

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH - II
IA 3975/2020
In
Company Petition (IB) No. 266/ND/2019**

In the matter of:

**Section 9 of the Insolvency and Bankruptcy Code, 2016 read with
Rule 6 of the Insolvency and Bankruptcy (Application to the
Adjudicating Authority) Rules, 2016**

AND

In the matter of :

R. Tarkeshwar Narayan

S/o Shri M.V. Rajamani

R/o 44-B, Gayathri Apartment,

Sector-9, Rohini, New Delhi-110085

...Applicant

VERSUS

1. Praveen Kumar Aggarwal

Resolution Professional

906, Tower-A, I-Thum Business Park,

Noida-201301, Uttar Pradesh

Cirp.horizon@synergypipe.com

...Respondent No.1

2. Indian Overseas Bank

Yusuf Sarai

C-1, Green Park Extn.,

Main Aurobindo Road,

New Delhi-110016

...Respondent No. 2

ORDER DELIVERED ON: 01.02.2022

CORAM:

Sh. Abni Ranjan Kumar Sinha, Hon'ble Member (Judicial)

Sh. L. N. Gupta, Hon'ble Member (Technical)

PRESENT :

For the Applicant/ Operational Creditor: Aishvary Vikram

For the Respondent/ Corporate Debtor: Ms. Mayuri Raghuvanshi

ORDER**AS PER: SH. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)**

The present application has been filed on behalf of the applicant i.e., the Committee of Creditors (hereinafter referred to as "CoC") praying therein to direct the RP/Respondent No. 1 to treat the claim of the Indian Overseas Bank/Respondent No. 2 as unsecured financial creditor.

2. Shri R. Tarkeshwar Narayan along with Shri Ashish Kumar Srivastava and Shri Mahipal Singh have been authorized vide resolution No.10 approved by the CoC in its first meeting dated 10/12/2019 to represent the CoC severally in any court proceedings in the matter and hence, is authorized to file the present application on behalf of the CoC.

3. Brief Facts of the case are as follows:

- i. The Adjudicating Authority vide its order dated 08/11/2019 admitted the application under Section 7 of the IBC Code, 2016 filed by the financial creditor / Applicant herein against the Corporate Debtor, and the CIR Process is at a stage wherein the Resolution Applicant had submitted its resolution plan to the Resolution Professional (hereinafter referred to as "RP"), appointed by the Tribunal, for discussion and consideration by the CoC. The RP / Respondent No.1 has filed an application before the Tribunal stating that the sealed cover containing the resolution plan has been allegedly gutted in an alleged fire incident, at the premises of erstwhile IRP and he is seeking directions about accepting another set of the resolution plan from the Resolution Applicant for placing it before the CoC.
- ii. That the several meetings of CoC have been conducted by the RP on various dates (first five CoC meetings by the erstwhile Interim Resolution Professional / RP, and sixth by the RP / Respondent No.1) and Financial Creditors i.e. home buyers and Indian Overseas Bank / Respondent no.2 herein along with



Operational Creditor i.e. Kaveri Sehkari Samiti have filed their claim with the then Interim Resolution Professional / RP.

- iii. That the IRIDIA Homebuyers Association is the Resolution Applicant in the CIRP of the Corporate Debtor and have submitted its resolution plan to the then Interim Resolution Professional / RP. Members of the IRIDIA Homebuyers Association forms major part of CoC along with the Indian Overseas bank / Respondent No.2.
- iv. That it is submitted that the sixth CoC meeting was held on 27/07/2020 and till that date the classification of creditors was never shared in any of the CoC meetings and even the same was never uploaded by the then IRP / RP and RP / Respondent No.1 on their online portals. On persuasions by the CoC the RP / Respondent No.1 shared the List of 243 Creditors of the Corporate debtor in the month of August, 2020. Further, the said list of creditors shared by the RP/Respondent No. 1 is not divided into any particular class of creditors nor does it show security status of creditors.
- v. That on 27.07.2020 (during the sixth CoC meeting), it was disclosed that the claim of the Indian Overseas bank / Respondent No.2 is being treated as Secured Creditor. It was put forward by the respondents that the same is being done in view of the mortgage towards the loan availed by the Corporate Debtor from Indian Overseas bank / Respondent No.2 on the land of Kaveri Sahkari Awas Samiti Ltd. Further, the same has also been shown as secured in the books of the Corporate Debtor and charge has also been registered with the Registrar of Companies.
- vi. It is submitted that the credit facility was given to the Corporate Debtor by the Indian Overseas bank / Respondent No.2 vide sanction letter dated 24/12/2013 wherein a term loan of Rs.28.50 Crores (to part finance 780 residential apartments project "Project IRIDIA" on a 6 acre plot at Sector



86, Noida with a total estimated cost of Rs. 210.47 Crores) was sanctioned in favour of the Corporate Debtor. The Collateral security was NIL and the prime security for the said term loan was Equitable Mortgage of 2.3114 Hectare of land and proposed apartment building to be constructed thereon 23114 Sq. Meters or 27634 Sq. Yards approx. in Khasra No. 123 (1.2780 hectare) and 155 (1.0334 hectare) falling within the revenue estate of village - Illahabans, Sector-86, Noida-Phase-II, Tehsil-Datri, District-Gautam Budh Nagar, Uttar Pradesh owned by Kaveri Sahkari Awas Samiti Ltd.

- vii. That it is submitted that the land wherein the project IRIDIA is being constructed by the Corporate Debtor is owned by the Kaveri Sahkari Awas Samiti Ltd. and the Corporate Debtor was the developer. It was agreed between the Corporate Debtor and Kaveri Sahkari Awas Samiti Ltd. that the Corporate Debtor shall develop the entire project and shall construct 780 residential apartments on the said land of the Kaveri Sahkari Awas Samiti Ltd. and after completion of the projects, the Corporate Debtor and Kaveri Sahkari Awas Samiti Ltd. shall divide the same in the ratio of 64:36.
- viii. That in the year 2016, the Indian Overseas bank / Respondent No.2 again issued the sanction letter bearing no. IOB/ADV/45/2015-2016 dated 21/01/2016 to the Corporate Debtor, wherein the same term loan of Rs.28.50 Crores for part financing 780 residential apartments under project "Project IRIDIA" on a 6 acre plot at Khasra No. 123 & 155, project IRIDIA, Illbans village, Sector-86, Tehsil-Dadri, Gautam Nagar, Noida with an estimated cost of Rs. 212.86 Crores in name of the Corporate Debtor. Again the Collateral security was NIL and the prime security was Equitable Mortgage of developers share (64%) of residentially converted land and proposed apartment building to be constructed thereon in 23114 Sq. Meters or 27634 Sq. Yards approx. in Khasra No. 123 (1.2780 hectare)

and 155 (1.0334 hectare) falling within the revenue estate dlf, village — Sector-86, Noida-Phase-II, Tehsil-Dadri, District-GautamBudh Nagar, Uttar Pradesh owned by Kaveri Sahkari Awas Samiti Ltd.

- ix. This Sanction Letter served by the Bank is signed by the Corporate Debtor, Guarantors (proposed in 2013) and Kaveri Sahkari Awas Samiti Ltd in token of their consent to change in terms and conditions through this letter. It is thus binding on all concerned parties.
- x. The Corporate Debtor at no point in time was the owner of the land wherein the project IRIDIA was being developed by the Corporate Debtor. Further, though the erstwhile IRP confirmed in the second CoC meeting that the custody of the land pertaining to 'Iridia' project had been taken by him, it was later on found that the possession of the land is with Kaveri Sahkari Awas Samiti Ltd. It is submitted that even the RP / Respondent No.1 in the sixth CoC meeting dated 27/07/2020 have categorically recorded that "the committee noted that the Kaveri Awas Sahkari Samiti — the land owner is still in physical possession of the land in spite of its claim having been admitted".
- xi. That it is submitted that the Indian Overseas bank / Respondent No.2 herein had also approached the Ld. DRT, Delhi against the Corporate Debtor under the SARFAESI ACT, 2002 and the documents filed by the Indian Overseas bank / Respondent No.2 find no mention of the Guarantee Agreements and further the Equitable Mortgage, as mentioned under the sanction letter dated 24/12/2013, created by the Kaveri Sahkari Awas Samiti Ltd. was not supported by Guarantee Agreements. It is further submitted that even during 2013, when the credit facility was advanced to the Corporate Debtor, no consent had been taken of the allottees for the mortgage of the property allotted to them and no mortgage could have taken

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place as the Corporate Debtor had no immovable property in his name and it was only due to the said reason, the Indian Overseas bank / Respondent No.2 issued fresh sanction letter dated 21/01/2016 (wherein the prime security to the term loan was changed to "Equitable Mortgage of developers share (64%) of residentially converted land and proposed apartment building to be constructed thereon in 23114 Sq. Meters or 27634 Sq. Yards approx. in Khasra No. 123 (1.2780 hectare) and 155 (1.0334 hectare) falling within the revenue estate of village-Allahabans, Sector-86, Noida-Phase-II, Tehsil-Dadri, District-GautamBudh Nagar, Uttar Pradesh owned by Kaveri Sahkari Awas Samiti Ltd." from earlier "Equitable Mortgage of 2.3114 Hectare of land and proposed apartment building to be constructed thereon 23114 Sq. Meters or 27634 Sq. Yards approx. in Khasra No. 123 (1.2780 hectare) and 155 (1.0334 hectare) falling within the revenue estate of village-Allahabans, Sector-86, Noida-Phase-II, Tehsil-Dadri, District - Gautam Budh Nagar, Uttar Pradesh owned by Kaveri Sahkari Awas Samiti Ltd.".

- xii. That the Indian Overseas bank / Respondent No.2 purposefully released the equitable mortgage created by them in the year 2013, on the share of Kaveri Sahkari Awas Samiti Ltd. on the land and the proposed apartment building to be constructed thereon, knowing fully well that the said equitable mortgage could not have been created.
- xiii. That in view of the above, the applicant vide email dated 06/09/2020 to the RP / Respondent No.1 explained that the claim of the Indian Overseas bank / Respondent No.2 cannot be treated as secured, despite it having been stated in the balance sheet dated 31/03/2019 pertaining to the Corporate Debtor states that the loan was secured by equitable mortgage of immovable properties of third party. It was clarified that the said balance sheet dated 31/03/2019 of the corporate debtor

shows zero immovable property. Therefore, no equitable mortgage of the immovable property of the Corporate Debtor could have taken place. Therefore, the claim of the bank could not have been treated as Secured.

