NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 390 of 2023
& I.A. No. 1301, 1302 of 2023, 7105, 7610 of 2024

(Arising out of the Order dated 10.02.2023 passed by the National Company Law Tribunal, New Delhi, Principal Bench, in I.A No. 836 / 2023 in C.P. (IB) No. 654(PB)/2019.)

IN THE MATTER OF:

Canara Bank
Through its Authorized Representative
A Body Corporate constituted under Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970
Having its Head Office At:
112, J.C. Road, Bangalore – 560002.

And having one of its branches
Amongst others at:
Retail Assets Hub
Now Shifted at:
Delhi Tamil Sangam R.K. Puram, Sector – 5,
New Delhi. **…Appellant**

Versus

Sh. Vivek Kumar
Resolution Professional
M/s AVJ Developers (India) Private Limited
R/o C-604, Rosewood Apartments,
Mayur Vihar-1, Extension,
New Delhi – 110091. **…Respondent**

Present

For Appellants: **Mr. Brijesh Kumar Tamber, Mr. Prateek Kushwaha, Mr. Vinay Singh Bist, Adv.**

For Respondents: **Mr. Saurabh Kalia, Mani Gupta, Aman Choudhary, Sonali Jain, Adv.**
Mr. Ambuj Tiwari, Adv.

Mr. Vivek Kumar, RP

J U D G E M E N T

(09.01.2025)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal has been filed by Canara Bank who is Appellant herein under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('**Code**') against the Impugned Order dated 10.02.2023 passed by the National Company Law Tribunal, New Delhi, Principal Bench ('**Adjudicating Authority**') in I.A. No. 836 of 2023 in C.P.(IB) No. 654(PB)/2019, where by the application preferred by the Applicant, seeking appropriation directions against the Respondent to admit the claim of the Appellant has been dismissed.

2. Sh. Vivek Kumar Resolution Professional of M/s AVJ Developers (India) Private Limited is the Respondent .

3. The Appellant stated that he submitted claims on 25.02.2021 under Form-C as a Financial Creditor to Resolution Professional. This claim pertains to 59 individual accounts of borrowers who obtained housing loans for purchasing residential units within the Corporate Debtor's project. The total amount claimed by the Appellant, as of 21.10.2019, is Rs. 17.46 Crores.

4. The Appellant brought out that he received a communication on 01.09.2022 from the Resolution Professional, who stated that the Appellant's claim had been rejected. The primary reason for this rejection was that only individual homebuyers are entitled to file claims directly with the Resolution

Professional. The Appellant's was also deemed to lack locus standi, as it was made on behalf of the homebuyers without any formal authorization. The Appellant contends that this decision is unjust, as it undermines the collective interests of the homebuyers represented. The Appellant asserts that he acted in good faith to represent the claims of multiple homebuyers who were unable to navigate the complexities of the insolvency process individually. Furthermore, the Appellant stated that proper authorization was implied through prior communications and actions taken by the homebuyers. In light of these circumstances, the Appellant urged this Appellate Tribunal that his claims should be reconsidered, emphasizing the need for a more inclusive approach acknowledging collective representation in claims related to insolvency proceedings.

5. The Appellant submitted that the rejection of the claim by the Resolution Professional was merely mechanical and did not provide any opportunity for the Appellant to clarify the situation regarding the loan accounts that have outstanding dues owed to the Appellant. It is in the case of the Appellant that this lack of engagement prevented fair assessment of the claims and the circumstances surrounding it.

6. The Appellant submitted that the disbursement of housing loans were made directly to the Corporate Debtor on behalf of the borrowers. A tripartite agreement was executed among the Appellant, the Borrower, and the Corporate Debtor for all relevant accounts. Furthermore, the Appellant submitted that

according to the terms of the said tripartite agreement, the Appellant holds a prior charge/lien on the residential units within the Corporate Debtor's project for which the housing loans were advanced.

7. The Appellant stated that one of the terms of the tripartite agreement stipulates that in the event of default, the entire amount advanced by the bank on behalf of the borrowers must be refunded by the Corporate Debtor/Builder to the bank. The Appellant emphasizes that this provision clearly outlines the obligations of the Corporate Debtor in case of default, reinforcing the right of the Appellant to recover funds advanced for housing loans therefore the Appellant assume the character of the Financial Creditor in terms of Section 5(8) of the Code.

8. The Appellant elaborated that the specific clause is unique and is in contrast with typical prevalent Tripartite Agreements amongst Bank, Homebuyer and Builders/ Corporate Debtor where full responsibilities of repayment of loan is on the Homebuyer as borrower and the Builders/ Corporate Debtor does not assume any responsibilities of repayment. The Appellant amplified that it is the intent of the Agreement which is vital to determine whether it is Financial Debt in terms of Section 5 (8) of the Code or not as well as who is the Financial Creditor. The Appellant submitted that in present case clearly he is the Financial Creditor as he directly lent money to the Corporate Debtor, albeit on behalf of the Homebuyer/borrower, with clear and specific clause that in case of any default by the Homebuyer/borrower or

Builders/Corporate Debtor not delivering flat to the Borrower etc. the Builders/Corporate Debtor will refund money to the Appellant Bank.

9. The Appellant submitted that he has approached the Debt Recovery Tribunal ('**DRT**') by filing Original Applications ('**OAs**') against the individual homebuyers (borrowers) concerning the outstanding dues. In its rulings on these OAs, the DRT, Delhi, has directed that the primary liability to refund the outstanding dues owed to the Applicant Bank lies with the Corporate Debtor. Specifically, one such OA filed by the Appellant, bearing number 356/2019, was disposed of in accordance with this directive.

10. The Appellant submitted that in a separate instance concerning one of the accounts, where the borrower has an outstanding debt payable jointly and severally with the Corporate Debtor to the Applicant Bank, a Writ Petition (C) No. 16170/2022 was filed before the Hon'ble Delhi High Court titled ***Pradeep Kumar Bhatt vs. Reserve Bank of India & Ors*.** In its order dated 23.11.2022, the Hon'ble Delhi High Court stayed the proceedings initiated by the Applicant Bank before the DRT against the Petitioner.

11. The Appellant stated that the Applicant Bank cannot be left without a remedy in the face of the admitted and adjudicated debt and default. The Appellant emphasized that it is essential that the rights of the Applicant Bank are upheld and that appropriate measures are taken to address the outstanding obligations.

12. The Appellant submitted that the reliance placed by the Resolution Professional on the judgment in ***Axis Bank Limited vs. Value Infracon India Private Limited & Anr*** passed in Company Appeal (AT) (Insolvency) No. 582 of 2020 is not applicable to the present case. This is due to the specific orders issued by the DRT, Delhi, which stipulated that the bank is permitted to pursue its claim before the Liquidator or the Adjudicating Authority as appropriate. The Appellant submitted that these orders establish a clear basis for the Appellant's claims and differentiate this case from the circumstances addressed in the cited judgment by the Resolution Professional.

13. The Appellant submitted that out of the 32 accounts for which the claim has been filed, it holds a decree in its favor from the DRT against 18 of those accounts, as well as against the Corporate Debtor. Furthermore, as per Section 3(10) of the Code, a creditor is defined as:*"any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor, and a decree-holder."*This definition underscores the Appellant's standing as a legitimate creditor in this matter.

14. The Appellant submitted that the rejection of the claim by the Respondent/ Resolution Professional, along with the subsequent dismissal of L.A. 836 of 2023, was legally flawed. The Appellant stated that the order of DRT, Delhi, were made in favor of the Appellant and this vital fact was ignored by the Adjudicating Authority.

15. The Appellant stated that, in light of the aforementioned facts and circumstances, the dismissal of L.A. 836/2023 is unsustainable under the law as the Adjudicating Authority failed to recognize that the Appellant cannot be left without a remedy concerning the admitted and adjudicated debt and default. Furthermore, the reliance placed by the Adjudicating Authority on the judgment in ***Value Infracon India Limited (Supra)*** is not applicable to the present case, given the specific orders issued by the DRT, Delhi, which allow the bank to pursue its claim before the Liquidator or the National Company Law Tribunal, as appropriate. The Adjudicating Authority has also overlooked that under the framework of the Code, particularly as per Section 5(8), the Appellant has the right to maintain its claim as a Financial Creditor against the Corporate Debtor in this case.

16. The Appellant submitted that the contractual arrangement established between the parties explicitly required the Corporate Debtor to indemnify the Bank in the event of a default. The Appellate submitted that the Allottees or borrowers, who received the loan, have not submitted any claims to the Respondent/ Resolution Professional. Consequently, in the absence of such claims being listed among the creditors in the information memorandum, there exists a significant risk that the right to claim may be extinguished upon the approval of the Resolution Plan. This situation raises serious concerns regarding the enforcement of indemnification rights and the overall integrity of the resolution process.

