IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI
BENCH- I

IA No. 614 of 2023
IN
CP(IB) No. 494 of 2019
Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016

IA No. 614 of 2023
In the Application of
IIRF India Realty XII Ltd. & Anr.
…Applicant
Versus

Srigopal Choudhary, Resolution Professional of Shree Ram Urban Infrastructure Ltd. & Ors.
…Respondents

In the matter of
SREI Equipment Finance Limited
…Financial Creditor
Versus

Shree Ram Urban Infrastructure Limited
…Corporate Debtor
Order Delivered on : 04.09.2024

Coram:
Hon'ble Member (Judicial) : Sh. Justice Virendrasingh G. Bisht (Retd.)
Hon'ble Member (Technical) : Sh. Prabhat Kumar

Appearances:

For the Applicant : Jash Shah, Md. Shahan Ullah, Advocates

For the Respondent No.1 : Smita Durve, Advocate

ORDER

Per: Virendrasingh G. Bisht, Member (Judicial)

1. This Application bearing **IA No. 614/2023** is filed by **IIRF India Realty XII Ltd.** and **Vistra ITCL (India) Ltd**. (formerly known as IL&FS Trust Co. Ltd.) ("**Applicants**") in the Corporate Insolvency Resolution Process ("**CIRP**") of **Shree Ram Urban Infrastructure Ltd.** ("**Corporate Debtor**") under the provisions of the Insolvency and Bankruptcy Code, 2016 ("**Code**") seeking the following reliefs :

   *a) To declare that the communication dated 17.06.2022 issued by the Respondent No. 1, the Resolution Professional ("**RP**") of Shree Ram Urban Infrastructure Ltd. ("SRUIL" and/or "**Corporate Debtor**") rejecting the claims of the Applicants is illegal and quash and set aside the communication dated 17.06.2022.*

   b) Direct that the Respondent No. 1 should not interfere with the claim of the Applicants in terms of this Tribunal's Order dated 17.06.2022.

   c) Grant ad-interim reliefs in terms of prayers (a) and (b).

   d) To declare that all the Applicants are a financial creditor of the Corporate Debtor and direct the Resolution Professional of the Corporate Debtor to immediately admit the legitimate claim of the Applicants amounting to Rs. 1486,12,03,644/-.

Brief Facts

2.1 The Corporate Debtor was admitted into CIRP on 06.11.2019. On 07.10.2022, the Resolution Professional ("**RP**") constituted the Committee of Creditors ("**CoC**") of the Corporate Debtor.

2.2 On 06.12.2020, the Applicants filed their proof of claim for Rs. 1486,12,03,644/- with the RP, which was rejected on 17.06.2022 stating that "*We regret to inform you that the Claim of M/S IIRF has been rejected now on thorough analysis and verification by the RP team*". No reason whatsoever was stated in the email.

Submissions made by the Ld. Counsel on behalf of the Applicant

2.3 On 19.04.2021, the claim of the Applicants was admitted by the Respondent RP on purported provisional and purported unverified basis stating that the claim is very voluminous and is subject to thorough analysis and verification later at any time either on further analysis and vetting by the IRP team and legal team of IRP and/or further post availability of the records from the office of the Official Liquidator. The RP was provided with all documents and data concerning the claim by the Applicants. It was further stated that the records of the Corporate Debtor are likely to be available to the IRP team post reimbursement of the expenses claimed by the Official Liquidator and that the claims shall be verified on availability of the records of the Corporate Debtor and the same shall be reanalysed and resubmitted post verification. However, the Applicants' submit that the RP has not received access to the Corporate Debtor's records from the Official Liquidator and hence there is no basis on which the RP has rejected the Applicants' claim.

2.4 It is also submitted that Section 25 of the Code restricts the duty of the Resolution Professional to verify and accept the claims. It is a settled position in law that the RP does not have adjudicatory role but merely has administrative role. However, in the present scenario, the

Resolution Professional has exceeded the duties cast upon him by the Code.