- xiv. The RP / Respondent No.1 on 08/09/2020 while replying to the said email dated 06/09/2020 with regards to the treatment of term loan by Indian Overseas bank / Respondent No.2 as unsecured has suggested that the same is factual and legal issue and could only be decided by the competent court.
- xv. From the above reply dated 08/09/2020, it is clear that the RP / Respondent No.1 is unable to take decision as to whether the claim of the Indian Overseas bank/ Respondent No. 2 be treated as secured or unsecured.

4. Respondent No. 1 in its reply dated 04.01.2021 has contended that:

- i. The Respondent No.1 has prayed to decide as to whether Indian Overseas bank is a secured creditor or an unsecured creditor as the said question is beyond the powers of the Answering Respondent being a Resolution Professional.
- ii. The Applicant has filed the present Application against the Ex-Resolution Professional of the Corporate Debtor i.e. Mr. Praveen Kumar Agarwal. However, the Committee of Creditors, on 04.10.2020 passed a resolution appointing Mr. Anil Tayal as the Resolution Professional for the Corporate Debtor in replacement of Mr. Praveen Kumar Agarwal and thereafter, filed an Application for approval of the same before this Adjudicating Authority and the Adjudicating Authority vide Order dated 16.10.2020 allowed the Application and directed the Ex-Resolution Professional to handover all the records and documents to the newly appointed Resolution Professional within a period of ten working days.



- iii. That while perusing the documents of the Corporate Debtor, the Answering Respondent observed that Indian Overseas Bank i.e. the Respondent No. 2 has submitted a claim of Rs. 36,15,88,929/- which has been admitted provisionally. Further, the said claim of the Respondent No. 2 has arisen as a result of a term loan of Rs. 28.50 Crores sanctioned by the Respondent No. 2 to the Corporate Debtor on 24.12.2013. It is submitted that the Respondent No. 2 started disbursement of the loan on 28.12.2013, which is as per the Statement of Accounts. The last disbursement of the loan amount was made by the Respondent No. 2 on 30.12.2015, on which date; an amount of Rs. 21,88,69,219/- was outstanding in the loan account. The said loan facility was secured.
- iv. The term loan of Rs. 28.50 Crores was payable in 18 monthly instalments of Rs. 158.33 lacs each after an initial holiday period of 18 months from the first disbursement. As the first disbursement was done on 28.12.2013, first instalment of Rs. 158.33 lacs was due on 28.06.2015. But the Corporate Debtor did not make payment of this or subsequent instalments. Therefore, after passage of 90 days from 28.06.2015, i.e., on 28.09.2015, the loan account became NPA.
- v. That pursuant to the above, the loan facility was reviewed by the Respondent No. 2 vide its sanction letter dated 21.01.2016 and the security of the loan was changed.
- vi. That it is further submitted that in terms of this revised sanction letter, which has been signed by the Respondent no. 2 and counter signed by the Corporate debtor and M/s Kaveri Sahakari Awas Samiti Ltd., the collateral security for the loan is NIL and the only mortgage proposed is future 64% share of the Corporate Debtor in the land and building.
- vii. That the amount of outstanding loan to the Respondent No. 2 is Rs. 26,85,24,621/- in the balance sheet dated 31.03.2019, hence, the Answering Respondent has provisionally admitted

claim of Its. 36,15,88,229/-. The said loan facility is claimed to be secured by equitable mortgage of immovable properties belonging to the company & Kaveri Sahakari Awas Samiti Ltd., and personal guarantee of the directors & Kaveri Sahakari Awas Samiti Ltd. in the balance sheet. As there was no immovable property of the Corporate Debtor as per the balance sheet, no equitable mortgage of its assets was subsisting as security to the above loan.

- viii. Further, based on the records available with ROC, it can be observed that, one charge for Rs. 28.50 Crores is registered on 28.12.2013 in favour of the Respondent No. 2, on the immovable property or any interest therein. However, it is pertinent to mention here that no specific immovable property belonging to the Corporate Debtor has been mentioned in the said document.
- ix. It is further submitted that after the loan facility was reviewed by the Respondent No. 2 vide its sanction letter dated 21.01.2016 and the security of the loan was changed, as per the ROC's website, the charge registered with ROC appears to have not been modified. The Answering Respondent has sought for clarification regarding Creation/Modification of Charge in the year 2016 from the Respondent No. 2.
- x. That the Respondent No. 2 vide email dated 22.12.2020, after several follow ups from the Answering Respondent, has informed that the charge created at the time of sanctioning the loan facility in the year 2013 is continuing and the Respondent No. 2 has exclusive charge on the immovable property (land and proposed apartment building to be constructed), hypothecation of stocks and entire receivables pertaining to the project and entire fixed assets of the company including Plant and machinery.
- xi. That it is further submitted that in terms of this revised sanction letter dated 21.01.2016, which has been signed by

the Respondent No. 2, and counter signed by the Corporate Debtor and M/S Kaveri Sahakari Awas Samiti Ltd., the collateral security for the loan is NIL and the only mortgage proposed is future 64% share of the Corporate Debtor in the land and building.

- xii. The resolution professional has no power to adjudicate upon the validity and quantum of the numerous claims made before him/her for the purpose of admission and rejection. The Answering Respondent referred the judgement of Hon'ble Supreme Court in the matter of **Swiss Ribbons Pvt. Ltd. v. Union of India (Writ Petition (Civil) No. 99/2018)** and in the matter of **Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors. (Civil Appeal No. 8766-67/2019 and other petitions)**.
- xiii. The verification of charge of Indian Overseas bank/ Respondent No. 2 as a secured creditor or unsecured creditor is beyond the powers of the Resolution Professional.

5. Respondent No. 2 in its reply dated 23.10.2020 contended that:

- i. Respondent No. 2 is a body corporate constituted under the banking Companies (Acquisition & Transfer of Undertakings) Act, 1970 and is the financial creditor of the above named corporate debtor and is a member of the CoC as well.
- ii. The corporate debtor namely Horizon Buildcon Private Limited is engaged in the business of real estate and other allied activities had availed a credit facility in the nature of a "Term Loan" from the respondent No. 2, which was secured against collateral.
- iii. Security interest was created in favour of the respondent no. 2.
- iv. The corporate debtor was the developer of the residential project namely "Project Iridia", which was being developed



over the land situated at "2.3114 Hectare/Sq. Mtr. Of Land or 27,634 sq.yds. approx in Khasra No.123 & 155, Illahabans, Sector 86 Noida, Dadri District" (hereinafter as "The Property") owned by Kaveri Sehkar Awas Samiti Ltd. While availing the credit facilities, equitable mortgage over the said land was created to act as a prime security for securing the term loan facility availed by the corporate debtor from the Respondent No.2 in the year 2013.

- v. The Samiti (owner of the equitably mortgaged land) and the corporate debtor (developer) had entered into a Collaboration Agreement dated 28/08/2012. It was agreed in terms of the said agreement that corporate debtor and the Samiti would collaborate for development, execution and completion of work of construction over the said land owned by the Samiti. As per Clause 7 of the said Agreement, it was agreed between the parties that, "the corporate debtor having 64% share on the entire built up area of the said land along with proportionate undivided, indivisible or impartially rights on the said land underneath the said complex and proportionate parking in the basement".
- vi. The Samiti also executed a Power of Attorney dated 28/08/2012 to sell flats in favour of the corporate debtor.
- vii. The corporate debtor availed the Term Loan to part finance 780 residential apartments in "Project Iridia" on a 6 acre plot at the aforementioned Property with a total cost estimated of Rs. 210.47 Crores vide Sanction Letter dated 24/12/2013, inter alia, on the terms set out therein:

| Sanction Letter Dated 24/12/2013 | | | | |
|---|------------------------------------|------------------------|---------------------------|---|
| SN | Facility | Amount | ROI | Securities |
| 1. | Term Loan For part financing | Rs. 28.50 Crores | Base rate + 5% i.e. | i. Equitable Mortgage of 2.3114 Hectare/Sq. Mtr. Of |

| | | | |
|---|---------|---------------|--|
| 780 residential apartments in "Project Iridia" on a 6 acre plot at Sector 86, Noida with a total cost estimated of Rs. 210.47 Crores. | (Fresh) | @ 15.25% p.a. | Land or 27,634 sq. yds. Approx in Khasra No. 123 & 155, Illahabans, Sector 86, Noida, Dadri District owned by Kaveri Sehkar Awas Samiti Ltd. ii. Receivables and stocks pertaining to project and; iii. Charge on & escrow operating cash flows from the project during the tenor of loan. |
|---|---------|---------------|--|

In terms of the aforementioned credit sanction letter, the Term Loan sanctioned in favour of corporate debtor by the Respondent was secured by way of primary security.