17. The Appellant submitted that the security interest charge has been duly created, with the explicit consent of the Corporate Debtor. Furthermore, this charge has been registered in accordance with the provisions of the SARFAESI Act, 2002, and is recorded under the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI). This registration underscores the validity and enforceability of the security interest held by the Appellant Bank.

18. The Appellant submitted that Section 15 (1) of the code mandates for the issuance of public announcement upon the commencement of the CIRP of the Corporate Debtor for inviting the claims against the Corporate Debtor from the creditor and the term claim' defined in Section 3(6) of the code provides for ‘a right to payment'. In terms of Section 16 of the Tripartite Agreement, the Appellant bank have right to payment in the event of default.

19. The Appellant submitted that the Appellant has provided the details of the borrowers/ Allottees who have defaulted in repayment of amount. The said list provides the details pertaining to the name of the borrower, sanctioned amount, NPA date and contractual liability of both Borrower and the Corporate Debtor. The claims were filed by the Appellant Bank on 25.02.2021 claiming to be a secured financial creditor in terms of Section 5(8) of the Code. The Appellant submitted that the definition of financial creditor' provided under Section 7 of the Code includes any person to whom financial debt is owed and definition of financial debt' as provided under Section 5(8) includes any debt along with

interest disbursed against the consideration of time value of money including money borrowed against the payment of interest and liability arising out of any guarantee or indemnity.

20. The Appellant submitted that the claim of the Appellant is arising out of the terms of the Tripartite Agreement. The Appellant stated that it is a settled law that the claim of the Allottees falls under the head of financial creditor in class and they are represented by the Authorized Representative. In terms of Section 5(8)(f) the Allottees are identified as Financial Creditors.

The Appellant elaborated that when any claim falls under the definition of the financial debt then such liability in the case of presence of guarantee or indemnity by any Person will also fall under the category of financial debt and in terms of Section 5(8)(i) such claimant is to be treated as Financial Creditors. The Appellant emphasised that the analogy is that when in case of contract of guarantee if a claim of the principal borrower falls under the head of financial debt then upon invocation of guarantee the claim against the guarantor by the creditor will also fall under the head of financial debt and such creditor will be treated as Financial Creditors. The Appellant elaborated that in the present case, the Corporate Debtor has already undertaken to secure the amount in Tripartite Agreement then the Appellant is also to be treated as financial creditor because the claim of the Allottee falls under the head of financial debt in view of Section 5(8)(i) of the Code.

21. The Appellant submitted that consequence of event of default is also clearly provided in the tripartite agreement which the Resolution Professional and the Adjudicating Authority failed to consider that the Appellant have right to sale the allotted/ mortgaged units to third party. It terms of the specific provision under the agreement, the right of the Appellant Bank cannot be taken away as per the provisions of the Code.

22. The Appellant during the course of the argument has placed reliance upon the judgment passed by this Appellate Tribunal in the matter of ***Canara Bank vs. Mr. S. Rajendran*** passed in Company Appeal (AT) (CH) (Ins.) No. 277 of 2023 and IA No. 851 of 2023, wherein it was held that non-Registration of Charge under Section 77 of Companies Act, 2013 cannot be ground to come to the conclusion that the claimant is not a secured creditor.

23. Concluding his arguments, the Appellant urged this Appellate Tribunal to dismiss the Impugned Order and allow his appeal.

24. Per contra, the Respondent denied all the averments made by the Appellant in the present appeal.

25. The Respondent submitted that the Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor by an order of the Adjudicating Authority dated 21.10.2019, wherein the Adjudicating Authority appointed Mr. Anil Tayal as the Interim Resolution Professional. Mr. Anil Tayal was subsequently confirmed as the Resolution Professional during the first meeting of the Committee of Creditors ('**CoC**') held on 22.11.2019. However,

on 04.10.2022, the Adjudicating Authority appointed the Respondent as the Resolution Professional replacing Mr. Anil Tayal.

26. The Respondent submits that the Appellant filed the claim amounting to Rs.17.46 Crores for the funds disbursed for the allotment of units to homebuyers in the AVJ Heights project of the Corporate Debtor on 25.02.2021. The Respondent highlighted that while the Appellant initially filed claims for 59 homebuyers, the Appellant filed I.A. No. 836 of 2023 before the Adjudicating Authority, and the current appeal only pertain to 32 homebuyers.

27. The Respondent submitted that the claims, submitted by the Appellant on 01.09.2021 were rejected by the erstwhile Resolution Professional primarily on the basis that it did not meet the criteria for classification as a financial debt under the definition provided in Section 5(8) of the Code. The Respondent submitted that the decision is supported by the legal principles established by this Appellate Tribunal in the ***Value Infracon India Private Limited (Supra)***, wherein it was held that Bank can't be treated as Financial Creditor in real estate project and it is only Homebuyers who are to be considered as the Financial Creditor as a class.

28. The Respondent submitted that, based on the said judgment, the Appellant cannot be classified as a Financial Creditor with respect to the loans extended to homebuyers for the purpose of financing the allotment of flats in the AVJ Heights project of the Corporate Debtor.

29. The Respondent submitted that the Appellant has attempted to establish its status as a Financial Creditor by relying on the tripartite agreements entered into among the homebuyers, the Appellant, and the Corporate Debtor. The Respondent referred to the recitals in these tripartite agreements states: *"WHEREAS the Borrower has approached the Bank to grant him a loan of ₹11,00,000 (Rupees Eleven Lac Only) for the purchase of Schedule B property, and the Bank has, via its sanction letter dated ..., agreed to sanction the loan of ₹11,00,000 (Rupees Eleven Lac Only) to the Borrower (hereinafter referred to as 'Loan')."* The Respondent also gave reference to various clauses within the Loan Agreement, such as Clause 2 and Clause 20 to indicate that the loan was disbursed to the homebuyer and not to the Corporate Debtor. The Respondent submitted that it is the homebuyers who are the Financial Creditors and not the Appellant as the Bank/Lender.

30. The Respondent submitted that the CoC approved the resolution plan for the Corporate Debtor during its fourteenth meeting held on 11.10.2021 and the Resolution Professional filed application IA No. 5385 of 2021 on 09.11.2021, seeking approval for the resolution plan from the Adjudicating Authority, which is currently pending adjudication. The Respondent also referred to this Appellate Tribunal's earlier judgement in the case of ***Mukul Kumar vs. M/s RPS Infrastructure*** passed in *Company Appeal (AT) (Insolvency) No. 1050 of 2020*, where it was held that a resolution professional is not permitted to entertain new claims once a resolution plan has been approved by the CoC

which establishes the finality of the CoC's decision and the importance of adhering to established processes within the insolvency framework.

31. The Respondent submitted that the liability to repay the loan lies solely with the individual homebuyers, as explicitly stated in the tripartite agreement. The Respondent denied the averments of the Appellant that according to the terms of the tripartite agreement, the Appellant holds prior charge or lien on the residential units or flats within the Corporate Debtor's project for which the housing loans were provided. The Respondent emphasized that this assertion of the Appellant is unfounded. The Respondent stated that under Section 77 of the Companies Act, 2013, it has been stipulated that every security interest must be registered with the RoC within 30 days of its creation and the Appellant has failed to produce any evidence demonstrating that such a charge was registered, thereby undermining its claim of a prior lien on the properties in question.

32. The Respondent submitted that the Appellant's assertion that its claim is based on adjudicated debt and default, and therefore must be accepted, is misleading in view of this the Appellate Tribunal's judgment in the ***Value Infracon India Private Limited (Supra),*** where it was held that a mere "Permission to Mortgage" is irrelevant in the absence of a registered charge under Section 77 of the Companies Act, 2013. The Respondent stated that the existence of a tripartite agreement does not alter the nature of the amount borrowed by the homebuyer in relation to the Bank and the Corporate Debtor.

33. The Respondent submitted that many homebuyers have already filed their claims in accordance with the law and accepting the Appellant's claim would lead to duplicity of claims, which could adversely impact the value of the Corporate Debtor and potentially disrupt the ongoing CIRP.

34. The Respondent submitted that the Appellant has relied on the order dated 26.08.2022 issued by the Debt Recovery Tribunal in O.A. No. 356/2019 which was obtained by the Appellant through the concealment of material facts and in violation of Section 14(1)(a) of the Code, which imposes a moratorium on the institution of suits or continuation of pending suits or proceedings against the corporate debtor, including execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or other authority. The Respondent stated that the Appellant filed its claim on 01.09.2021, while the order from the Debt Recovery Tribunal was pronounced on 26.08.2022. This timeline clearly indicates that the Appellant failed to disclose the imposition of the moratorium on the Corporate Debtor to the Debt Recovery Tribunal and the Appellant did not mention these proceedings in its claim submitted to the erstwhile Resolution Professional. The respondent argues that these actions amount to a fraud on the court, violating the established moratorium, thereby rendering such orders non est in law. Consequently, the Respondent asserted that Appellant cannot rightfully claim to be a financial creditor based on these proceedings, as they were conducted without due regard for the legal framework governing insolvency proceedings.