2.5 The relevant facts required to adjudicate upon this claim are as follows -

2.5.1 It is submitted that between 2009 and 2012, the Applicants invested Rs, 299,99,99,777/- for the construction of the Corporate Debtor's Palais Royale Project ("**Project**"). The investment was made by subscription of 550 equity shares and 5,09,318 preference shares of SRM Sites Pvt. Ltd. ("**SRM Sites**"), a 100% subsidiary of the Corporate Debtor. The funds were channelled as private equity investment under which the amounts were given to SRM Sites in four tranches under four separate and identical Share Subscription Agreements ("**SSHA(s)**") and four Transfer Options Agreements ("**TOA(s)**"). The Applicant's investment made as a financial debt to the Corporate Debtor is a commercial borrowing secured, inter alia, vide a charge created through Escrow Agreements pertaining to 14 flats in the Project executed between SRM Sites, the Applicants, Corporate Debtor, and IDBI Trusteeship Services Limited **(Escrow Agreements).**

2.5.2 The Applicant has relied on the following relevant clauses of the SSHA(s) and the TOA(s) to prove that the Applicants herein are financial creditors of the Corporate Debtor :

a) The 4th SSHA dated 17.12.2012 in recitals D to K clearly records the entire factual circumstances behind the solicitation of funds by the Corporate Debtor from the Applicants. This is also reflected in the conditions precedent to disbursement set out in the SSHA(s), which required that certain contraction milestones be met by the Corporate Debtor and SRM Sites to avail the next tranche of money from the Applicants.

b) It is clear from the above that the main condition for release of the tranches, that formed a part of the 1st SSHA dated 02.09.2009 was the completion of a certain portion of construction of the Project. In addition, the accounts statements certified by the Corporate Debtor's statutory auditors clearly demonstrate that the amounts obtained from the Applicants were being used entirely to fund the development of the Project. Therefore, it is clear from these clauses and the certificates and account statements given by the Corporate Debtor to the Financial Creditor in fulfilment of the conditions precedent that the Funds were in fact being extended for the sole purpose of financing the development of the Project.

c) As per Clause 3.1 and 3.2 of the TOA, the TOA is a standalone agreement independent of the other agreement, namely the SSHA, and the transfer options under the TOA(s) are granted by the Corporate Debtor for the consideration it has received under the SSHA which is deemed as sufficient consideration.

d) As per Clause 6.4 of the SSHA, the Applicants had the rights to call upon SRM Sites to buy back their shares upon occurrence of any one of the events listed thereunder which, inter alia, included any misrepresentation or material breach of the contractual provisions or material representations or warranties by the Corporate Debtor or SRM Sites, occurrence of any events listed in Clause 3.5 and pertinently, on completion of a specified period from the closing date of Tranche-1 (Clause 6.4.5).

e) As per Clause 6.8 of the SSHA, if SRM Sites failed to honour its buyback obligations, the Corporate Debtor had agreed to purchase the Applicant's shares at a mutually agreed price.

f) As per Clause 3.6 of the TOA, the Corporate Debtor had agreed that if the exit price as calculated under the SSHA did not provide

Applicants with IRR of at least 27%, then the Corporate Debtor, at Applicant's request, would purchase all of the Applicant's share at a price which would provide at least 27% IRR on their investment. As per Clause 3.7 of the TOA, the Corporate Debtor agreed that if SRM Sites failed to honour its buy back obligations under the SSHA, Corporate Debtor would within a period of (30) thirty days purchase the Applicants' shares at a price which would provide Applicants with the agreed IRR.

g) As per Clause 3.8 of the TOA, in the event Applicants were not provided an exit under Clause 6.1 of the SSHA, the Corporate Debtor had agreed to call upon Applicants to sell the shares held by Applicants in SRM Sites on a proportionate basis upto the quantity specified at the derived transfer price by sending a notice within (15) fifteen days prior to Corporate Debtor's Transfer Option. The transfer date has been set out at Clause 1 of the TOA.