- viii. That the said term loan availed by the corporate debtor was secured by creation of equitable mortgage over the Property of the Samiti. It was pursuant to the same, the Samiti issued a letter of confirmation dated 30/12/2013 to the Respondent No.2, stating that it had deposited with the Respondent No.2 all documents pertaining to title immovable and moveable properties owned by the Samiti. It was stated in the said letter that the same was being done with intent to secure the repayment of the Respondent No.2 of money that are due and shall from time to time or at any time or any time from corporate debtor. The Samiti had also executed a F-111 dated



- 28/12/2013 extending its guarantee towards the repayment of amount in default by the corporate debtor.
- ix. That the corporate debtor also executed a Loan Agreement dated 28/12/2013 with the Respondent No. 2 wherein, as regards the security for repayment in favour of Respondent No. 2.
 - x. That on the same day, the corporate debtor also executed Letter of hypothecation dated 28/12/2013 for hypothecating the Machinery/ Goods/Book Debts called as 'Securities' to secure the aforesaid credit facility availed by it in favour of Respondent No. 2. Thus, the Respondent No. 2 holds the first charge over the same and is secured to the extent of such hypothecated machineries/goods/book-debts etc.
 - xi. That the corporate debtor had also created a charge on the entire assets of its company (movable/immovable) and the same is duly registered with the Registrar of Companies on 28/12/2013, bearing charge ID No.10472888. The creation of said charge confirms the financial borrowings of the corporate debtor along with creation of secured interest by way of equitable mortgage of the said property, hypothecation of machinery/ book debts etc in favour of the Respondent No.2.
 - xii. Subsequently, upon the request of the corporate debtor for review of the Term Loan, the Respondent No.2 issued a reviewed Sanction letter dated 21.01.2016 to the corporate debtor by sanctioning the following credit facility:

| Sanction Letter Dated 21/01/2016 (Reviewed) | | | | |
|--|--|-----------------------------------|--|--|
| SN | Facility | Amount | ROI | Securities |
| 1. | Term Loan For part financing 780 residential | Rs. 28.50 Crores (Fresh) | Base rate + 5% i.e. @ 14.70% | iv. Equitable Mortgage of developer's share (64%) of residentially |

| | | | | |
|--|---|--|------|--|
| | apartments in "Project Iridia" on a 6 acre plot at Sector 86, Noida with a total cost estimated of Rs. 212.86 Crores. | | p.a. | <p>converted land and proposed apartment building to be constructed thereon 2.3114 Hectare/Sq. Mtr. Of Land or 27,634 sq. yds. Approx in Khasra No. 123 & 155, Illahabans, Sector 86, Noida, Dadri District owned by Kaveri Sehkari Awas Samiti Ltd.</p> <p>v. Receivables and stocks pertaining to project and;</p> <p>vi. Charge on & escrow operating cash flows from the project during the tenor of loan.</p> |
|--|---|--|------|--|

In terms of the aforementioned credit sanction letter, the Term Loan sanctioned in favour of corporate debtor by the Respondent was secured by way of primary security.

- xiii. It is submitted that the bank- Respondent no. 2 continued to hold equitable mortgage over the corporate debtor's share being 64% of residentially converted land and proposed apartment building to be constructed on the land of the Samiti in Sector 86 Noida, Dadri District owned by Kaveri Sehkari Awas Samiti Ltd. The loan was at time availed against collaterals mentioned hereinabove. This is supported

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firstly by, execution of the Collaboration Agreement dated 28/08/2012, wherein it was mentioned that the corporate debtor and the Samiti would collaborate for development, execution and completion of work of construction over the said land owned by the Samiti. It was specified in Clause 7 of the said Agreement that the corporate debtor is having 64% share on the entire built up area of the said land along with proportionate undivided, indivisible or impartially rights on the said land underneath the said complex and proportionate parking in the basement. **Secondly**, by execution of Power of Attorney dated 28/08/2012 by owner of the Land Samiti to sell flats in favour of the corporate debtor. **Thirdly**, by creation of a charge on the entire assets of its company (movable/immovable) by the corporate debtor and the same being duly registered with the Registrar of Companies on 28/12/2013, bearing charge ID No.10472888. The creation of said charge confirms the financial borrowings of the corporate debtor along with creation of secured interest by way of equitable mortgage of the said property, hypothecation of machinery/ book debts etc in favour of the Respondent No2. **Lastly**, by the execution of a reviewed sanction letter dated 21/01/2016 on the request of corporate debtor by the Respondent No.2, where the repayment of Term Loan was primarily secured by the Equitable Mortgage of developer's share (64%) of residentially converted land and proposed apartment building to be constructed thereon 2.3114 Hectare/Sq. Mtr. Of Land or 27,634 sq.yds.approx in Khasra No.123 & 155, Illahabans, Sector 86, Noida, Dadri District owned by Kaveri Sehkar Awas Samiti Ltd.

- xiv. In order to ascertain that who can be termed as a secured creditor under the code, Respondent No. 2 referred the definitions of "Creditor", "Debt", "Property", "secured creditor", "security interest" as provided under Section 3 of



- IBC and definitions of "financial creditor", "financial debt" as provided under Section 5 of IBC.
- xv. Respondent No. 2 also referred the Judgment of Hon'ble Supreme Court in the matter of **Anuj Jain vs. Axis Bank Limited and Ors. (26.02.2020-SC) MANU/SC/0228/2020.**
 - xvi. Resolution Professional has rightly admitted the claim of Respondent No. 2 & rightly classified it under "Secured Financial Creditor" category.
 - xvii. Respondent No.2 being the rightful secured financial creditor of the above named corporate debtor and upon default committed by the corporate debtor in repaying the credit facilities availed by it had filed a section 7 Insolvency Petition bearing CP (IB) 1857/ND/2019 before the Bench-V of this Tribunal, wherein notice to the Corporate Debtor was issued on 20/08/2019. However, another petition filed by the above named Applicant on behalf of Homebuyers of the Corporate Debtor was admitted and accordingly, the same was brought to the knowledge of the Bench and vide order dated 15/01/2020 the Bench-V was pleased to pass an order granting liberty to the Respondent No.2 to file its claim with the IRP of the corporate debtor. Accordingly, the claim was filed by the Respondent No.2 on 17.12.2019 before the IRP of the corporate debtor and the same was admitted to the tune of Rs. 36,15,88,929.00.
 - xviii. That it is submitted that the Applicant has erroneously and mischievously disputed the status of the Respondent no.2 as secured creditor under the Insolvency and Bankruptcy Code 2016 and also under the SARFAESI Act, 2002. The creation of equitable mortgage by the Samiti in favour of the Respondent No.2 for securing the loan availed by the Corporate Debtor is supported by the letter of confirmation dated 30/12/2013. The Samiti had deposited the title deeds with the Respondent No.2 pertaining to the equitably



mortgaged property owned by the Samiti. It was stated in the said letter dated 30/12/2013, that the deposit of the documents was done with the intent to secure the repayment of the Respondent No.2 of money that are due and shall from time to time or at any time or any time from corporate debtor. Further, the Copies of credit sanction letters dated 24/12/2013 and 21/01/2016 bear the signatures and stamp of the authorized representative of the Samiti, which shows due acknowledgment on the part of the Samiti. Moreover, the Samiti had also executed a Revival Letter dated 03/08/2016 acknowledging its liability towards the repayment of the loan to the Respondent No.2 in its capacity as the guarantor.

- xix. Respondent No. 2 is a secured creditor under SARFAESI Act, 2002.
- xx. The loan account of the corporate debtor was classified as a Non- Performing Asset (NPA) on 31/03/2017 with effect from 31/10/2016 as per the internal guidelines of the Respondent No.2, in consonance with the guidelines laid down by the Reserve Bank of India. Since the Corporate Debtor did not make any attempt to either regularize its accounts or repay the outstanding dues, the Respondent No.2 was constrained to take steps under the SARFAESI, Act 2002 for the enforcement of its secured asset by issuing demand notice u/s 13(2) SARFAESI Act, 2002 dated 19/05/2017 to the corporate debtor.
- xxi. That the Respondent No. 2 has filed an OA No. 788/2017 titled as "Indian Overseas Bank v. Horizon Buildcon Pvt Ltd" before the Debts Recovery Tribunal and the same has been proceeded ex-parte against the corporate debtor and its guranators and is at the stage of final disposal.
- xxii. That in the Affidavit of Reply dated 12/02/2021, the Respondent No. 2 has referred to the judgment of Hon'ble

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Supreme Court in the matter of Anuj Jain vs. Axis Bank Limited and others (2020) 8 SC 401 and in the matter of Bikram Chatterji vs. Union of India (2019) 19 SCC 161 and the judgment of Hon'ble Gujarat High Court in the matter of State Bank of India vs. Kusum Vallabhda Thakkar 1991 (SCC online Guj 14).

6. That the applicant has filed the written submission and scanned copy is reproduced below:

WRITTEN ARGUMENTS ON BEHALF OF THE APPLICANT

1. The present application being LA No. 3975/2020 has been filed by the Applicant before this Hon'ble Tribunal to direct the Resolution Professional ("RP") to treat the claims of Indian Overseas Bank ("IOB") as unsecured and to treat IOB as an unsecured financial creditor. [@ Pg. 11, Application].
2. The present written arguments intend to address two issues: (i) the Applicant has the *locus standi* to present this application before this Hon'ble Tribunal; (ii) the claims of IOB are of an unsecured financial creditor. The Applicant for the sake of brevity has not repeated the facts leading to the present Application and craves leave to refer and rely on the contents of the pleadings filed before this Hon'ble Tribunal, however, for the purpose of the present written submission, the Applicant has pointed out relevant facts and made cross references to the facts stated in the pleadings for the sake of completeness.

The Applicant has the *locus standi* to present this application.

3. It is submitted that the Applicant was appointed as '*the representative for the purpose of representing the Committee of Creditors for any legal proceeding of any Court/Tribunal that will require the presence of members of Committee of Creditors in the matter of Horizon Buildcon Private Limited*' by Resolution 10 passed in the 1st Committee of Creditors ("CoC") Meeting held on 10.12.2019. [See Compliance



Affidavit dt. 02.03.2021, @ Pg. 38] The said resolution was approved by 100% members of the CoC as on 10.12.2019. [See Compliance Affidavit dt. 02.03.2021, @ Pg. 40]

4. It is submitted that the validity of this resolution is not affected by the inclusion of IOB into the CoC, post the 1st CoC meeting, as per Rule 12 (3) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016. ("2016 Regulations") [See Rule 12(3) of 2016 Regulations].
5. Even otherwise, IOB after becoming a part of CoC has not proposed any resolution in the last 9 meetings of CoC meetings held after the 1st CoC meeting doubting or objecting the capacity of the Applicant to represent the CoC.
6. Moreover, in the Reply filed to the present application, IOB has not raised any objection on the *locus standi* of the present Applicant to represent the CoC before this Hon'ble Tribunal. [See Pg. 1-22, IOB Reply] On the contrary, IOB in its para-wise reply has stated that the Applicant representing the CoC is a matter of record. [See Para 1 @ Pg. 22, IOB Reply] Therefore, no objection has been raised by IOB in this regard.
7. Without prejudice to the aforesaid, it is further submitted for the sake of argument that the inherent principles under the Insolvency and Bankruptcy Code, 2016 as identified by the Hon'ble Supreme Court in the judgment of *Committee of Creditors of Essar Steel India v. Satish Kumar Gupta & Ors.*, (2020) 8 SCC 531, recognises that equitable treatment is to be provided to similarly situated creditors. [Judgment annexed] The RP in the Information Memorandum by recognising the claims of IOB as secured creditors, which in fact, has no security interest on the assets of Respondent No. 1, has discriminated between same class of creditors. [See Pg. 94, Compliance Affidavit] If the claims of IOB are treated as secured, it leads to discrimination vis-à-vis the Applicant and other similarly situated home buyers.
8. In view of the aforesaid, the Applicant even in its individual capacity as a Financial Creditor and a member of CoC has the *locus standi* to present this application before this Hon'ble Tribunal.
9. It is further submitted that the RP has not put the Resolution Plan submitted by IRIDIA Home Buyers Association to vote before the members of CoC, on the ground that the said Resolution Plan considers the claims of IOB as unsecured



creditors. As per the RP the said Resolution Plan is in violation of Section 30(2) r/w Section 30(4) r/w Section 53 of the IBC. In view of the aforesaid, the decision of this Hon'ble Tribunal on the present application is of immense importance.