35. The respondent submitted that the established legal precedent requires a direct disbursal of the amount owed by the financial creditor to the corporate debtor for the debt to qualify as 'Financial Debt' under the relevant provisions. In this case, although the loaned amount was credited directly to the accounts of the Corporate Debtor, the Respondent asserted that there was no actual disbursement made in exchange for the consideration of time value of money, as required to classify the Appellant as a financial creditor. Furthermore, it is acknowledged that the Appellant /Canara Bank itself has admitted that the funds were disbursed "on behalf of the said borrowers," indicating that the transaction does not meet the necessary criteria for direct engagement with the Corporate Debtor.

36. The respondent submits that the contention of the Appellant that the Corporate Debtor has guaranteed the debt or indemnified the Appellant under Clause 16 must be rejected as the obligation of the Corporate Debtor does not extend to repaying the money owed by the homebuyer; rather, it is limited to refunding the money received by the Corporate Debtor from the Appellant. This obligation is triggered not solely by a default on the part of the homebuyer but also in other specific instances, which removes it from the definition of a guarantee. Furthermore, the Respondent argued that the obligation outlined in Clause 16 should be interpreted as akin to that of a garnishee, rather than creating an independent right against the Corporate Debtor. The Respondent stated that the Tripartite Agreement clearly indicates that the liability for

repayment remains with the homebuyer, and specific provisions for indemnification are explicitly included within that agreement. Therefore, any claims by the Appellant regarding a guarantee or indemnification by the Corporate Debtor lack legal merit and should be rejected.

37. The Respondent submits that the appellant claim regarding a prior charge or mortgage over the property, as stipulated in the Lease Deed dated 01.09.2010 between the Greater Noida Industrial Development Authority (GNIDA) and the Corporate Debtor, is without merit. The Respondent explained that Lease Deed explicitly states that the Corporate Debtor could only create a charge or mortgage on the property after obtaining prior permission from GNIDA. In this instance, the Respondent stated that no such permission was ever sought or obtained by the Corporate Debtor, thereby rendering any purported charge in favor of the Appellant invalid. The Respondent emphasized that Appellant was fully aware of the terms of the Lease Deed, as these terms were also referenced in the Builder Buyer Agreement executed between the allottee and the Corporate Debtor. This agreement was available to Appellant at the time of executing the Tripartite Agreement, further indicating that Appellant cannot claim ignorance of the restrictions imposed by GNIDA. The Respondent contended that the Appellant's assertions regarding a valid charge on the property are legally unfounded.

38. Concluding his arguments, the Respondent requested this Appellate Tribunal to dismiss this appeal with costs.

39. The Intervention Application bearing I.A. No.7105 of 2024 was made before us. That the Intervener is suspended director of Corporate Debtor/AVJ Developers (India) Pvt. Ltd. (Corporate Debtor).

40. The intervener submits that, according to the terms of the Tripartite Agreement, no security is created in favor of the Appellant Bank in any manner,

41. The case of the Intervenor is that Clause 18 clearly indicates that security is not established in favor of the Appellant Bank but rather pertains to a third party that has yet to be identified by the Appellant Bank. The Intervenor contended that the Appellant Bank cannot benefit from a clause that is inherently premature and has not been enforced by the Appellant Bank itself. This lack of a valid security interest further supports the argument against the Appellant's claims regarding his rights under the Tripartite Agreement.

42. The intervener submits that the Appellant Bank's reference to certain paragraphs in the Tripartite Agreement as formal clauses with riders is misleading. Specifically, Clause 3 of the Tripartite Agreement states that the "Bank shall be first and paramount over the charge which the Builder may have over the said flat/loan amount." The Intervenor stated that according to the mortgage clause in the lease agreement with GNIDA dated 31.08.2009, GNIDA holds the first charge over the assets. Therefore, the Appellant Bank's claim to a first charge is inherently illegal.

43. The Intervenor submitted that the Appellant Bank has not obtained any permission from GNIDA prior to mortgaging the property in its favor, rendering these clauses inapplicable. The absence of such permission means that any purported charge or lien created by the Appellant Bank lacks legal standing and cannot be enforced. Thus, Appellant's claims regarding its security interest should be dismissed based on these grounds.

44. The Intervenor emphasised that even if the claim of the Appellant/Canara Bank is not allowed, then also there is a provision in Resolution Plan, to admit his claim and give him the claim amount in prorata basis to the other creditor, under which category he falls accordingly Resolution Plan need not to be return to CoC at any event.

> *"1. In case any additional fund required for the completion of project or for the payment of any inability as per the resolution plan, the same shall be infused by the RA from his own source."*

45. The Intervenor further argued that even if the claim of the Appellant/Canara Bank is admitted, its share in the Committee of Creditors (CoC) would remain negligible, amounting to less than 1%. Furthermore, if additional claims are admitted after CoC approval of the Resolution Plan and the plan is subsequently referred back to the CoC, it could create perpetual delays, hindering the approval of the Resolution Plan by the CoC and, consequently, by the Adjudicating Authority.

46. Concluding his arguments, the Intervenor requested this Appellate Tribunal to dismiss this appeal.

Findings

47. We note that the Appellant/Canara Bank filed claims asserting that it advanced funds to Corporate Debtor on behalf of the individual homebuyers for dwelling units. We note that the Corporate Debtor defaulted on construction and in handing over flats and is currently under CIRP. The Respondent rejected Appellant's claim on 01.09.2022, stating that the claim did not qualify as financial debt under Section 5(8) of the Code. The Respondent referenced the Hon'ble Supreme Court of India judgement in the case of ***Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors.*** passed in Writ Petition (Civil) No. 43 of 2019 decided on 09.08.2019 which established that homebuyers are considered financial creditors under Code provisions. Additionally, the Respondent also cited this Appellate Tribunal's judgement ***Value Infracon India Pvt. Ltd. (Supra)*** that banks lending to homebuyers cannot be classified as financial creditors since the repayment obligation lies with the homebuyers. We further note that the Adjudicating Authority held that Appellant Bank did not directly finance the Corporate Debtor, making the homebuyers the real Financial Creditors and therefore the Respondent's decision to reject the claim of the Appellant was upheld, leading to the dismissal of IA-836/2023 of the Appellant.

48. It will be necessary for us to refer to the relevant provision of the code which reads as under :-

> *"3(6) "claim" means –*
>
> *(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;*
>
> *(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;*
>
> *3 (10)- "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder.*
>
> *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;*
>
> *3 (34)- "transfer" includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien;*
>
> *5 (7)- "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to*
>
> *5(8)- "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes–*
>
> *(a) money borrowed against the payment of interest;*

(b) any amount raised by acceptance under any acceptance credit facility or its de materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

[Explanation. -For the purposes of this sub-clause, - (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or

any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

(Emphasis Supplied)

49. We would like to refer to the relevant portion of the Impugned Order to understand the reasoning for rejection of IA filed by the Appellant Bank seeking direction of the Respondent to consider his claims. The following is the excerpts from the Impugned Order :-

"This application has been filed by Canara Bank pleading that they have advanced various amount to individual home buyers and home buyers in turn have given the money in advance to the CD for the purpose of booking their units, the CD defaulted in the construction and the CD is now under CIRP proceedings. The Canara Bank/Applicant has filed a claim before the RP on the ground that they are the financial creditors as they have lent the money to the home buyers. This claim was rejected by the RP by proceedings dated 01.09.2022 (Annexure-3) (Page-18) where under the RP relied upon the decision of the Hon'ble NCLAT, New Delhi the relevant portion of which is at Page 19 which reads as under;-

a. That the claim which has been filed by you in Form-C does not qualify as a debt in terms of the definition of the financial debt as defined under section 5(8) of the Code. Section 5(8) of the code,

defines financial debt as "a debt along with interest, if any, which is disbursed against the consideration for time value of money. Further, on the basis of the Judgement dated 09.08.2019, passed by the Hon'ble Supreme Court in matter of Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors [In The Supreme Court Of India Writ Petition (Civil) No. 43 OF 2019], by virtue of which, the Home Buyers in real estate projects were deemed to be Financial Creditors under the provisions of IBC, 2016, Section 5(8)(1) definition of financial debt was amended and an explanation was added to classify any amount raised from allottee under a real estate project shall be deemed to be an amount having commercial effect of borrowing and such debt to be further classified as a financial debt. In addition, the home buyers being financial creditors are entitled to be represented in the Committee of Creditors (COC) through their authorised representative and also possess voting rights pursuant to Regulation 16A & 25A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016.

b. Secondly, the Hon'ble National Company Law Appellate Tribunal, New Delhi Bench at New Delhi, in the matter of Axis Bank Limited Vs. Value Infracon India Private Limited & Aur

[Company Appeal (AT) (Insolvency) No. 582 of 20201 vide order dated 20.12.2021, stated

"17. Be that as it may, we are of the considered view that this subject matter cannot be viewed from such a narrow compass. It is definitely not the scope and objective of the Code to incinde Banks/Financial Institutions which have advanced louns to Hame Buyers to be considered as 'Financial Creditors' and included in the CoC, specifically in the light of the fact the liability to repay the Home Loan it on the individual Home Buyers. This would defeat the very spirit and objective of the Code aiming at Resolution and maximisation of the assets of the 'Corporate Debtor". Presence of a mere tri-partite Agreement does not change the character of the amount borrowed by the Homebuyer vis-a-vis the Bank and vis-a-vis the 'Corporate Debtor'. Viewed from any angle, the Appellant cannot be included as a 'Secured Financial Creditor" in this case."

