made under the head of salary payment fall under the purview of Section 49?

10. For ease of reference provisions of section 43 is extracted below: -

“Section 43: Preferential transactions and relevant time.

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in Section 44.

(2) A corporate debtor shall be deemed to have given a preference, if-

- (a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and*
- (b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.*

(3) for the purposes of sub-section (2), a preference shall not include the following transfer-

- (a) transfer made in the ordinary course of business or financial affairs of the Corporate Debtor or the transferee;*
- (b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that—*
 - (i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest and was used by corporate debtor to acquire such property; and*
 - (ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property;*

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation.—For the purpose of sub-section (3) of this section, “new value” means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if—

(a) it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.”

11. Section 43 of IBC deals with preferential transaction and Sub Section (2) of section 43 of IBC provides for a deeming provision that if there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and if the transfer has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53, then such transfer would fall within the ambit of preferential transaction. However, sub-section (3) lays down exceptions one of which is when transfer is made in the ordinary course of the business of the Corporate Debtor and the transferee.

Issue i: Whether the mortgage deed creates interest in favour of the Respondent No.1 and whether such creation of interest puts the Respondent No. 1 in a beneficial position than it would have been in

the event of a distribution of assets being made in accordance with section 53?

12. On perusal of the Mortgage Deed dated 29.07.2021, it is evident that the Corporate Debtor has created a security interest over 29 units having aggregate area of 61,803 sq. ft. in favour of the Respondent No. 1. It is pertinent to note that, the Respondent No. 1, prior to execution of the said Mortgage Deed was an unsecured financial creditor. Even though, the corporate debtor under the DSA dated 18.12.2014 had undertaken to execute deed for perfecting the security, however, such deed was executed only on 29.07.2021 (ie. 2 months prior to initiation of the CIRP). Thereafter, by the said mortgage deed, second charge was created in favour of the Respondent No. 1 and it had the effect of changing the status of Respondent No. 1 from unsecured to secured creditor. Hence, the Respondent No. 1 is put in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

Issue ii: Whether the Mortgage Deed executed between the Corporate Debtor and Respondent No. 1 comes under the ‘Ordinary Course of Business’ as stipulated under Section 43(3)?

13. It was submitted that the CIRP against the Corporate Debtor was initiated by this Tribunal vide order dated 06.09.2021. The Mortgage Deed between the Corporate Debtor and was executed on 29.07.2021, i.e., just 2 months prior to the commencement of CIRP. The Applicant has submitted that the Mortgage Deed was executed 7 years after the execution of the DSA, whereas, the Respondent No. 1 has contended that the said Mortgage Deed was executed in pursuance of the DSA dated 18.12.2014 and the same comes under the exception of “ordinary course of business” as stipulated under Section 43(3).

14. In the present case, the Respondent No. 1 has relied on the DSA dated 18.12.2014 to demonstrate that the transactions were undertaken in the ordinary course of business. It is contended that the Mortgage Deed

was executed by the Corporate Debtor in the ordinary course of its business and was executed in the course of the same transaction which originated in the year 2014 upon execution of the DSA and the mortgage deed amounted to perfection of security interest already created under the DSA.

15. With regard to the delay of 7 years in executing the mortgage deed, it was contended that, on representations made by the Corporate Debtor, the Respondent No. 1 has waited for Corporate Debtor to discharge the facilities availed from Yes Bank Limited and also took the requisite steps to secure its interest by excluding area admeasuring 61803 sq. ft. while executing a mortgage in favour of the DHFL. Subsequently, on failure of the Corporate Debtor to discharge the facilities from Yes Bank, the Corporate Debtor and Respondent No. 1 executed a Mortgage Deed thereby creating a second charge in favour of the Respondent No. 1.

16. In the given circumstance, it is evident that there is substantial gap of 7 years in executing a mortgage deed and the Respondent No. 1 could have created first charge immediately after the execution of DSA on 18.12.2014 or a second charge immediately after the execution of mortgage deed in favor of Yes bank. It appears that Respondent No. 1 had no or little intention of perfecting security as it earlier allowed Yes Bank to create first charge and later left it open even to create second charge by DHFL, however, leaving certain area. Such predisposition and non-action could hardly be termed as anything but being 'Ordinary Course of Business'. It is also vital to emphasize that the legal maxim "Vigilantibus non dormientibus jura subveniunt" translates to "the law aids the vigilant, not those who sleep over their rights" and is applicable on the facts and circumstances of the present case as there is unjustifiable gap and merely taking certain steps to secure the security interest does not justify the substantial gap in execution of the Mortgage Deed. Hence, the said mortgage creating a interest in favour of the Respondent No. 1 cannot be considered as falling under the "Ordinary Course of Business".

Issue iii. Whether the transaction falls under look back period as Stipulated under Section 43(4)?

17. To determine whether the transaction falls under look back period, it would be relevant to take note of the Section 43(4), which is as under;

“(4) A preference shall be deemed to be given at a relevant time, if—

(a) it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.”

18. It is an undisputed fact that the Respondent No. 1 in the present case is not a related party and the relevant time for scrutinizing the preferential transactions made in favour of a person other than a related party is one year preceding the insolvency commencement date. In the present case the CIRP of the Corporate Debtor was initiated vide order dated **06.09.2021** and the Corporate Debtor and Respondent No. 1 has executed the said Mortgage deed on **29.07.2021**. Hence, the mortgage deed and subsequent creation of security interest in favour of the Respondent No.1 clearly falls under the look back period of one year as stipulate under section 43(4)(b).