h) As per Clause 3.9 of the TOA, in case the Corporate Debtor fails to send the Transfer Notice to the Applicants as stipulated in Clause 3.8 of the TOA mentioned above, notwithstanding other exit rights granted to the Applicants under the SSHA, Applicants had the option to call upon the Corporate Debtor to buy/purchase the Transfer Shares held by the Applicants in SRM Sites on a proportionate basis at the Derived Transfer Price by sending notice at least (7) seven days prior to Applicant's Transfer Option. Further, the obligations of the Corporate Debtor to make payments to Applicants under the TOA were secured by way of (4) four Escrow Agreements. The Escrow Agreements recorded that the Applicants' Specified Charged Apartments were furnished as security by the Corporate Debtor to secure the payment obligations of the Corporate Debtor and SRM Sites.

i) As per Clause 4.2 of the Escrow Agreement, in the event of a default, inter alia, by the Corporate Debtor, the Escrow Agent was empowered to take steps directly to sell the Specified Charged Apartments and deposit the monies realized from the sale into a designated bank account of the Corporate Debtor operated by the Escrow Agent and pay over such monies to the Applicants (Clause 3.2.5 of the Escrow Agreement) as instructed. Under Clause 8 of the Escrow Agreements, the Corporate Debtor indemnified the Applicants against any loss or liability that may be incurred or suffered by them including on account of exercise of any powers or any actions taken by an Indemnified Party under the Escrow Agreement and the Escrow Documents.

2.5.3 On 17.12.2012, the 1st TOA was amended revising the dates for exercising their Transfer Options. Under Clause 2.1 of the Amended TOA read with Clause 3.10 of the 1st TOA, with regard to the shares held by the Applicants in SRM Sites under the 1st SSHA, the Corporate Debtor had agreed to exercise its Call Option and purchase :

a) the first 83,333 shares (at the end of 24 months) of the Closing Date of the 1st Tranche
b) Next 83,333 shares (at the end of 30 months) of the Closing Date of 1st Tranche
c) Next 41,667 shares (on any date in the month of December, 2012)
d) Last 41,667 shares (on any date in the month of December, 2012)

2.5.4 The Corporate Debtor vide its letters dated 28.09.2011, 26.03.2012, 04.09.2012 and 13.12.2012 expressed its willingness to buy back 162,016 Compulsorily Convertible Preference Shares ("**CCPS**") held by the Applicants in SRM Sites under the 1st SSHA read along with Clause 3.10 of the 1st TOA. Pursuant to the same, the Corporate Debtor in part performance of its obligation to repay

the financial debt given by the Applicants to the Corporate Debtor, paid an amount of Rs. 116,92,36,515/- to the Applicants. These CCPS as on date are standing in credit of the Corporate Debtor. In view of these part payments, on 12.07.2012, the Corporate Debtor requested the Applicants to release their charge on the two (2) units out of the fourteen (14) units of the Applicant's Specified Charged Apartments. This in itself is an acknowledgement of the security created by the Corporate Debtor in favour of the Applicants.

2.5.5 On 07.01.2013, the Applicants invoked their put option under Clause 3.9 of the 1st TOA. SRUIL did not honor the put option and hence defaulted in payment of the debt due to the Applicants. Thereafter, several communications were exchanged between the Applicants and the Corporate Debtor, inter alia, calling upon the later to fulfil its obligations under the Agreements. The Corporate Debtor, in response to the above communication, addressed a letter dated 05.03.2015 accepting and admitting their obligations under the Agreements and specifically undertook to perform its further obligations and make payments.