Admittedly, in the present case the bank has not directly financed the CD. The real financial creditors are the home buyers. The decision of the Hon'ble NCLAT applies to the facts of the present case hence the RP was right in rejecting the claim. We find no reason to interfere in the proceedings and the reasoning of the RP.

(Emphasis Supplied)

50. We note that the claims as submitted by the Appellant bank was considered by the Erstwhile Resolution Professional however the same were rejected, vide e-mail dated 01.09.2022, which reads as under :-

2/2/23, 4:00 PM Gmail - Fw: Fw: Canara Bank, FORM C for claim in NCLT

Gmail canpisce company <canpisce@gmail.com>

Fw: Fw: Canara Bank, FORM C for claim in NCLT

2 messages

From: Avj Developers <cirp.avj@gmail.com>
Sent: 01 September 2022 17:17
To: Retail Hub DELHI C.O. <retailcodel@canarabank.com>; BRIJESH PATEL <brijeshpatel@canarabank.com>
Cc: caaniltayal <caaniltayal@gmail.com>
Subject: Re: Fw: Canara Bank, FORM C for claim in NCLT

CAUTION: This email is originated from outside Canara Bank. Do not click any links or open attachments unless you recognize the sender and know that the content is safe.

Dear Sir,

This is in reference to your claim submitted as a financial creditor in Form-C dated 24.02.2021 vide email dated 25.02.2021, to the undersigned appointed in order to conduct the Corporate Insolvency Resolution Process ("**CIRP**") in the matter of M/s AVJ Developers (India) Private Limited ("**Corporate Debtor**") by the Hon'ble National Company Law Tribunal, Principle Bench, at New Delhi ("**Adjudicating Authority**") vide its order dated 21.10.2019 in the matter of AVJ Developers (India) Private Limited.

The undersigned is in receipt of the aforementioned claim for Rs. 17,46,00,000/- (Rupees Seventeen Crore Forty-Six Lakhs Only) submitted by you in the capacity of a financial creditor in Form-C on account of some housing loan financed to the Corporate Debtor. Further, in order to substantiate your claim you have

relied upon the Housing loan application, sanction letter, tripartite agreement, and account statement however, in support of your claim, you have only submitted the following documents: -

- Form C, Canara Bank, Retail Assets Hub F-19, New Delhi,
- Details of the accounts; and
- Affidavit.

It is pertinent to mention here that upon perusal of your claim in Form-C along with the documents attached thereto and the record of the Corporate Debtor, the undersigned was inclined to reject your claim for the below mentioned reasons: -

a. That the claim which has been filed by you in Form-C does not qualify as a debt in terms of the definition of the financial debt as defined under section 5(8) of the Code. Section 5(8) of the code, defines financial debt as "a debt along with interest, if any, which is disbursed against the consideration for time value of money. Further, on the basis of the Judgement dated 09.08.2019, passed by the Hon'ble Supreme Court in matter of Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors [In The Supreme Court Of India Writ Petition (Civil) No. 43 OF 2019], by virtue of which, the Home Buyers in real estate projects were deemed to be Financial Creditors under the provisions of IBC, 2016, Section 5(8)(f) definition of financial debt was amended and an explanation was added to classify any amount raised from allottee under a real estate project shall be deemed to be an amount having commercial effect of borrowing and such debt to be further classified as a financial debt. In addition, the home buyers being financial creditors are entitled to be represented in the Committee of Creditors (COC) through their authorised representative and also possess voting rights pursuant to Regulation 16A & 25A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016.

b. Secondly, the Hon'ble National Company Law Appellate Tribunal, New Delhi Bench at New Delhi, in the matter of Axis Bank Limited Vs. Value Infracon India Private Limited & Anr [Company Appeal (AT) (Insolvency) No 582 of 2020] vide order dated 20.12.2021, stated that-

> ***"17. Be that as it may, we are of the considered view that this subject matter cannot be viewed from such a narrow compass. It is definitely not the scope and objective of the Code to include Banks/Financial Institutions which have advanced loans to Home Buyers to be considered as 'Financial Creditors' and included in the CoC, specifically in the light of the fact the liability to repay the Home Loan is on the individual Home Buyers. This would defeat the very spirit and objective of the Code aiming at Resolution and maximisation of the assets of the 'Corporate Debtor'. Presence of a mere tri-partite Agreement does not change the character of the amount borrowed by the Homebuyer vis-a-vis the Bank and vis-a-vis the 'Corporate Debtor'. Viewed from any angle, the Appellant cannot be included as a 'Secured Financial Creditor' in this case."***

c. That the said claim has been filed directly by the Bank on behalf of the homebuyers without any authorization being granted to bank by the homebuyers or if any authorization has been granted the same has not been annexed with the claim form.

d. That the bank does not have the onus to file its claim in Form-C on behalf of the homebuyers as on account of the fact that any housing loan financed by the bank to the corporate debtor must have been through a tripartite agreement between the bank, borrower/homebuyer and the Corporate Debtor and therefore, the liability to pay back the borrowed amount lies upon the borrower and not the Corporate Debtor. Since the bank has not provided the financial debt to the corporate debtor directly, the claim in this case has to be filed by the Homebuyers in Form-CA.

e. That the detail of accounts provided by the bank as an annexure to the claim form clearly depict that the individual buyers/borrowers/homebuyers are the one who have approached the bank as each individual also possesses a unique account number through which the bank provided financial assistance to these borrowers. Hence, in this case, it is the prerogative of these individuals to either file claim with the RP or not, while the banks may opt for any legal recourse against these individuals in case the individuals default in payment of their EMIs.

Therefore, in light of the aforementioned facts and circumstances, the undersigned was constrained to reject your claim in Form C as a financial creditor as the same has been filed without any locus and goes against the spirit of the Insolvency and Bankruptcy Code, 2016.

With Warm Regards,
Mr. Anil Tayal
Resolution Professional
In the Matter of AVJ Developers (India) Private Limited
IBBI Reg. No.:-IBBI/IPA-001/IP-P01118/2018- 2019/11818
Regd. Address:-201, Sagar Plaza, District Center, Laxmi Nagar
Delhi-110092
E-Mail: cirp.avj@gmail.com, caaniltayal@gmail.com

On Fri, Aug 19, 2022 at 11:12 AM Retail Hub DELHI C.O. <retailcodel@canarabank.com> wrote:

प्रिय महोदय/महोदया/Dear Sir/Madam

This is a gentle reminder and request to kindly provide us the status of the mentioned case as per the trailing mail. For any query/ calrification please feel free to reach out to Ms Sarayu Bhardwaj at 9646441097.

Please treat the matter as urgent and respond at the earliest.

धन्यवाद सहित / With Thanks
खुदरा आस्ति केंद्र/Retail Assets Hub
दिल्ली तामिल संगम भवन/ Delhi Tamil Sangam
आर.के पुरम/ R. K. Puram
दिल्ली /Delhi -110022

51. From above it is apparent that the Erstwhile Resolution Professional rejected the claims of the Appellant Bank on the ground that the claim filed by the Appellant Bank were not financial debt in terms of Section 5(8) of the Code in the opinion of the Respondent and he referred to the judgment of the Hon'ble Supreme Court of India in the matter of ***Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors.*** passed in Writ Petition (Civil) No. 43 of 2019 decided on 09.08.2019 where it was held that it is the homebuyers in real estate projects who are deemed to be financial creditors under the Code. The Resolution Professional also referred to the Regulation 16A and 25 A of the IBBI (Insolvency Resolution Process for Corporate Person), Regulation, 2016. The Respondent also relied upon the decision of this Appellate Tribunal decided on 20.12.2021 in the matter of ***Value Infracon India Private Limited (Supra)***.