10. It is submitted that this Hon'ble Tribunal has the jurisdiction to decide this application under Section 60(5)(c) of IBC. Section 60(5)(c) provides that the Hon'ble Tribunal can decide "*any question of priorities or any question of law or fact, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this code.*" In this regard, it is submitted that the Hon'ble Supreme Court in a recent judgment of *Gujarat Urja Vikas Nigam Limited v. Amit Gupta & Ors*, 2021 SCC Online SC 194, has interpreted the term '*arising out of*', '*in relation to*' as having a very wide import and has held to include all questions which are related to corporate insolvency process to be within the jurisdiction of NCLT. [Judgment annexed] Moreover, the decision of the NCLT in this regard will be an inquisitorial exercise and not a adversarial exercise.
11. In view of the aforesaid submissions, the Applicant submits that it has the *locus standi* to present this application before this Hon'ble Tribunal and this Hon'ble Tribunal has the jurisdiction to decide the present application.

IOB is a unsecured creditor

12. It is submitted that IOB by sanction letter dated 24.12.2013, sanctioned a term loan of Rs. 28.50 Crores in favour of the Corporate Debtor. The Collateral security under the Sanction letter was NIL and the prime security for the said loan was an equitable mortgage of 2.3114 hectares of land falling within the revenue estate of village-Illahabassi, Sector-86, Noida Phase-II, Tehsil-Dadri, District-Gautam Budh Nagar, Uttar Pradesh owned by Kaveri Sahkari Awas Samiti Ltd. ["Land"]
13. This Land was owned by Kaveri Sahkari Awas Samiti Ltd and the same is acknowledged in the Sanction Letter. [See Sanction Letter dt. 24.12.2013 @ Pg. 61, See specifically Pg. 65, IOB Reply] The repayment term for Rs. 28.50 Cr was 18 monthly instalments of Rs. 158.33 lacs each after an initial holiday period of 18 months from the first disbursement. [See Pg. 65, IOB Reply] The term loan agreement also provides for the same arrangement. [See Pg. 82, IOB Reply]
14. As per the Status Report filed by the RP, it is clear, that the first disbursement was done on 28.12.2013, and the first instalment of Rs. 158.33 lacs were due on 28.06.2015. However, the Corporate Debtor did not make payment of this or

subsequent instalments. Therefore, after passage of 90 days from 28.06.2015 i.e., on 28.09.2015 the loan account became NPA. [@ Pg. 3, RP Status Report]

15. In view of the aforesaid, it is submitted that as per Article 137 of the Limitation Act, 1963, the period of limitation to approach before this Hon'ble Court under Section 7 or before for filing claims before the RP came to an end on 28.09.2018. Therefore, IOB cannot rely upon the Sanction Letter dt. 24.12.2013 for claiming itself to be a secured creditor.
16. In this regard, it is further submitted that as per the judgment passed by the Hon'ble NCLAT in *V. Padmakumar v. Stressed Assets Stabilization Fund (SASF)*, 2020 SCC OnLine NCLAT 417, the date of NPA is the only crucial date for computing the limitation period for application under Section 7 of IBC. The Hon'ble NCLAT in the aforesaid judgment has further held that an acknowledgment of debt in the Balance Sheet/Annual Return is irrelevant for computing the period of limitation. [Judgment annexed] In view of the aforesaid, IOB cannot rely on the particulars of the loan mentioned in the Balance Sheet of the Corporate Debtor.
17. Moreover, the aforesaid charge in form of equitable mortgage was not created on the immoveable property of the Corporate Debtor (Respondent No. 1) but an immoveable property belonging to the Society M/s Kaveri Sahakari Awas Samiti Ltd. The RP in this regard states that no immoveable property was with the Corporate Debtor as per the balance sheet. The RP further states that the Corporate Debtor does not own any immoveable property [See Para 9-10 @ Pg. 4] Therefore, the charge created on property of a third party cannot give IOB the status of secured financial creditor against the Corporate Debtor i.e., Respondent No. 1.
18. In view of the aforesaid, the claims of IOB of being a secured financial creditor is without any merit, because (i) it is barred by limitation; (ii) it is created on the immoveable property belonging to a third party.
19. In the context of the fresh Sanction Letter dated 21.01.2016 [@ Pg. 108, IOB Reply], it is submitted that the equitable mortgage was never created on developer's share (64%) of residentially converted land and proposed apartment building to constructed on the land owned by M/s Kaveri Sahkari Awas Samiti Ltd and was never registered with the Registrar of the Companies. IOB has not filed any document to show that the charge was created pursuant to Sanction Letter dated 21.01.2016, and is even registered. On the contrary, the documents on record,

clearly shows that the charge stipulated vide Sanction Letter dated 21.01.2016 was never either created or registered.

20. It is submitted that as per Companies Act, 2013, Section 77 (1) specifically requires any charge created on a property to be registered with the ROC. Even an equitable mortgage created by deposit of title deeds is also required to be registered. [See A. Ramaiya: Guide to the Companies Act, 18th Edition, 2014] The effect of non-registration of charge is provided under Section 77(3). [Relevant Sections annexed]
21. The Supreme Court in the judgment of *Oil and Natural Gas Corporation v. Official Liquidator of Ambika Mills Company Limited and Ors.*, (2015) 5 SCC 300, in the context of Section 125 of the Companies Act, 1956 (which is part *mutatis* with Section 77 of Companies Act, 2013) has held that if a charge is not registered with ROC, it renders a secured creditor as an unsecured creditor. [Judgment Annexed] Hence, the claim of IOB is at best of an unsecured creditor.
22. It is submitted that the Applicant claims that no equitable mortgage was created pursuant to Sanction Letter dated 21.01.2016 as a fresh one, because the date of commencement of repayment is 31.05.2016. [See @ Pg. 111] Hence, the claim of IOB that the Sanction Letter dated 21.01.2016 is a revised Sanction Letter is completely baseless.
23. Without prejudice to the aforesaid, even assuming that the equitable mortgage stipulated by IOB vide its Sanction Letter dated 21.01.2016 is a revised or modified charge, still under Section 79 of the Companies Act, 2013, the same is also required to be registered with the ROC. The effect of non-registration of modified or revised charge has the same effect as under Section 77(3) of the Companies Act, 2013. [Relevant Sections Annexed]
24. In view of the aforesaid, it is submitted that the present Applicant has the *locus standi* to present this application, and this Hon'ble Tribunal, in view of the aforesaid submissions, should declare the status of IOB as an unsecured creditor in the present case.

7. That the applicant has also filed an additional written submission and scanned copy is reproduced below:

WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANT/PETITIONER

1. The present Written Submissions are filed on behalf of Applicant/Petitioner in pursuance of Order dated 08.10.2021 passed in the application, i.e., I.A. No. 3975/2020 ("Application") filed by the Applicant before this Hon'ble Tribunal to direct the Resolution Professional ("RP") to treat the claims of Indian Overseas Bank ("IOB") as of an unsecured creditor. [@@ Pg. 11, Application]
2. Before advertng to the written submissions, the Applicant briefly outlines only the relevant facts leading to the present application and required for adjudication of the present Application as under: -

| Date | Particular |
|------------|---|
| 28.08.2012 | Collaboration Agreement dated 28.08.2012 executed between Kaveri Shikari Awas Samiti ("Samiti") and Horizon Buildcon Pvt. Ltd ("Corporate Debtor" or "CD") [@@ Pg. 36-55, IOB Reply] for construction of residential apartment on the land belonging to Samiti. On the same date, a Power of Attorney ("PoA") was issued by Samiti in favour of CD. [@@ Pg. 56-60, IOB Reply] |
| 24.12.2013 | IOB provided a loan facility to CD pursuant to a Credit Sanction Letter dated 24.12.2013 ("First Sanction Letter"). [@@ Pg. 61-74, IOB Reply] |
| 30.12.2013 | Supporting documents executed and provided by Samiti and CD (CD acting as PoA holder of Samiti). [@@ Pg. 75-80, IOB Reply] |
| 2013-2016 | CD defaulted in repayment of the loan amount. [@@ Pg. 3, RP's Status Report] |
| 21.01.2016 | IOB modified the First Sanction letter by way of the Sanction Letter dated 21.01.2016 and/or executed a fresh sanction letter ("Second Sanction Letter") [@@ Pg. 108-113, IOB Reply] No documents were provided by Samiti or CD during the execution of the Second Sanction Letter. |
| 2019 | This Hon'ble Tribunal accepted the Petition filed by the Applicant and initiated the insolvency resolution process against the CD and imposed a moratorium on the assets of CD. |
| 10.12.2019 | The First Committee of Creditors Meeting ("CoC Meeting") takes place wherein the Applicant is appointed as an authorized representative to represent the CoC. [@@ Pg. 38, Compliance Affidavit dt. 02.03.2021 filed by Applicant] |
| 27.07.2020 | The erstwhile RP did not share the information memorandum with the CoC members. In the 6 th CoC Meeting, the erstwhile RP stated that the claims of IOB have been treated as of a secured creditor. |
| 06.09.2020 | The Applicant sent an email to erst-while RP to treat the claims of IOB as of an unsecured creditor. [@@ Pg. 113, Application] |

08.09.2020 The RP denied the change in status of IOB and requested the Applicant to get the status of IOB decided by a proper forum. [@ Pg. 115, Application]

15.09.2020 The present Application filed before this Hon'ble Tribunal.

3. In the present Written Submissions, the Applicant address three issues: *first*, the Applicant has *locus standi* to present this application before the Hon'ble Tribunal and this Hon'ble Tribunal has jurisdiction to decide this application; *second*, IOB has no security interest on the property of the CD; *third*, IOB has not registered the modification in the charge created by Second Sanction Letter with the Registrar of Companies ("RoC") and hence due to Section 77 r/w Section 79, the claims of IOB are to be treated as that of a unsecured creditors.