2.5.6 It is pertinent to note that the funds disbursed by the Applicants were utilized for construction of the Palais Royale Project and have the effect of commercial borrowing qua the Corporate Debtor on account of the Corporate Debtor agreeing to provide the Applicants an exit with the agreed IRR on the amounts disbursed by the Applicants for the Project. It also constitutes a guarantee given by the Corporate Debtor as the Corporate Debtor has not merely provided security for SRM Sites' dues through a charge over the 14 apartments but also undertook upon itself the liability to repay amounts to the Applicants in this regard. It is settled law that the nomenclature given to a document, or a clause can never be determinative of the legal nature of the obligations undertaken thereunder. In other words, a document or clause would not, in

law, necessarily be guarantee only because the word "guarantee" is used therein and equally, would not, in law necessarily be precluded from being a guarantee only because the word "guarantee" is not used therein. In other words, what is determinative, in law, is the nature of the obligations under the document/clause and not the nomenclature. Reliance is placed on the conjoint reading of ***Vodafone International Holdings BV vs. Union of India and Anr.*** and ***Vandana Global Limited vs. IL & FS Financial Services Limited.*** It is clear that investment made by the Applicant by subscribing to the shares of SRM Sites is a financial debt owed by the Corporate Debtor and is not a mere equity transaction.

2.5.7 On a bare reading of Section 126 of the Contract Act, it is clear that under Clause 6.8 of the SSHA read with Clause 3.1, 3.2, 3.8 and 3.9 of the TOA along with Clause 4.2 of the Escrow Agreement, the Corporate Debtor has undertaken to discharge the entire liability of SRM Sites, in case of default on the part of SRM Sites, by agreeing to purchase the Applicant's shares at a specified price which would provide an IRR linked return to the Applicants and the obligations to make payments to Applicants were secured by the Charged Apartments. Thus, the aforesaid clauses of the Agreements are in the nature of guarantee obligation undertaken by the Corporate Debtor and inter alia, satisfy the ingredients of a contract of guarantee under Section 126 of the Contract Act.

2.5.8 The fact that the Applicants were assured an exit with an agreed IRR in a defined time frame, evidences that there was an element of time value of money in respect of the amounts disbursed by the Applicants. It is clear from a combined reading of the Agreements, that the amounts disbursed by the Applicants are nothing but a secured loan transaction. The Applicants are therefore financial creditors as per Section 5(7) of the IBC.

2.5.9 The Applicants place reliance on the Judgment of this Tribunal in ***HDFC Ventures Trustee Company Ltd. v. Kakade Estate Developers Ltd. in CP(IB) No. 747/2022 [Order dated 29.03.2023]*** whereby it was held that:

> *"4.11.2. However, as observed in preceding para, the Promoters are obligated to pay to the Applicant and take back CCPS from the Applicant against such payment. Accordingly, these sums can be held to be in nature of debt qua Promoters. This amount was disbursed to the Corporate Debtor against time value of money upon execution of ARSSHA, as the Promoters were obligated to pay the principal amount paid towards subscription to CCPS along with the additional amount to be determined in accordance with the formula provided in ARSSHA. The time of such payment is also clearly stipulated in ARSSHA. Merely right of representation on the Board of Corporate Debtor and the right to vote in the general meeting vested in a creditor cannot convert the transaction into an investment as such right(s) are insisted upon and taken by lender(s) now a days to securitize their money. Further, the arrangement between the Applicant and the Promoters had the commercial effect of borrowing as the Promoters had raised funds, repayable upon specified tenure along with stipulated return, to fund the business of Corporate Debtor, which it were obligated to do so in capacity of Promoters and their having agreed to provide Exit Route to the Applicant caused the applicant to disburse the money to the Corporate Debtor. The promoter's obligation under Exit Route is in nature of debt having been disbursed against time value of money under Promoter's obligation to provide Exit route and has Commercial effect of borrowing. It squarely falls under the definition of Financial Debt in terms of Clause (f) of Section 5(8) as it is in nature of any amount raised by the Promoters for*

Corporate Debtor under a transaction having the commercial effect of a borrowing."

2.5.10 The aforesaid Judgment was upheld by the Hon'ble NCLAT in ***CA(AT)(INS) No. 481 of 2023*** titled ***Sanjay D. Kakade v. HDFC Ventures Trustee Company Ltd. & Ors.*** vide Judgment dated 24.11.2023.