52. Yet another ground taken by the Resolution Professional for rejection of the claim was lack of authorisation by the Homebuyers in favour of the Appellant Bank. We also note that in the rejecting claim the Respondent stated that "*the liability to pay back the borrower amount lies upon the borrower and not the Corporate Debtor."* And finally, the Resolution Professional found that it is prerogative of the homebuyers to either file claim with the Resolution Professional or not to file claims but it is not for bank to file such claims but Appellant bank can take the legal recourse against homebuyers in accordance with the law.

53. Now it will be desirable to look into and examine the relevant clauses of the tripartite agreement entered into amongst the Appellant Bank, the Homebuyers and Borrower/ Corporate Debtor. The relevant portion of the tripartite agreement is reproduced as under :-

"उत्तर प्रदेश UTTAR PRADESH CA 138831

Tripartite Agreement

(To be executed by the Borrower, Canara Bank and Land owning Builder/PA holder of the land owner having rights to construct and sell Flats)

WHEREAS under an Agreement for Sale dated .....entered into between the Builder and the Borrower, the Builder has agreed to sell Schedule B property to the Borrower and in furtherance thereof, the Borrower has already paid to the builder Rs.15,85,000/- (Rupees Fifteen Lac Eighty Five Thousand Only) by way of advance money and the receipt of which is acknowledged by the Builder.

WHEREAS the Borrower has approached the Bank to grant him loan of Rs 11,00,000/- (Rupees Eleven lac Only) for purchase of Schedule B property and the Bank has vide its sanction letter dated.... Agreed to sanction the loan of Rs 11,00,000/-(Rupees Eleven lac Only) to the Borrower (hereinafter called "Loan".

Whereas Borrower and builder represent that after completion of construction of flat, Builder shall execute Sale Deed for Schedule B property in favour of Borrower in terms of this agreement. Pending execution of Sale Deed,

the Bor- rower and the Builder have requested the Bank to disburse the said loan to the Borrower. Bank has agreed to disburse the said loan on the following terms and conditions among others:

2. The Borrower has already paid a sum of Rs.15,85,000/- (Rupees Fifteen Lac Eighty Five Thousand Only) to the builder on..... as advance money for the purchase of Schedule B property. ***The Borrower hereby authorizes the Bank to disburse the above said loan amount directly to the Builder*** *in terms of the above said Agreement for Sale or as requested by the Borrower. The sum of Rs.11,00,000/- (Rupees Eleven Lac Only) advanced by the Bank to the Borrower and remitted by the Bank directly to the builder shall be deemed as disbursed by the Bank directly to the Borrower.*

3. That the Bank has and shall have the first and paramount lien over the money disbursed by the Bank as loan to the Borrower, The charge in favour of the Bank shall be first and paramount over the charge which the Builder may have over the said flat/loan amount.

4. That the Builder agrees that they have no objection to the Borrower(s) mortgaging Schedule B Property as security for the above said Loan.

5. That the Builder shall note in its records, the charge and lien of the Bank over the Schedule B property. The Builder shall not transfer the Schedule B property to any person without the prior written consent of the Bank

11. That on receipt of the entire loan amount, the Builder shall execute a proper Conveyance Deed/ Sale Deed/Lease

Deed in favour of the Borrower. The Builder undertakes to deliver the same along with original Registration fee receipt directly to the Bank and not to the Borrower (s). Before the execution of the Sale Deed /Conveyance Deed/ Lease Deed, the Builder shall inform the Bank about the same and date of registration shall be fixed with written consent of Bank. On receipt of the entire loan amount, the Builder shall deliver possession of Schedule B property to the Borrower.

13. The Borrower/s, hereby undertakes to create equitable mortgage in favour of Bank after obtaining the original sale deed of Schedule B Property as per guidelines of the Bank.

16. In the event of ***default of repayment of the loan and/or the Borrower(s)*** *committing any other default which make the* ***Borrower liable*** *for the* ***re payment of the entire amount outstanding in the said loan as per the terms of*** *the loan agreement executed between the* ***Borrower's and the Bank****, or if the Borrower withdraws from his agreement or* ***Builder cancels*** *the booking of the Borrower, or in the event of failure of the Builder to complete the project, or in* ***the event of death of the Borrower, or in any event where the title to the schedule flat/dwelling unit is not/not being passed on to the*** *Borrower or in any other eventualities of the nature* ***by which the*** *loan advanced by the Bank is* ***not utilised*** *for the purpose for which it was so advanced or breach of any of the terms and conditions contained in this agreement****, the entire amount advanced by the Bank on account of the Borrower shall be refunded by the Builder to the Bank.*** *If the entire amount refunded by the Builder is insufficient to close the loan account, Borrower shall make*

immediate arrangements for payment of such deficit amount *as may be required to* ***close the loan account****. If the Builder fails to repay the amount as stated under this clause, the* ***Borrower shall repay the entire loan*** *amount* ***with interest****, expenses, penal interest, etc. in terms of the loan agreement executed by the Borrower/s.*

17. The Builder hereby agrees that the ***Builder shall not refund the Borrower*** *or any other person any advance/contribution given by the Borrower* ***unless the Builder has taken written consent from the Bank to that effect.***

18. ***In the event of any default by the Borrower and the Builder not paying the dues of the bank, the Bank shall have right to identify third party in the place of Borrower and Builder shall accept the purchaser*** *identified by the Bank and execute necessary Conveyance deed/Sale deed in favour of the said third party /purchaser. The Borrower* ***is bound to accept the said*** *Conveyance deed / Sale deed executed by the Builder at the* ***request of the Bank****. The decision of the Bank as to* ***whether Borrower has committed default or not shall be final and binding on the Borrower Builder.***

(Emphasis Supplied)

54. This Appellate Tribunal had previously passed an order in the present appeal on 19.12.2023 which reads as under:

" This appeal is directed against the order dated 10.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi) by

which I.A. No. 836 of 2023 filed by the Appellant (Canara Bank) praying therein to be declared as a secured financial creditor has been declined.

2.The pleaded case of the appellant is that it had advanced various amount to the Corporate Debtor for booking their units. The Corporate Debtor is in CIRP, therefore, the Appellant filed a claim before the RP on the ground that they are the financial creditor as they have lent money to the home buyers. This claim was rejected by the RP on 01.09.2022. Aggrieved against that decision of the RP, the application bearing I.A. No. 836 of 2023 has been filed which too has been dismissed vide the impugned order relying to a decision of this Tribunal in the case of Axis Bank Vs. Value Infracon India Pvt. Ltd. & Anr. CA (AT) (Ins) No. 582 of 2020 decided on 20.12.2021 in which it has been held that :-

"17. Be that as it may, we are of the considered view that this subject matter cannot be viewed from such a narrow compass. It is definitely not the scope and objective of the Code to include Banks/Financial Institutions which have advanced loans to Home Buyers to be considered as 'Financial Creditors' and included in the CoC, specifically in the light of the fact the liability to repay the Home Loan is on the individual Home Buyers. This would defeat the very spirit and objective of the Code aiming at Resolution and maximisation of the assets of the 'Corporate Debtor'. Presence of a mere tri-partite Agreement does not change the character of the amount borrowed by the Home Buyer vis-a-vis the Bank and vis-avis the 'Corporate Debtor'.

Viewed from any angle, the Appellant cannot be included as a 'Secured Financial Creditor' in this case".

3. Although Counsel for the Appellant has vehemently argued that the impugned order is bad in law but he could not cite any judgment to the contrary to the decision rendered in the Case of Axis Bank (Supra), therefore, we do not find any merit in the present appeal and the same is hereby dismissed. No costs.

(Emphasis Supplied)

55. It will be necessary for us to refer to order of the Hon'ble Supreme Court of India while remanding this case back to us for fresh consideration vide order dated 27.09.2024 passed in Civil Appeal No. 7311 of 2024 in the matter of ***Canara Bank vs. Vivek Kumar, Resolution Professional of AVJ Developers (India) Pvt. Ltd.*** which reads as under :-

"*With the consent of the parties, the appeal is taken up for final hearing. Heard the learned counsel appearing for the parties. One of the issues before the National Company Law Appellate Tribunal (for short, 'NCLAT') was whether as per the clauses of the relevant agreement, the developer was liable to repay the loan. Instead of considering the case of the appellant on facts, by a very cryptic order running into three paragraphs, the NCLAT has dismissed the appeal preferred by the appellant. Reliance placed by the NCLAT on its own judgment appears to be not correct, as the said case was decided on its own facts.*

As the NCLAT has not considered the merits of the appeal preferred by the appellant, we set aside the

impugned order dated 19th December, 2023 and remand Company Appeal No.390 of 2023 for a fresh consideration by the NCLAT.