19. The applicant has also submitted that the Debenture Subscription Agreement (DSA) dated 18.12.2014 is unregistered. However, this Bench is of the judicious opinion that the RP has gone into the correctness of documents submitted by the Respondent, which in our opinion cannot be gone into by him. In this regard, reliance could be placed on the judgment of Hon’ble NCLAT in **Mr. Umesh Kumar V. Mr. Narendra Kumar Sharma, Insolvency Resolution Professional of Indirapuram Habitat Centre Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 100 of 2024]**, wherein it has held as under-

“24.....We are of the considered opinion that examining the validity/sustainability of any contractual agreement including its formatting etc lies outside the purview of the charter of duties and responsibilities of the RP. In fact, determination of the tenability/validity of a contractual agreement falls in the realm of a civil dispute and therefore outside the scope and jurisdiction of both the Adjudicating Authority and the Appellate Tribunal.”

20. Based on the above discussion and the documents on record, we are of the considered opinion that this case clearly falls within the scope of Section 43 of the IBC, 2016. Therefore, the relief sought in **prayer clause (ii) is allowed**, and accordingly, the security interest created in favour of Respondent No. 1 stands released/discharged forthwith.

Issue iv. Whether the payments made under the head of salary payment fall under the purview of Section 49?

21. The Applicant has contended that the salary payment was made without providing any details in the books of accounts or substantiating documents and it indicating that these transactions to the tune of Rs. 3.80 Crores was done with the intention to defraud Creditors. Whereas, the Respondent No. 3 to 5 through their written submissions have contended that the salary was paid but not expensed out due to covid-19 pandemic and unavailability of office staff due to lockdown. Subsequently on 06.09.2021 the IRP has been appointed thereby control and management of the corporate debtor was handed over to the IRP. Hence, the suspended directors were unable to update the data and accounts. It is further argued that list of documents is filed with the written submissions to show the working of the salary account but the same is not on record.

22. It would be relevant to take note of the section 49 and 45(2) of the IBC, 2016, which is as under;

“49. *Transactions defrauding creditors.—Where the corporate debtor has entered into an undervalued transaction as referred to in subsection (2) of section 45 and the Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor—*

(a) for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor; or

(b) in order to adversely affect the interests of such a person in relation to the claim,

the Adjudicating Authority shall make an order—

(i) restoring the position as it existed before such transaction as if the transaction had not been entered into; and

(ii) protecting the interests of persons who are victims of such transactions: Provided that an order under this section—

(a) shall not affect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and

(b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.”

“45(2). *A transaction shall be considered undervalued where the corporate debtor—*

(a) makes a gift to a person; or

(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.”

23. In the present case, the Applicant has not produced the details of the parties in whose favour the payment has been made. Furthermore, the Applicant has failed to establish that the said transactions fall under the purview of Section 49 of IBC, 2016. Moreover, Section 45(2) stipulates a gift or transfer of an asset for consideration of a value which is significantly less than the value of consideration provided by the Corporate Debtor and the same is not established by the Applicant.
24. It is important to note that the employees of the Corporate Debtor did not file any claim with the Resolution Professional for salary dues. Additionally, the explanation given by Respondents No. 3 to 5, that they could not update the data due to the COVID-19 pandemic and the unavailability of office staff, was not refuted by the Resolution Professional. Other than the Transaction Audit Report and subsequent verification, the Resolution Professional had no additional material to establish that Respondents No. 3 to 5 have undertaken the transaction with 'intent' to defraud the creditors.
25. Further, the Respondent No. 3 to 5 have contended that the audit report does not give a true reflection of the facts of the accounts of the Corporate Debtor and is conducted without seeking inputs from the suspended management. In this regard, it is pertinent to note that the Transaction Report is advisory in nature based on which the RP may form its opinion under section 43(1). In the present case, after considering such facts and circumstances the RP has formed independent opinion that the preference has been given and made the present application. What is required under the law is forming of opinion by the RP and the same has not to be shown or demonstrated by any specific document. Hence, it cannot be said that the Respondent has failed to form independent opinion in the present case.
26. Considering the above discussion and the documents on record, we hold that the Applicant has failed to established a case under Section

49 of the IBC, 2016. Accordingly, the relief sought in **prayer clause (iv) is dismissed.**

27. It is noted that the Applicant is not pressing relief sought in **prayer clause (iii)** in respect of the Vistra Transaction, therefore, the same is **not granted.** It is also noted that Respondent No. 6 did not appear despite being given sufficient opportunity, and therefore, the case has proceeded ex-parte against them.

28. In view of the facts and circumstances of the case, discussion herein above and as concluded in foregoing paragraphs, Prayer (ii) is allowed and prayer (iv) is dismissed. Prayer (iii) is dismissed as it being not pressed. Accordingly, IA/4504/2024 is **partially allowed.**

29. No order as to costs.

Sd/-

Charanjeet Singh Gulati
Member (Technical)

|Omkar, LRA|

Sd/-

Mohan Prasad Tiwari
Member (Judicial)