Locus Standi of the Applicant to present the present application

4. The Applicant has already submitted its contentions/verments on the *locus standi* of the Applicant to file the present application in paragraph 3-11 of the Written Arguments on behalf of Applicant. The Written Arguments on behalf of the Applicant is annexed herewith and marked as Annexure A-1.
5. In the said Written Arguments, the Applicant claims *locus standi* on the following grounds:
- The Applicant was appointed as the representative of CoC by Resolution 10 passed in 1st CoC Meeting which was approved by 100% of members of CoC on 10.12.2019 [See Compliance Affidavit dt. 02.03.2021 @ Pg. 38 & 40].
 - IOB has not raised any objection on the *locus standi* of the present Applicant to represent CoC before this Hon'ble Court [See Pg. 1-22, IOB Reply & Para 1 @ Pg. 22, IOB Reply] or during the CoC meetings.
 - Even otherwise, the Applicant being a Financial Creditor having an inherent right of being treated equally with other creditors (including IOB) has a right to question privileged treatment given to IOB by RP, contrary to documents on record. [Committee of Creditors of Essar Steel India v. Satish Kumar Gupta & Ors., (2020) 8 SCC 531, Para 88]

IOB has no security interest on the immovable properties of the CD

6. It is an admitted case that the CD has no immovable assets [Para 9 & 10 @ Pg. 4 - 5, RP's Status Report]
7. IOB also admits that equitable mortgage is created over the immovable property owned by Samiti, and not of the CD. [Para IX @ Pg. 6, IOB Reply dt. 23.10.2020]
8. Even from the two sanction letters, i.e., First Sanction Letter [See Prime Security @ Pg. 46, IOB Reply dt. 23.10.2020] and Second Sanction Letter [See Prime Security @ Pg. 111, IOB Reply dt. 23.10.2020] the so-called charge is created only on the immovable property owned by Samiti.
9. Hence, based on these admitted facts, it is admitted position that IOB has no security interest on the immovable property of the CD.
10. On the aspect of law, IOB solely relies on the definition of "security interest" under Section 3(31), IBC, and on the judgment of *Anaj Jain v. Axis Bank Limited & Ors.*, (2020) 8 SCC 491, to claim that IOB will remain to be a secured creditor even when such security is created on a third-party property.
11. Before adverting to the submissions of IOB, it is submitted that the intention of IBC is not to provide for a debt recovery mechanism. The intention is to revive the company by inviting resolution plan during insolvency process; and in case of non-revival, to send it for liquidation.
12. It is precisely because of this reason that at each stage, only the assets of corporate debtor are to be considered, because in the end it is the corporate debtor who is to be revived. Some notable sections are as under: -

During Insolvency Stage

- Section 18, explanation exempts assets owned by third party [See Explanation to Section 18, IBC].

A

- Section 25 permits RP to only protect the assets of the CD [See Section 25(1)(2), IBC].
- Section 28, which provides for prior approval of CoC is limited to the assets of CD [See Section 28 (b), IBC].

During Liquidation Stage

- Section 36, which provides for liquidation estate, under sub section (3) limits it to assets on which corporate debtor has ownership rights; and sub section (4) expressly excludes assets owned by third party. [See Section 36 (3) & (4), IBC]
 - Section 52 which provides for secured creditor rights in liquidation proceedings also limits it to liquidation estate, which is defined and contained in Section 36. [Section 52 (1) & (2), IBC]
13. In the judgment of *Dynapro Private Ltd v. V. Nagarajan*, 2019 SCC Online NCLAT 493 at 17 & 18, the Hon'ble NCLAT states that the term "assets" only includes "the assets of corporate debtor and not the assets of any third party".
 14. In the context of Section 3(31) IBC as relied by IOB, it is submitted that "security interest" means "right, title or interest or claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person".
 15. IOB has placed reliance on the term "any obligation of any person" however it failed to appreciate that such right has to be created "by a transaction".
 16. The term "transaction" is defined under Section 3(33) which "includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor".
 17. Hence, security must be provided from the assets of the corporate debtor. Therefore, reliance by IOB on Section 3(31) IBC is *overlaid* and deserves to be rejected.
 18. Without prejudice to the *foregoing*, it is submitted that Section 3 specifically states "In this code, unless the context otherwise requires", which clearly shows that the definition under this section cannot control other provisions if the context of other sections provides only for assets of corporate debtor.
 19. IOB relies on para 49.1 of the *Anuj Jain Judgment (supra)*, but it fails to cite para 50.1 which limits security interest only over the assets of the corporate debtor. Moreover, the ratio of the judgment is on a different context altogether. Hence, reliance by IOB on the judgment of *Anuj Jain (supra)* is completely irrelevant and without any basis.
 20. IOB also stated that if security interest is not recognized on property of a third party (property mortgaged by Guarantor), then banking system will lapse. This submission is completely baseless, because a bank will always have a right to proceed under recovery law against the Guarantor or file a suit. There is no legal impediment against a Bank from proceeding against the Guarantor in a recovery proceeding. However, this cannot be used as a ground to make IOB as a secured creditor against the CD, as it has no security on the assets of CD.
 21. It is further stated that the CD only has development rights over the land [See Recitals A, B, C, G, 2, 4, 6, Collaboration Agreement @ Pg. 36, IOB Reply]. Further till date, the CD has no right over the land except what is contemplated by the Collaboration Agreement. It is only after the plot is fully developed that the division of share in the ratio of 64%-36% is contemplated on built up area. [See Para 7, Collaboration Agreement @ Pg. 45, IOB Reply].
 22. It is further stated that the directors (ex-management) of CD have entered the sanction letter based on the Power of Attorney ("PoA") of Samiti. IOB during arguments relied on Affidavit/Undertaking of Directors of CD [See Pg. 99, IOB Reply], but failed to point out that CD entered this arrangement based on PoA of Samiti [See Para 2 of Affidavit/Undertaking @ Pg. 99, IOB Reply].
 23. In this context, the Applicant relies on *Surya Lamp and Industries Pvt Ltd v. State of Haryana and Anr.*, (2012) 1 SCC 656, wherein the Hon'ble Supreme Court has held that an agreement to sale, a PoA or any form of

arrangement which is not in form of conveyance (in this case a sale deed) cannot transfer title on a land [Para 23 & 24, Suraj Lamp Judgment]. In view of the aforesaid, it is submitted that CD only had development rights on the land and the said land cannot be treated as asset of the CD.

IOB has not got the modified charge registered with ROC

24. It is an admitted case that the Sanction Letter dated 21.01.2016 is not registered as a charge. The RP in the status Report states that the modified charge was not registered with the RoC. [Para 14 @ Pg. 6, RP Status Report] Even the document filed by IOB of the charges registered with the RoC shows that the charge created by First Sanction Letter is registered, but not the charge created by Second Sanction Letter. [@ Pg. 100, IOB Reply]
25. IOB justifies the non-registration of the charge on the ground that the second sanction letter was just a review, and not a modification and hence did not require registration of charge.
26. This stand of IOB is completely contrary to the mandate under Section 77 and Section 79 of the Companies Act, 2013. Section 79(b) clearly provides that "any modification in the terms and conditions or the extent or operation of any charge registered under that section" is to be registered. The consequence of non-registration is fatal, as it renders a secured creditor into an unsecured creditor, as such charge cannot be considered by the Liquidator [See Section 77(3)].
27. The Supreme Court in the judgment of *Oil and Natural Gas Corporation v. Official Liquidator of Ambica Mills Company Limited and Ors.* (2015) 5 SCC 380, Para 21 in the context of Section 125 of the Companies Act, 1956 (which is *pari materia* with Section 77 of Companies Act, 2013) has held that if a charge is not registered with ROC, it renders a secured creditor into an unsecured creditor.
28. It is submitted that Section 79(b) uses two words of great import, *firstly* it uses the word "any" and *secondly*, it uses the word "modification". The term "any" will include even a minuscule change, and the term "modification" etymologically would mean "to change something slightly".
29. In the present context, the Applicant also relies upon *Ramaya Guide to the Companies Act, 2013* (19th Edition) wherein the learned author opines that "release of a particular asset from the operation of the charge by reason either of part repayment of a loan or otherwise e.g. movable property released from the operation of charge" and/or "Change in the terms relating to the maintenance of margin or in the period of repayment of a loan or any other change in repayment terms" amounts to a modification of charge, mandating registration with RoC under law.
30. In the present case, there is not just slight modifications as alleged by IOB but serious changes in the charge created. The same is depicted in a tabular fashion hereunder: -

| SNO. | PARTICULARS | FIRST SANCTION LETTER | SECOND SANCTION LETTER |
|------|-----------------|--|---|
| 1. | Prime Security | Equitable Mortgage of 2.3114 Hectare of Land and proposed apartment building to be constructed thereon in 2.3314 sq. meters or 27634 sq. yards approx. in Khasea Nos. 123 (1.2780 hectare) and 155 (1.0334 hectare) falling within the revenue estate, Sector 86, Noida-Phase II, Tehsil- Dadri, District-Gautambudh Nagar, Uttar Pradesh, owned by M/s Kaveri Sahakri Awas Samiti Ltd. [@ Pg. 66, IOB Reply] | EM of developer's share (64%) of residentially converted land and proposed apartment building to be constructed thereon in 23114 sq. meters or 27634 sq. yards approx. in Khasea Nos. 123 (1.2780 hectare) and 155 (1.0334 hectare) falling within the revenue estate of Village, Illahabans, Sector 86, NOIDA-Phase-II, Tehsil-Dadri District-Gautambudh Nagar, Uttar Pradesh owned by M/s Kaveri Sahakri Awas Samiti Ltd. [@ Pg. 111, IOB Reply] |
| 2. | Repayment Terms | The term Loan of Rs. 28.50 Crores shall be payable in 18 monthly installments of Rs. 158.33 lacs each | The term loan of Rs. 28.50 crores shall be repayable in 18 monthly installments of Rs. 158.33 lacs each, after an initial |

| | | | |
|----|----------------------|--|--|
| | | after an initial holiday period of 18 months from first disbursement. Door to Door Tenor is <u>36 months</u> including moratorium period of 18 months, from the date of first disbursement. Monthly Interest to be serviced as and when debited. [@ Pg. 65, IOB Reply] | holiday period of 28 months from the first disbursement. Door to door tenor is 46 months including moratorium period of 28 months, from the date of first disbursement. Monthly interest to be serviced as and when debited. [@ Pg. 111, IOB Reply] |
| 3. | Date of commencement | 28.12.2013 | Date of commencement of repayment: 31.05.2016 Loan end date: 31.10.2017 |

31. From the aforesaid, it is not a case of minor modification, but substantial modifications. Even otherwise, it is submitted that under the mandate of Section 77 r/w Section 79 of the Companies Act, 2013, even a slightest change in conditions of charge/document will be required to be registered with the RoC.