We direct that the restored Company Appeal shall be listed before the NCLAT on 14th October, 2024 in the morning when the parties who are represented here shall be under an obligation to appear. On that day, the appellant may apply for appropriate interim relief. To enable the appellant to apply for appropriate interim relief, we direct that till 16th October, 2024, the Resolution Plan shall not be approved.

We, however, make it clear that the application for interim relief which will be made by the appellant shall be decided by the NCLAT without being influenced by this limited relief granted by this Court. All contentions of the parties are kept open.

The appeal is accordingly allowed.

The application for intervention is disposed of.

However, if the intervenor make an application in the remanded Company Appeal for intervention, the same shall be considered by the NCLAT in accordance with law. :

(Emphasis Supplied)

56. The case referred by the Respondent as well as the Adjudicating Authority in the case of ***Pioneer Urban Land (Supra)*** and the relevant portion of the judgment reads as under :-

"18. It can be seen that the Insolvency Law Committee found, as a matter of fact, that delay in completion of flats/apartments has become a common phenomenon, and

that amounts raised from home buyers contributes significantly to the financing of the construction of such flats/apartments. This being the case, it was important, therefore, to clarify that home buyers are treated as financial creditors so that they can trigger the Code under Section 7 and have their rightful place on the Committee of Creditors when it comes to making important decisions as to the future of the building construction company, which is the execution of the real estate project in which such home buyers are ultimately to be housed.

19. Shri Shardul Shroff, whose dissent was provided to us in the form of an e-mail, after finding that self-financed home buyers may be financial creditors, but a home buyer who is a borrower is not, then went on to state:

"8. If the home buyers have taken loans from banks, then it is such lenders who should be on the table on the CoC as special status creditors.

9. Our report ought to be altered to the extent that home buyers financiers should be treated as unsecured financial creditors and they should be representatives of the home buyers. There should be no direct right given to home buyers to be on the CoC."

Even the dissent of Shri Shroff recognises that in the case of home buyers, who have taken loans from banks, such banks ought to be on the Committee of Creditors. If such banks ought to be on the Committee of Creditors as representatives of the home buyers, and they are to vote only in accordance with the home buyer's instructions, why should the home buyer himself then not be on the Committee

of Creditors, and why should it make any difference as to whether he has borrowed money from banks in order to pay instalments under the agreement for sale or whether he does it from his own finances? These matters have not been addressed by the dissenting view which in principle, as we have seen, supports home buyers who have taken loans as against home buyers who have used their own finances. Perhaps the real reason for Shri Shroff's dissent is the fact that unsecured, as opposed to secured, financial creditors are being put on the Committee of Creditors. If there is otherwise good reason as to why this particular group of unsecured creditors, like deposit holders, should be part of the Committee of Creditors, it is difficult to appreciate how such a group can be excluded.

The Real Estate (Regulation and Development) Act, 2016 (RERA) and its impact on the real estate sector.

68. However, Dr. Singhvi strongly relied upon the report of the Bankruptcy Law Reforms Committee of November, 2015 and in particular paragraph 3 of 'Box 5.2 – Trigger for IRP' which states that financial creditors are persons where the liability to the debtor arises from a "solely" financial transaction. This Committee report, which led to the enactment of the Code, is an important guide in understanding the provisions of the Code. However, where the provisions of the Code, as construed in the light of the objects of the Code, are clear, the fact that from a huge report one word is picked up to indicate that all financial creditors must have debtors who owe money "solely" from financial transactions cannot possibly have the effect of

negating the plain language of Section 5(8)(f) of the Code. In fact, what is important is that the threshold limit to trigger the Code is purposely kept low – at only one lakh rupees – making it clear that small individuals may also trigger the Code as financial creditors (as financial creditors include debenture holders and bond holders), along with banks and financial institutions to whom crores of money may be due.

69. That this amendment is in fact clarificatory is also made clear by the Insolvency Committee Report, which expressly uses the word "clarify", indicating that the Insolvency Law Committee also thought that since there were differing judgments and doubts raised on whether home buyers would or would not be included within Section 5(8)(f), it was best to set these doubts at rest by explicitly stating that they would be so covered by adding an explanation to Section 5(8)(f). Incidentally, the Insolvency Law Committee itself had no doubt that given the 'financing' of the project by the allottees, they would fall within Section 5(8)(f) of the Code as originally enacted."

(Emphasis Supplied)

57. In ***Pioneer Urban Land (Supra)*** we note that several Writ Petitions were filed before the Hon'ble Supreme Court of India challenging the constitution validity of the amendment made to the Code subsequent to report of Insolvency Law Committee dated 26.03.2018. The amendment was made under Section 5(8)(f) of the Code which entitles the allottees of the real estate project to be financial creditor so that they could independently pursue Section 7 of the Code.

The Hon'ble Supreme Court of India upheld the amendment and also stipulated that amendment was only clarificatory in nature since allottee of the real estate projects were already been presumed in Section 5(8)(f) of the Code and no new rights were created.

58. The order of the Hon'ble Supreme Court of India is very categorical and clear there that the amendment in the Code was made to make homebuyers as Financial Creditors to the extent of money invested by them in buying the concern dwelling units whether financed from to its own source or from borrowed money through banks.

59. We also note that as per amendment in the Code as well as in the judgment of the Hon'ble Supreme Court of India, there is hardly any scope for the lenders/ banks who gave loan to the homebuyers to be treated as Secured Financial Creditor and consequently fined place in this CoC.

60. The Respondent has heavily relied upon the judgment of this Appellate Tribunal in case of ***Value Infracon India Private Limited (Supra),*** thus it will be necessary for us to refer to the said judgment and the relevant portion of the judgment reads as under :-

> *"1. Challenge in this Appeal namely Company Appeal (AT) (Insolvency) No. No. 582 of 2020 is to the Impugned Order dated 05.02.2020, passed in CA No. 639/2019 in CP No. (IB)-22(PB)/2018 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Principal*

Bench, New Delhi), dismissing the Application as devoid of merit….

On perusal of this application, it appears this bank advanced loan to the home buyers of the corporate debtor. In view of it, now the bank is asking this Bench to pass an order declaring him a secured financial creditor of the corporate debtor and also to allow him to sit in the CoC. We are of the view that this bank cannot be called as a creditor to the corporate debtor because the loans are given to the home buyers of the corporate debtor. Therefore, we have not found any merit in this application, hence dismissed as misconceived.

2. Succinctly put, the facts in brief are that the Section 7 Application filed by M/s. Daimler Financial Services Private Limited against the 'Corporate Debtor' was admitted on 04.05.2018; a Public Announcement was made by the IRP inviting claims on 09.05.2018; M/s. Axis Bank hereinafter referred to as the 'Appellant' filed its claim amounting to Rs.15,76,14,801/- on 20.09.2018 vide email, but the Office of the IRP refused to accept the Hard Copy; the RP rejected the document of the Appellant for want of documents on 07.10.2018; the Appellant submitted the claims once again with the relevant documents, but the same was not accepted; and thereafter the Appellant choose to file this Application before the Adjudicating Authority.

4. Submissions of Learned Counsel appearing on behalf of the Appellant:

- *Learned Counsel for the Appellant vehemently contended that the Adjudicating Authority directed the RP to consider*

the claim of the Appellants in the light of the decree/recovery certificate issued by the Debt Recovery Tribunal (DRT) as the recovery certificates have been issued jointly against the Home Buyers and the 'Corporate Debtor'. Therefore, the Appellant who is a certificate holder in the DRT proceedings, cannot be put outside the purview of the definition of Creditor as defined under Section 3(10) of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as the 'Code').

…

• Learned Counsel argued that the allottees are getting the refund of their money under the Resolution Plan in settlement of their claims, there is a possibility that the Home Buyers would not deposit these amounts with the Appellant Banks in settlement of their dues, despite the fact that lien over the said Flat has already been acknowledged by the 'Corporate Debtor' in its separate 'Permission to Mortgage' letter issued to the Appellant at the time of disbursement of the loans. The Appellant has given a list of 42 Home Buyers who have already transferred their respective rights under the Flats in favour of the Appellant as evident from the lien marked by the 'Corporate Debtor' in favour of the Appellant. The subrogation clause mentioned in the standard tri-partite Agreement, the Power of Attorney by the Home Buyer is in favour of the Appellant and other documents executed by the Home Buyers are also in favour of the Appellant.

5. Submissions of the Learned Counsel appearing on behalf of First Respondent/Resolution Professional representing the 'Corporate Debtor':

- *Except for the tri-partite Agreement there is no document which has been signed by all the three parties. The liability to repay the loan is on the individual Home Buyers as stated in the tri-partite Agreement.*
- *The Appellant is claiming to be the 'Secured Creditor' and contended that they have security interest in the property of the 'Corporate Debtor'. Admittedly no 'charge' was created under Section 77 of the Companies Act, 2013 in favour of the Appellant.*
- *The definition of the 'Financial Creditor' under Section 5(8) of the Code was amended to include Home Buyers as the 'Financial Creditors' by inserting explanation under clause 5(8)(f) and accordingly it has been provided for the real estate allottees to be recognised as 'Financial Creditor'. It does not provide that the Banks advancing loans to the real estate allottees for booking of the Real Estate units would be considered as 'Financial Creditors' in any case.*
- *The Hon'ble Apex Court in 'Pioneer Urban Land & Infrastructure Ltd. & Anr.' (Supra) has observed that Home Buyers are to be considered as 'Financial Creditors' irrespective of the fact 'whether he has borrowed money from the Banks or agreed to pay instalments under the Agreement for sale or whether he does it from his own finances'*

Assessment:

7. The central point in this Appeal is whether the Appellant/M/s. Axis Bank can be considered as a 'Financial Creditor' on account of its having sanctioned and released housing loans to some of the allottees who have purchased Flats/units in the Project floated by the 'Corporate Debtor'

9. The Hon'ble Supreme Court in paras 18 and 19 in 'Pioneer Urban Land & Infrastructure Ltd. & Anr.' (Supra) has observed as follows:

19. Shri Shardul Shroff, whose dissent was provided to us in the form of an e-mail, after finding that selffinanced home buyers may be financial creditors, but a home buyer who is a borrower is not, then went on to state:

"8. If the home buyers have taken loans from banks, then it is such lenders who should be on the table on the CoC as special status creditors.

10. It is clear from the principle laid down by the Hon'ble Supreme Court in 'Pioneer Urban Land & Infrastructure Ltd. & Anr.' (Supra) that it is the Home Buyer who should be considered as 'Financial Creditors' of the 'Corporate Debtor' whether he has self financed his flat or has exercised his choice of taking a loan from the Bank.

11. Additionally, we are of the considered view that as per Section 77 of the Companies Act, 2013 every security interest has to be registered with the Registrar within 30 days of its creation and admittedly no 'charge' has been created against any of the property of the 'Corporate Debtor' in favour of the Appellant..

It is not denied that there is no registered 'charge' created on the asset or property as contemplated under Section 77

of the Companies Act, 2013. Further, there is no submission made on behalf of the Bank as to whether any steps were taken under Section 78 of the Companies Act, 2013. The ratio of 'Indiabulls Housing Finance Ltd.' Vs. 'Mr. Samir Kumar Bhattacharya and Anr.' passed by this Tribunal in Company Appeal (AT) (Insolvency) No. 830 of 2019 regarding "Registration of charge" is squarely applicable to the facts of this case.

15. It can be seen from the material on record that Axis Bank had rendered financial assistance for the purpose of booking units in the Project floated by the 'Corporate Debtor' and had a tie-up with the 'Corporate Debtor' for procuring business from the Home Allottees. The Home Loan Agreements in these cases were made individually by the Borrowers. As per standing instructions, the money in the account of the Home Allottees was disbursed automatically to the 'Corporate Debtor'. Tri-partite Agreement is only by way of security that the developer would withhold the allotment in the event of default by the allottee. The Bank had sought security by creating mortgage of the residential units for the loans availed by the Home Buyers and the 'Corporate Debtor' had given permission for the same to enable the Home Buyer to procure financial assistance.

16. From the aforenoted clause in the tri-partite Agreement entered into between the Home Buyer, the Axis Bank and the 'Corporate Debtor', it is evident that in case of any default by the Borrower, the Bank would have the right to write to the builder for cancellation of Agreement executed between

the developer and the Borrower, whereafter the Bank shall have the right to pay the sale consideration and get the subject property registered. There is no material on record to evidence that any such cancellation has taken place. The Home Loan Agreement read with the Demand Letters and the Allotment Letter clearly specify that when there is a 'default' on behalf of the Home Allottee a penalty interest would have to be paid by the allottee to the Bank. Therefore, the 'default' aspect is to be seen vis-a-vis the Home Allottee and the Appellant Bank only. It is contended by the Respondent that though the Allotment Letter shows that the payments were construction linked, the Bank released the entire amount prior to completion of construction.

17. Be that as it may, we are of the considered view that this subject matter cannot be viewed from such a narrow compass. It is definitely not the scope and objective of the Code to include Banks/Financial Institutions which have advanced loans to Home Buyers to be considered as 'Financial Creditors' and included in the CoC, specifically in the light of the fact the liability to repay the Home Loan is on the individual Home Buyers. This would defeat the very spirit and objective of the Code aiming at Resolution and maximisation of the assets of the 'Corporate Debtor'. Presence of a mere tri-partite Agreement does not change the character of the amount borrowed by the Home Buyer vis-a-vis the Bank and vis-a-vis the 'Corporate Debtor'. Viewed from any angle, the Appellant cannot be included as a 'Secured Financial Creditor' in this case and hence we

find no reasons to interfere with the well-reasoned Order of the Adjudicating Authority."

(Emphasis Supplied)

61. We have already noted that while remanding the present appeal back to us for fresh consideration, the Hon'ble Supreme Court of India has indicated *the NCLAT has dismissed the appeal preferred by the appellant. Reliance placed by the NCLAT on its own judgment appears to be not correct, as the said case was decided on its own facts.*

62. We note from the order of the Hon'ble Supreme Court of India that the case was remanded back to us for the reason that this Appellate Tribunal's earlier order did not consider the merits of the appeal preferred by the Appellant. The Hon'ble Supreme Court of India also indicated this Appellate Tribunal did not consider whether as per clauses of the tripartite agreement, the developer was liable to repay the loan.

63. Hence it become correct important to understand the background and the ratio of the said judgement i.e., ***Value Infracon India Private Limited (Supra).*** We already noted the relevant portion of the said judgment in the preceding paragraphs. It is clear that in the said case the loans were given by the banks to the individual homebuyers and it was responsibility of the homebuyers alone to repay the loan to the bankers/ Financial Creditors and there was no responsibility of the Corporate Debtor/ Borrower for any payment to banker in case of any default by borrower or Corporate Debtor.

64. The most significant portion of the judgment is the relevant clause to tripartite agreement entered amongst the homebuyers/ developers and the Financial Creditors in case of ***Value Infracon India Private Limited (Supra)*** and the same is quoted as under :-

> *"14. The relevant clause of the tri-partite Agreement entered into between the Home Buyers, the developer and the Appellant/M/s. Axis Bank is reproduced as hereunder:-*
>
> *"It is agreed by and between the parties to this Agreement that in case if the BORROWER fails to honour the commitment, the developer/BUILDER shall inform the BANK and the BANK shall have the right to pay the Sale consideration and get it registered either in BANK's name or its nominee. Likewise in the event the Borrower defaults in payment of instalments then, in such an event also, the Bank shall have the right to inform about such default on the part of the Borrower to the Builder and shall accordingly have the right to write to the Builder cancellation of Agreement executed between the Builder and the Borrower, where after the Bank shall have the right to pay the Sale consideration and get the subject property registered either in the Bank's name or in the name of the Bank's nominee."*
>
> *(Emphasis Supplied)*

65. This clause of ***Value Infracon India Private Limited (Supra)*** clearly indicate that in case borrower/ homebuyers failed to honour its commitment, the bank had right to pay the balance sale consideration and get it registered either in bank's name or its nominee's name.

66. In contrast to this the cause 16 of tripartite agreement of the present case before us reads as under :

> *"16. In the event of* ***default of repayment of the loan and/or the Borrower(s)*** *committing any other default which make the* ***Borrower liable*** *for the* ***re payment of the entire amount outstanding in the said loan as per the terms of*** *the loan agreement executed between the* ***Borrower's and the Bank****, or if the Borrower withdraws from his agreement or* ***Builder cancels*** *the booking of the Borrower, or in the event of failure of the Builder to complete the project, or in* ***the event of death of the Borrower, or in any event where the title to the schedule flat/dwelling unit is not/not being passed on to the*** *Borrower or in any other eventualities of the nature* ***by which the*** *loan advanced by the Bank is* ***not utilised*** *for the purpose for which it was so advanced or breach of any of the terms and conditions contained in this agreement****, the entire amount advanced by the Bank on account of the Borrower shall be refunded by the Builder to the Bank.*** *If the entire amount refunded by the Builder is insufficient to close the loan account, Borrower shall make* ***immediate arrangements for payment of such deficit amount*** *as may be required to* ***close the loan account****. If the Builder fails to repay the amount as stated under this clause, the Borrower* ***shall repay the entire loan*** *amount* ***with interest****, expenses, penal interest, etc. in terms of the loan agreement executed by the Borrower/s."*
>
> *(Emphasis Supplied)*

67. This Clause is quite different from the typical clauses of the Tripartite agreement and different from the equivalent clause of the ***Value Infracon India***

Private Limited (Supra) noted, quoted and discussed in the preceding paragraphs.