32. During arguments, IOB relied upon condition 12 [@ Pg. 112, IOB Reply] to argue that all conditions in First Sanction Letter flow into the Second Sanction Letter. It is submitted that this argument is completely irrelevant and even otherwise deceiving, because condition 12 states: "all other terms and conditions as per our sanction dated 24.12.2013 is applicable". The use of the term "other" clearly means that apart from the aforesaid changes, which is clear and evident, other conditions will follow. Hence, condition 12, resultantly creates an exception for the aforesaid three changes relating to security, term of payment, and date of loan commencement and repayment.

33. In view of the aforesaid submissions, it is stated that the non-registration of charge under the second sanction letter, resultantly leads the claim of IOB to be treated as of an unsecured creditor.

Disparaging remarks against Homebuyers and RP

34. The Applicant states that IOB alleged that the approach of homebuyers is "*my way or the highway*" and the conduct of the present RP is to "*favour the homebuyers and act as a traitor*". Without going into the merits of these disparaging remarks, the Applicant submits that since inception of this dispute, the Applicant has always been requesting the erstwhile RP to consider the claims of IOB on merits and documents, and the same prayer has been made before this Hon'ble Tribunal.

Conclusion

35. In view of the aforesaid, the Applicant prays this Hon'ble Tribunal to allow I.A. No. 3975/2020 filed by the Applicant before this Hon'ble Tribunal and direct the RP to treat the claims of IOB as of an unsecured creditor.

8. That the Respondent no. 1 has filed the written submission and scanned copy is reproduced below:

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WRITTEN SUBMISSIONS ON BEHALF OF RESPONDENT NO. 1 I.E. RESOLUTION PROFESSIONAL FOR HORIZON BUILDCON PRIVATE LIMITED IN I.A. 3975 OF 2020

MOST RESPECTFULLY SHOWETH:

1. That it is submitted that the present Written Submissions are being filed on behalf of the Resolution Professional for Horizon Buildcon Private Limited in compliance of order dated 08.10.2021 passed by this Hon'ble Adjudicating Authority.
2. That it is submitted that the loan given to the Corporate Debtor by Respondent No. 2 being Indian Overseas Bank was secured by equitable mortgage of immovable properties of third party i.e. M/s Kaveri Sahakari Awas Samiti Ltd.
3. The claim of Respondent to the tune of Rs. 36,15,88,929/- has arisen as a result of a term loan of Rs. 28.50 crores sanctioned by Respondent No. 2 to the Corporate Debtor on 24.12.2013. It is pertinent to mention herein that Respondent No. 2 started disbursement on 28.12.2013, which is as per the statement of accounts [Page No. 14-17 of reply]. That the last date of disbursement of the loan amount was made by Respondent No. 2 on 30.12.2015 on which date an amount of Rs. 21,88,69,219/- was outstanding in the loan account.
4. The terms and conditions of the loan account are provided in the sanction letter dated 24.12.2013 issued by Respondent No. 2 [Page No. 18-31 of reply].
5. The term loan of Rs. 28.50 crores was payable in 18 monthly instalments of Rs. 158.33 lacs each after an initial holiday period of 18 months from the first disbursement. As the first disbursement was done on 28.12.2013 first instalment of Rs. 158.22 were due on 28.06.2015. But the Corporate Debtor did not make payment of this or subsequent instalments. Therefore, after 90 days account was declared as NPA on 28.09.2015.
6. The Loan facility was reviewed by Respondent No. 2 vide sanction letter dated 21.01.2016 [Page No. 32-37 of reply] and the security of the loan was changed.
7. That it is pertinent to mention here that in terms of this revised sanction letter, which has been signed by the Respondent No. 2, and counter signed by the Corporate Debtor and M/s Kaveri Sahakari Awas Samiti Ltd., the collateral security for the loan is NIL and the only mortgage proposed is future 64% share of the Corporate Debtor in the land and building.
8. That the amount of outstanding loan to the Respondent No. 2 is Rs. 26,85,24,621/- in the balance sheet dated 31.03.2019 [Page No. 38-61 of reply], hence, Resolution Professional has provisionally admitted claim of Rs. 36,15,88,229/-. That the said loan facility is claimed to be secured by equitable mortgage of immovable properties belonging to the company & M/s Kaveri Sahakari Awas Samiti Ltd., and personal guarantee of the directors & M/s Kaveri Sahakari Awas Samiti Ltd. in the balance sheet. As there was no immovable property of the Corporate Debtor as per the balance sheet, no equitable mortgage of its assets was subsisting as security to the above loan.
9. Further, based on the records available with ROC, it can be observed that, one charge for Rs. 28.50 Crores is registered on 28.12.2013 in favour of the Respondent No. 2 on the immovable property or any interest therein. However, it is pertinent to mention here that no specific immovable property belonging to the Corporate Debtor has been mentioned in the said document. On a bare perusal of the balance sheet dated 31.03.2019 of the Corporate Debtor, it can be clearly observed that the Corporate Debtor does not own any immovable property.
10. It is pertinent to mention here that after the loan facility was reviewed by the Respondent No. 2 vide its sanction letter dated 21.01.2016 and the security of the loan was changed, as per the ROC website the charge registered with ROC appears to have not been modified. That the Respondent No. 1 has sought for clarification regarding Creation/Modification of Charge in the year 2016 from the Respondent No. 2.
11. That the Respondent No. 2 vide email dated 22.12.2020 [Page No. 76-77 of reply], after several follow ups from the Respondent No. 1, has informed that the charge created at the time of sanctioning the loan facility in the year 2013 is continuing and the Respondent No. 2 has exclusive charge on the immovable property (land and proposed apartment building to be constructed), hypothecation of stocks and entire receivables pertaining to the project and entire fixed assets of the company including Plant and machinery.
12. That it is relevant to mention here that in terms of this revised sanction letter dated 21.01.2016, which has been signed by the Respondent No. 2, and counter signed by the Corporate Debtor and M/s Kaveri Sahakari Awas Samiti Ltd., the collateral security for the loan is NIL and the only mortgage proposed is future 64% share of the Corporate Debtor in the land and building.
13. That it is relevant to mention here that in this present case, based on the records available with ROC, it can be observed that, one charge for Rs. 28.50 Crores is registered on 28.12.2013 in favour of the Respondent No. 2 on the immovable property or any interest therein. However, after the loan facility was reviewed by the Respondent No. 2 vide its sanction letter dated 21.01.2016 and the security of the loan was changed, charge registered with ROC has not been modified. That in terms of this revised sanction letter, which has been signed by the Respondent No. 2, and counter signed by the Corporate Debtor and M/s Kaveri Sahakari Awas

Samiti Ltd., the collateral security for the loan is NIL and the only mortgage proposed is future 64% share of the Corporate Debtor in the land and building

RESOLUTION PROFESSIONAL HAS NO POWERS TO 'ADJUDICATE'

14. That it is submitted that the duty of the Resolution Professional is to receive and collate all the claims submitted by the creditors and has no power to "adjudicate" upon the validity and quantum of the numerous claims made before him/her for the purposes of admission and rejection. In the case of *Swiss Ribbons Pvt. Ltd. v. Union of India* Writ Petition (Civil) No. 99 of 2018, the Hon'ble Supreme Court of India conclusively ruled therein that the Resolution Professional has no adjudicatory powers. To establish the proposition, the Hon'ble Court compared the powers of a Resolution Professional to a liquidator and stated that a liquidator has power to determine the valuation of claims under Section 40 of the IBC, and that such determination qualifies as a decision which is "quasi-judicial in nature". After having established this, the Hon'ble Court stated that since a Resolution Professional, unlike a liquidator, cannot act without the approval of, and can be replaced by, the committee of creditors (COC), therefore, acts as "a facilitator of the resolution process whose administrative functions are overseen by the committee of creditors and by the Adjudicating Authority".
15. Furthermore, the Hon'ble Supreme Court in the matter of *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.* [Civil Appeal No. 8766-67/2019 and other petitions], has held that the role of the Resolution Professional is not adjudicatory but administrative. Further, with respect to the claim, it has been stated that in the CIRP, all claims must be submitted to and decided by the Resolution Professional so that a prospective Resolution Applicant knows exactly what has to be paid in order that it may then take over and run the business of the Corporate Debtor.

VERIFICATION OF CHARGE OF INDIAN OVERSEAS BANK AS A SECURED CREDITOR OR UNSECURED CREDITOR BEYOND THE POWERS OF THE RESOLUTION PROFESSIONAL

16. It is also relevant to refer to the provisions of the Companies Act, 2013 which provides for Registration of Charges

Duty to Register Charges, etc.

77. (1) It shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation:

[Provided that the Registrar may, on an application by the company, allow such registration to be made

(a) in case of charges created before the commencement of the Companies (Amendment) Ordinance, 4[2019], within a period of three hundred days of such creation; or

(b) in case of charges created on or after the commencement of the Companies (Amendment) Ordinance, 4[2019], within a period of sixty days of such creation, on payment of such additional fees as may be prescribed;

Provided further that if the registration is not made within the period specified

(a) in clause (a) to the first proviso, the registration of the charge shall be made within six months from the date of commencement of the Companies (Amendment) Ordinance, 4[2019], on payment of such additional fees as may be prescribed; and different fees may be prescribed for different classes of companies;

(b) in clause (b) to the first proviso, the Registrar may, on an application, allow such registration to be made within a further period of sixty days after payment of such additional fees as may be prescribed.]

Provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.

4[Provided also that this section shall not apply to such charges as may be prescribed in consultation with the Reserve Bank of India.]

(2) Where a charge is registered with the Registrar under sub-section (1), he shall issue a certificate of registration of such charge in such form and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favor the charge is created.

(3) Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the Liquidator appointed under this Act or the Insolvency and Bankruptcy Code, 2016, or the case may be, or any other creditor unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section (2).

(4) Nothing in sub-section (3) shall prejudice any contract or obligation for the repayment of the money secured by a charge.

17. Section 77(3) of the Companies Act, 2013 is a non-obstante clause, which provides that a Liquidator under appointed under the Insolvency and Bankruptcy Code, 2016 shall only consider those charges into account, which are duly registered under Section 77(1) and a Certificate of Registration of such charge is issued by the Registrar under Section 77(3) of the Companies Act, 2013.

In view of the above facts and circumstances and also keeping in view the position of law, it is humbly prayed that this Hon'ble Adjudicating Authority may be pleased to decide as to whether Indian Overseas Bank is a secured creditor or an unsecured creditor as the said question is beyond the powers of the Respondent No. 1 being a Resolution Professional.

9. That the Respondent no.2 has filed the written submission and scanned copy is reproduced below:

**SHORT WRITTEN SYNOPSIS ON BEHALF OF THE RESPONDENT NO.2 IN I.A. NO.
3975/2020 (INDIAN OVERSEAS BANK)**

1. The Respondent no.1 had rightly classified the Respondent no.2 (hereinafter "Bank") as secured creditor since the credit extended to the corporate debtor under sanction advice dated 24/12/2013 (at Page 61-74 of Reply filed by Bank) was secured by way of (a) equitable mortgage over the project land (b) Charge on entire receivables and stock pertaining to the project, (c) lien/charge and escrow of operating cash flow from the project during the tenor of loan and (d) hypothecation of entire fixed assets including plant and machineries etc. and current assets including raw material, work in progress, finished goods etc. [Re: Column 8 of Form C at pages 124-126 and Para 2 of Demand Notice at pages 130-135 of Reply filed by Bank] upon perusal of the following documents:

Equitable Mortgage

- 1.1. Form 379 B (at Page 75-77 of the Reply filed by Bank) which is a proof deposit of the title deeds the project land to secure repayment of the credit extended to corporate debtor. The title deeds even as on date are with the bank as a proof of equitable mortgage still in existence.
- 1.2. Undertaking executed by corporate debtor (at page 90-99 of the Reply filed by Bank) undertaking not to sell/alienate/mortgage/gift/create in kind of encumbrance or part with the possession of the project land till the credit facility extended is liquidated and to deposit the original title deeds.

Hypothecation/Charge/Lien

- 1.3.F110C: Term Loan Agreement (at Pages 81-89 of the Reply filed by Bank) wherein the corporate debtor had hypothecated the entire fixed assets including land, building, plant and machinery etc. by way of 1st charge in favour of the bank as security for repayment of the credit. [Re: Clause 5 at page 83 and schedule at page 89]
- 1.4.F110E: Letter of Hypothecation (at Pages 91-99 of the Reply filed by the Bank) executed by the corporate debtor whereby the entire fixed assets including plant and machineries etc and also current assets including raw material, work in progress, finished goods etc., (which in the

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present case are the flats/ building / superstructure etc..) are also hypothecated for securing the loan. [Re: Schedule at Page 97]

Respondent No. 2 is a secured creditor by virtue of Section 3(31) of IBC

2. Secondly the argument that since the project land does not belong to the corporate debtor, the Bank cannot be classified as secured creditor is legally untenable as security interest defined u/s 3(31) of IBC means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person. Anything done for the benefit of the principal debtor is a sufficient consideration to the surety for giving guarantee as expressly provided in Section 127 of the Contract Act. Thus, even though there is no consideration to the third party-surety for mortgage, the consideration of having done anything for the benefit of the principal debtor is a sufficient consideration. It is for this reason that Section 3(31) of the IBC only requires a transaction/arrangement for securing the payment of debt by any person in favour of the corporate debtor and doesn't mandate that the property shall belong to a corporate debtor for qualifying as a secured creditor. [Re: para 49.1 of *Anaj Jain vs. Axis Bank Limited and Ors.* (2020) 8 SCC 401 annexed as R3-1 (Pages 5-134)].
3. Section 3(33) of the IBC defines the transaction as an agreement of "transfer of assets" and as per Section 3(34) of the Code elaborates that a transfer includes "mortgage". Accordingly F111 Guarantee for Cash Credits etc. (at Page 78-80 of the Reply filed by Bank) was executed to secure the repayment of the credit availed by the corporate debtor.
4. The decision in *Dynepro Private Ltd. v. Nagarajan* 2019 SCC Online NCLAT 493 has no application to the facts of present case. The decision does not states that in order to acquire a status of a secured creditor the property mortgage to secure repayment of loan must belong to the corporate debtor.
5. Further even assuming otherwise collaboration agreement dated 28/04/2012 (Pages36-55 of the Reply filed by Bank) under Clause 7 of the said Agreement, shows that it was agreed between the parties that, "the corporate debtor having 64% share on the entire built up area of the said land along with proportionate undivided, indivisible or impartibly rights on the said land underneath the said complex and proportionate parking in the basement." Further clause 8(b) stated that only members of 64% share shall also be treated as member of Kaveri Sahakari Awas Samiti Ltd. and share certificate shall be issued by the owners to all allottees of the developers. The argument that it is only after the plot is fully developed the division is contemplated is erroneous in view of in view of clauses 7,8 and 29(n) of the collaboration agreement which clearly states that share is indivisible and no distinction is to be made between the 36% allottees and 64% allottees and it is the corporate debtor who was to allot all the flats.
6. It is pertinent to note that these flats are to be built on the project land whose title deeds are still with the Bank. In fact clause 24 of the collaboration agreement (page 48 of the Reply of Bank) clearly states that the credit availed for construction of flats was secured by way of mortgage.
7. The judgment of *Suraj Lamp and Industries Pvt. Ltd. V. State of Haryana and Anr.* (2012) 1

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SCC 656 as cited by the Applicant in an attempt to negate the claim of the Bank, is not relevant with the matter at hand as the same discusses the absolute transfer of title whereas here is the case where mortgage was created in favour of Bank.

Charges registered with RoC

8. It is not in dispute that Charges registered with RoC even as on date [Re: Page 100-107 of the Reply of Bank] and Column 9 of Form (Page 103) lists the above mentioned documents as proof of the charge created in favour of the bank. It is not a case where charges were not registered and therefore reliance placed on the *ONGC v. Official Liquidator of Ambica Mills Co. Ltd. and others (2015) 5 SCC 300* has no application to the present case.
9. Similarly the reliance placed on Ramaiya Guide to the Companies Act 2013 is also erroneous as in the present case the project land was never released which is evident from the following:
 - 9.1. Title deeds of the Project Land are still with Bank
 - 9.2. The credit sanction advice states that the project land and all conditions of sanction advice dated 2/10/2013 will apply.
 - 9.3. If the asset was released there would have been a document of release showing the title deeds are returned.
10. The argument that the charge was not modified pursuant to sanction letter dated 21/01/2016 is erroneous as it only reviews the existing terms loan and no fresh or additional facilities were granted to the corporate debtor [Re: Page 111 of the Reply of Bank]. Therefore, the charge that was created under sanction letter dated 24/12/2013 continued and resultantly the bank continued having a charge on the aforesaid secured asset and therefore continued to hold the title deeds. [Re: Page 112 of the Reply of Bank- third line from the top states that project land is included and not released as security and clause 12 which says that old terms and conditions as per sanction advice dated 24/12/2013 is applicable].
11. Even assuming otherwise this Hon'ble Tribunal has recognised financial creditors as a secured creditor even though the security in the form of charge over immovable property was not registered as there is consensus ad idem between the parties who created the security and to whom it is created. [Re: para 8 and 9 of *Suhani Trading and Investment Consultants Pvt. Ltd. v. Deccan Chronicle Holdings Ltd.*, 2018 SCC Online NCLT 24842 annexed as R2-2 (Pages 135-137) and para 12 and 13 *Indiabulls Housing Finance Limited v. Sigma Leisure Private Limited*, 2018 SCC Online NCLT 31738 annexed as R2-3 (Pages 138-142)]. Thirdly the requirement mandated under S.77 applies during liquidation and CIRP.
12. The reliance placed on decision of the Hon'ble NCLAT in *V. Padmakumar v. Stressed Asset Stabilization Fund (SASF)* 2020 SCC Online NCLAT 417 to contend that the claim of the Bank is time barred is erroneous as the said decision has been overruled by the Hon'ble Supreme Court in para 47 of the *Asset Reconstruction Company (India) Ltd. v. Bishul Jainwal*, (2021) 6 SCC 366 annexed as R2-4 (Pages 143-150).

Conduct of the Applicant

13. While the present IA was pending without even taking leave of this Hon'ble Tribunal a Revised Resolution Plan dated 24/11/2020 was submitted by IRIDIA Home Buyers Association treating the bank as unsecured creditor disregarding classification made by Respondent no.1. The

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Resolution Plan states that term "Financial Creditor" means as prescribed in the Code but while defining secured creditor it has deviated from the definition prescribed under the Code. The condition imposed by the applicant that in case the present application is decided in favour of the bank, the Resolution Plan will be revised/withdrawn is a blatant disregard of orders of this Hon'ble Tribunal. [Re: Para vii Page 4 of order dated 31/05/2021 of this Hon'ble Tribunal in IA No.1005/2021].