68. The clause of tripartite agreement in the present appeal is very categorical that in case of default of payment of loan or borrower committing any default or any event of failure of builder or in event where the title of dwelling unit is not passed on to the borrower/ homebuyers or due to breach of any terms and conditions contained in the tripartite agreement ***"the entire advance by the bank on account of borrower shall be refunded by the builder to the bank"***. The clause 16 also provide that in case the builder fails to pay the amount as stated in this clause, the borrower shall pay the entire loan amount with interest, including panel interest etc., in terms of loan agreement.

69. Thus, the distinguishable aspect of the tripartite agreement of the present appeal vis-à-vis the tripartite agreement of ***Value Infracon India Private Limited (Supra)*** relied heavily by the Respondent (Resolution Professional) (as well as the Adjudicating Authority in the Impugned Order in rejecting of claims of the Appellant) is that in case of tripartite agreement of ***Value Infracon India Private Limited (Supra)*** there is no responsibility of the Corporate Debtor/ builder/ developer, whatsoever to repay any money of the bankers and the entire responsibility was of the homebuyers, where in in terms of clause 16 of the tripartite agreement of the present appeal, the primary responsibility of repayment of loan in case of any of the eventuality laid down in tripartite agreement falls on the builder/ Corporate Debtor. This indicate relationship of

the Appellant Bank and the Corporate Debtor to meet the stipulation of Section 5(8) of the Code regarding the financial debt. This aspect was not available in the case of ***Value Infracon India Private Limited (Supra).***

70. In Clause 16 of the tripartite agreement in the present appeal and it is only on the failure of the builder to repay to the Appellant/Bank, the borrower/ homebuyer is required to repay the entire outstanding balances to the Appellant/ Bank. We note that this is quite distinctive term which has been signed by the Appellant Bank as lender, the borrower (homebuyers) and the builder (Corporate Debtor) making direct relationship and set of obligations and rights between the Appellant/ Bank and the Corporate Debtor/ Builder. In fact, the primary responsibility in the present case is of the Corporate Debtor/ Builder and secondary responsibility is of borrower/ Homebuyers.

71. We have already taken into consideration the definition of financial debt in our earlier discussion. The main requirement is that there must be debt along with interest, if any, which is disbursed against time value and money and there should be disbursement of money from creditors to debtors in terms of Section 5(8) of the Code. In context of Section 5(8) of the Code, promise by the debtor to pay money to the creditor may also tantamount to transaction as defined under Section 3(33) of the Code and same may attract the provisions of the Section 5(8) of the Code. We have already noted that the clause 16 of the tripartite agreement in the present appeal amongst the parties indicates that the entire amount advanced by the bank on account of the borrower shall be

refunded by the Corporate Debtor/ Builder to the Appellant/ bank thus in terms of Section 5(8) r/w Section 3(33) of the Code, the same may become a financial debt advanced by the Appellant bank to the Corporate Debtor.

72. We would like to reiterate and re-emphasised that in normal case it is only the homebuyers/ allottee who could be treated as Financial Creditor and not lenders/ banker who lent the money to the allottee. The very fact that the amendment was made in Section 5(8)(f) of the Code was to enable the homebuyers/ allottees to act as Financial Creditor and participate in CoC. However, since the peculiar clause has been provided in the present agreement which create the rights of the Appellant banker for the right to payment in terms of Clause 3(6) of the Code and based on this right to payment the appellant has pleaded to be classified as Financial Creditor to the extent of its money due to be paid by the Corporate Debtor which was specifically agreed in Clause 16 of the agreement.

73. Another pleas taken by the Respondent is regarding non registering of the charge created in favour of the Appellant as well as claims under recovery certificate issue by the DRT amounting to financial debt.

74. As regard the issue of non registration of mortgaged as per Section 77 of the Companies Act, 2013 the issue was dealt by this Appellate Tribunal in the matter of ***Canara Bank (Supra)***. The relevant portion of this judgment reads as under :-

"52. Be that as it may, on a careful consideration of respective contentions, this Tribunal, keeping in mind of the prime fact that 'Right to recover' the money, lent by enforcing a mortgage is a 'Right to enforce', an interest in the property and that the claim of the 'First Charge Holder', shall prevail over the claim of the 'Second Charge Holder', and the `Appellant / Petitioner', can very well enforce the 'Security Interest', resting on Section 58(f) of the 'Transfer of Property Act', 1882 and `Rule 8 of the Security Interest (Enforcement) Rules, 2002', comes to a resultant conclusion that 'mortgage', is the result of the `Act of Parties', where the `Transfer of Ownership Interest', in a particular `Immoveable Asset' is created, and that the conclusion arrived at by the `Adjudicating Authority / Tribunal', in upholding the decision of the `Liquidator', in classifying the `Appellant / Petitioner / Bank', as an `Unsecured Financial Creditor', is an illegal and an invalid one, in the eye of `Law' and in the `Liquidation Proceedings', the Appellant /Bank, is to be treated as `Secured Creditor', as held by this `Tribunal'.

53. In addition, the `non-registration of the Mortgage', as per Section 77 of the Companies Act, 2013, is not a sufficient / enough ground, to come to an `opinion', that the `Appellant', is not a `Secured Creditor'. In reality, the 'rights' of a `Mortgagee', under the `Transfer of Property Act', 1882 and the 'SARFAESI Comp. App (AT) (CH) (Ins) No. 277/2023 Page 22 of 23 Act', are not to be diluted, in terms of Regulation 21 of IBBI (Liquidation process)

Regulations, 2016."

(Emphasis Supplied)

75. The above judgment make the position clarified that such non registration will not has any adverse impact on the right of the Appellant.

76. As regard claim under recovery certificate issued by the DRT, we will again refer to Clause 5(8) of the Code, where the word "include" has been used which enlarge the scope of the definition of Section 5(8) of the Code. We observe that subsequent to the word 'includes' 9 sub-clauses from (a) to (i) have been mentioned. This list is not exhaustive and only illustrative. Thus, the recovery certificate issued by the DRT may fall within the definition of financial debt.

77. We have already taken into consideration that the Impugned Order rejected the claims of the Appellant mainly based on the judgment of the Hon'ble Supreme Court of India in the matter of ***Pioneer Urban Land (Supra)*** and this Appellate Tribunal in the case of ***Value Infracon India Private Limited (Supra)***. The Impugned Order passed by the Adjudicating Authority stated that the bank did not finance the Corporate Debtor and real financial creditors are the homebuyers and based on the judgment of this Appellate Tribunal ***Value Infracon India Private Limited (Supra)*** the Adjudicating Authority rejected the case of the Appellant.

78. We have examined both the cases in greater details in preceding paragraphs as well as legal provisions of the Code and various clauses of the

agreement specially in contrast with provisions of the Tripartite Agreement of the present case vis- a vis ***Value Infracon India Private Limited (Supra),*** as such we find that the Adjudicating Authority has erred in not considering the aspects brought out by the Appellant in the present appeal.

79. The Appellant Bank has directly disbursed the amount to the Corporate Debtor/ Builder, albeit, on behalf of the Borrowers/ Homebuyers and in terms of the Tripartite Agreements amongst the Allottees, Builder and the Bank, the Corporate Debtor/ Builder has undertaken to refund the entire amount advanced by the bank in case of event of default of repayment of loan.

80. We observe that Clause 9.5(v) of the Resolution Plan provides for submission of claims by allottee/ unit holder/ flat/ shop owner who had failed to file the same with the Respondent or who had filed it but the same was under verification, within 45 days of the approval of the Resolution Plan. Thus, even the plan is approved by CoC, the home-buyers/ Financial Creditor are entitled to file their claims and there is no extinguishment of the claims during such protected period.

81. We note that Intervenor brought to our notice the clause in Resolution Plan :-

> *"1. In case any additional fund required for the completion of project or for the payment of any inability as per the resolution plan, the same shall be infused by the RA from his own source."*

In fact the pleadings of the Intervenor and provision in the Resolution Plan support the cause of the Appellant and gives the Appellant due protection.

82. In view of above detailed discussion, the appeal succeeds. The Impugned Order is set aside and I.A No. 836 / 2023 in C.P. (IB) No. 654(PB)/2019 is restored to its original number and the matter is remanded back to the Tribunal for reassessment of the case, in accordance with law. The Adjudicating Authority may decide without being influenced by any of the observation made herein above. All contentions of the parties will also remain open.

83. Parties are directed to appear before the Adjudicating Authority on **27.01.2025**.

84. No costs. I.A. if any, are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

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