14. While filing the present IA, the applicant also got the Respondent no.1 replaced as RP. The Respondent no.1 arrayed in personal capacity was not put to notice by the Applicant. Thus, while the decision of the Respondent no.1 classifying the Bank as secured creditor is under challenge, the Respondent no.1 is not before this Hon'ble Tribunal. This is not the only time the Applicant has adopted this strategy. The Applicant had also filed IA No. 140/2021 without even making the Indian Overseas Bank a party. [Re: Order dated 27/01/2021 passed this Hon'ble Tribunal]
15. The Bank has requested for details of the payments made by the homebuyers under the Builder Buyer Agreement, the details have not been placed before the Committee of Creditors. It is the case of the Bank that the home buyers must be asked to pay the balance amount payable by the allottees as per the Builder Buyer Agreement and utilising the funds for project completion just as the Hon'ble Supreme Court had directed in *Bikram Chatterji v. Union of India*, (2019) 19 SCC 161 annexed as R2-5 (Pages 191-386). [RE: Email dated 10/02/2021 filed in reply IA no.140/2021 annexed as R2-6 (Pages 387-388)]. The Respondent no.2 has therefore become an inconvenient member of CoC to the Applicant.
16. That in view of the above it is most respectfully prayed that the application deserves to be dismissed in law as well as in equity.

10. We have heard the Learned Counsel appearing for the applicant, Respondent No. 1 and 2 and perused the averments made in the application, reply and written submissions filed by the respective parties.

11. On the basis of the averments made in the application, reply and the written submissions filed on behalf of the parties, the following are the admitted facts: -

- i) Respondent No.-2, The Indian Overseas Bank advanced the loan in terms of the agreement arrived between the Respondent No.-2 and the Corporate Debtor and Kaveri Sehkari Awas Samiti Ltd.



The loan amount has been disbursed by the Respondent No.-2 to the Corporate Debtor.

- ii) It is also an admitted fact that the first sanction letter was issued on 24th December, 2013 and the second sanction letter was issued on 21st January, 2016.¹
- iii) It is also an admitted fact that in pursuance of the first sanction letter, the prime security for the said term loan was Equitable Mortgage of 2.3114 Hectare of land and proposed apartment building to be constructed thereon 23114 Sq. Meters or 27634 Sq. Yards approx. in Khasra No. 123 (1.2780 hectare) and 155 (1.0334 hectare) falling within the revenue estate of village - Illahabans, Sector-86, Noida-Phase-II, Tehsil-Datri, District-Gautam Budh Nagar, Uttar Pradesh owned by Kaveri Sahkari Awas Samiti Ltd.
- iv) It is also an admitted fact that the first IRP accepted the claim of the Respondent No.-2, the Indian Overseas Bank as a secured creditor.
- v) It is also an admitted fact that during the CIRP, the first IRP was changed and Mr. Anil Tyal, has been appointed as the new RP.

12 On perusal of the reply filed by the new RP, Mr. Anil Tyal, it appears that he has changed the stand which, was taken by the first IRP Mr. Parveen Kumar Aggarwal and he has prayed to determine the status of the Respondent No.-2.

13. In other words, by filing the reply, the Respondent No.-1, the existing RP, has supported the averments made in the application filed by the applicant on the point of change of status of Respondent No.-2 as a Secured Creditor to Unsecured Creditor.

14 It is not the claim of the applicant that the Respondent No.-2 is not a Financial Creditor. The only limited question required to be decided in this matter is **whether mortgage created by the Corporate Debtor in respect of**

the property of third person can be treated as security and on the basis of that security whether the Respondent No.-2 will be treated as a Secured Creditor or not?

15. Both the parties have placed reliance upon the decision of **Mr. Anuj Jain**, therefore, at this juncture, we would like to refer to the decision of Mr. Anuj Jain, the relevant portion of the said Judgment is reproduced below: -

"28. In a recent judgment of this Court in **Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. V. Axis Bank Ltd.** this court, speaking through Maheswari, J. referred to various precedents on restrictive and expansive interpretation of words and phrases used in a statute, particularly, the words 'means' and 'includes' and held:-

"46. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become "financial debt" for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursement against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of "disbursement" against "the consideration for the time

value of money" could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said clauses (a) to (i) of Section 5(8) would be falling within the ambit of "financial debt" only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as "financial debt" within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money.

47. As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.

48. It is also evident that what is being dealt with and described in Section 5(7) and in Section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code.

49. Expounding yet further, in our view, the peculiar elements of these expressions “financial creditor” and “financial debt”, as occurring in Sections 5(7) and 5(8), when visualised and compared with the generic expressions “creditor” and “debt” respectively, as occurring in Sections 3(10) and 3(11) of the Code, the scheme of things envisaged by the Code becomes clearer. The generic term “creditor” is defined to mean any person to whom the debt is owed and then, it has also been made clear that it includes a “financial creditor”, a “secured creditor”, an “unsecured creditor”, an “operational creditor”, and a “decreeholder”. Similarly, a “debt” means a liability or obligation in respect of a claim which is due from any person and this expression has also been given an extended meaning to include a “financial debt” and an “operational debt”.

49.1. The use of the expression “means and includes” in these clauses, on the very same principles of 20 interpretation as indicated above, makes it clear that for a person to become a creditor, there has to be a debt, i.e., a liability or obligation in respect of a claim which may be due from any person. A “secured creditor” in terms of Section 3(30) means a creditor in whose favour a security interest is created; and “security interest”, in terms of Section 3(31), means a right, title or interest or claim of property created in favour of or provided for a secured creditor by a transaction which secures payment for the purpose of an obligation and it includes, amongst others, a mortgage. Thus, any mortgage created in favour of a creditor leads to a security interest being created and thereby, the creditor becomes a secured creditor. However, when all the defining clauses are read together and harmoniously, it is clear that the legislature has maintained a distinction amongst the expressions “financial creditor”, “operational creditor”, “secured



creditor" and "unsecured creditor". Every secured creditor would be a creditor; and every financial creditor would also be a creditor but every secured creditor may not be a financial creditor. As noticed, the expressions "financial debt" and "financial creditor", having their specific and distinct connotations and roles in insolvency and liquidation process of corporate persons, have only been defined in Part II whereas the expressions "secured creditor" and "security interest" are defined in Part I.

50. A conjoint reading of the statutory provisions with the enunciation of this Court in *Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17]*, leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression "financial creditor" is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders, namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor."



16. A bare perusal of the decision referred to Supra shows that in the Anuj Jain case, Hon'ble Supreme Court had considered the question relating to the disbursement of the amount by the third person and on the basis of that decided, whether the third person be treated as a Secured Financial Creditor or not.

17. Here, in the case in hand, admittedly, there is no dispute that the amount has been disbursed by the Respondent No.-2 to the Corporate Debtor and not by the third person and so the Respondent no 2 is admittedly the Financial Creditor.

18. Now the question is, whether the property mortgaged by the Corporate Debtor, which stands in the name of third person can be treated as a security for the purpose of disbursement of that loan amount or not?

19. At this juncture, we would like to refer to the definition of Secured Creditor and security interest as defined under Section 3 sub-Section 30 and 31 of IBC, 2016 and the same are reproduced below:-

Section 3 sub-Section 30 and 31

(30) "secured creditor" means a creditor in favour of whom security interest is created;

(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

20. The conjoint reading of Section 3 sub-Section 30 and 31 of IBC, 2016 shows that a "Secured Creditor" means a Creditor in favour of whom security interest is created and the "security interest" is defined under Section 3 sub-Section 31 of the IBC, 2016, which means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction, which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or **any other agreement or arrangement securing payment or performance of any obligation of any person.**



21 When we consider the case in hand, in terms of the definition refer to Supra then it is seen that any other agreement or arrangement securing payment or performance of any obligation of any person comes under the definition of security interest and if a security interest is created then the creditor in whose favour the interest is created shall be treated as Secured Creditor.

22 Here, in the case in hand, admittedly, the security interest is created in favour of the Respondent No.-2, of course, according to the applicant and Respondent No.-1, the property which is mortgaged belongs to the Kaveri Sahkari Awas Samiti Ltd. and it does not belong to the Corporate Debtor but it is not denied, that on the basis of that security interest, a loan was disbursed in favour of the Corporate Debtor and therefore, the Respondent No.-2 is, admittedly, a Financial Creditor.

23. So, in view of the aforesaid discussion, we are of the considered view that in terms of Section 3 sub-Section 30 and 31 of the IBC, 2016, the Respondent No.-2 is rightly declared a "secured creditor" by the then Resolution Professional and there is no illegality in that declaration.

24 At this juncture, we would also like to refer to the argument advanced on behalf of the applicant and the Respondent No.-1 that by subsequent sanction letter, the charge which was registered in the office of the Registrar was omitted and therefore, it cannot be treated as a security in terms of Section 77 of the Companies Act.

25 In this regards, the Learned Counsel appearing for the Respondent No.-2, in the course of her arguments submitted that the second sanction letter is continuation of the first sanction letter and therefore, the charge created on the basis of the first sanction letter shall continue and it cannot be changed.



26. At this juncture, we would like to refer to the relevant terms and conditions of the second sanction letter dated 21/01/2016, the scanned copy of which is reproduced below:-

10. The Company should ensure that the securities (prime as well as collateral) charged to us are insured for the full value with bank's clause for all possible risks at all the times and submit the same to us.
11. The Company should ensure periodical servicing of interest and repayment of installment.
12. All other terms and conditions as per our sanction dated 24.12.2013 is applicable.


 (Sochipem Kasar)
 Manager





 (Mpenu Modi)
 Chief Manager

27. In terms of the condition at serial no. 12 of the second sanction letter dated 21/01/2016, other terms and conditions of the first sanction letter dated 24/12/2013 remain applicable. Therefore, there is no reason to disapprove the contention of the Respondent-2 regarding creation of the charge under Section 77 of the Companies Act. Rather, on perusal of the both the sanction letters together, we find that the subsequent sanction letter is in continuation of the first sanction letter and therefore, the charge created and registered under Section 77 of the Companies Act 2013 shall be treated as a valid charge.

28. Hence, we find, no force in the contention raised on behalf of the Learned Counsel appearing for the applicant.

29. So far as the decisions upon which the applicant has placed reliance, in our considered view, are not applicable to the facts and circumstances of the case and the then RP has rightly placed the Respondent No.-2 under the category of Secured Creditor. Therefore, we are not inclined to interfere with the decision taken by the then RP by which the Respondent No.-2 is placed under the category of Secured Creditor.



30. Hence, we find, no merit in the application. Accordingly, **the application is hereby dismissed.**

- Sol -

(L. N. Gupta)
(Member Technical)

- Sol -

01.06.2020
(Abni Ranjan Kumar Sinha)
(Member Judicial)