Submissions made by the Ld. Counsel on behalf of the Resolution Professional of the Corporate Debtor

3.1 The Respondent No. 1 submits that vide an order of this Tribunal dated 28.11.2022, Mr. Srigopal Choudhary, who has been arraigned as the Respondent in the present Application, was removed as the RP and replaced by one Mr. Sapan Garg. Thereafter, this Tribunal vide an order dated 22.12.2022, replaced Mr. Sapan Garg by the present RP, i.e. Mr. Pankaj Ramdas Majithia. The present Application was filed in or around December 2022 and does not array the correct Resolution Professional as a Respondent, and hence ought to be set aside.

3.2 It is submitted that on 19.04.2021, the erstwhile RP provisionally admitted the Applicant's claim of approximately Rs. 1486 crores and accordingly, the Applicants became a part of the CoC with 63.74% voting share. Subsequently, the RP vide mail dated 17.06.2022 rejected the Applicant's claim after a detailed examination of the documents and accordingly, they were removed from the CoC.

3.3 It is submitted that the Applicant in a bid to challenge its removal also filed Contempt Case No. 14 of 2023 before the Hon'ble NCLAT thereby alleging that the Respondent had acted in violation of their Order dated 17.12.2021. However, the same came to be withdrawn by the Applicant on 17.05.2023 as the Hon'ble NCLAT was of the

view that the removal of the Applicant by the Respondent from CoC was not violative of the Order dated 17.12.2021.

3.4 The RP submits that the Applicant filed their claim on 09.12.2020, more than a year after the last date of submission of proof of claims and thus was way beyond the timelines given for submission of claim under IBC.

3.5 It is submitted that the Amendment Agreement provided that the purchase of the 4th and last tranche was to be made in December 2013. Having only made the claim before the RP in November 2020, the claim, is thoroughly barred by limitation. The Applicants also rely upon the fact that the Corporate Debtor had undertaken to purchase even the remaining shares of SRM Sites by 31.12.2015 and thus the present claim of the Applicant is time-barred and ought to be rejected.

3.6 It is further submitted that the Applicants made a private equity investment in SRM Sites and have not extended a loan/debt to constitute a debt under Section 7 of the Code. Fund raising through this kind of private equity investment with buyback obligations/exit in terms of the SSHA(s) and TOA(s) are in the form of equity investment, deal with return of equity alone, and is vastly distinct from debt financing that deals with the return of the loan amount/ borrowing in the nature of a financial debt.

3.7 Besides, the charge for 14 flats purportedly provided as security under the Escrow Agreements was never registered by the Applicant with the Registrar of Companies, or with the Sub-Registrar of Assurances, nor any execution or registration of any document of title of the said flats in their favour was sought by the Applicant. It is also a matter of record that none of these documents are duly stamped or registered. In any event, such Escrow is to secure the buyback of the Applicants'

equity investment in SRM Sites, and not for repayment of any debt/loan/borrowing by the Corporate Debtor.

3.8 The SSHA(s) and TOA(s) stipulate a range of IRR based on median sale price of flats that form basis of the assured buyback price. It is noted that the exit price for the Investors assured an IRR of 20% - 30% which depended on the median sale price of flats and was subject to fluctuation. This shows that the parties' intended to share the profits as a return on the equity investment, thereby demonstrating that the Applicants were shareholders and not lenders of SRM Sites.

3.9 In any case IRR cannot be equated with interest payments as the same is in relation to expected profit and dividend payout. In a binding judgment of this Tribunal in ***Hubtown Limited v. GVFL Trustee Company Pvt Ltd.***, on identical facts, while deciding whether the GVRL was a financial creditor and whether the debt claim is a financial debt or not, the Tribunal held in the negative. This Tribunal held that equity is not a debt; any contract for acquisition of shareholding in body corporate can never result in the formation of a debt. GVFL's share purchase in Hubtown Mehsana (an SPV incorporated by Hubtown Limited to complete the construction of its project) with a put option cannot be considered a debt which is disbursed against consideration of time value for money. It was further held that the IRR fixed at 26% (as compared to the variable IRR in the present case), cannot be equated with interest payments. The relevance of IRR for an investor in shares is in relation to expected profit and dividend pay out and capital appreciation of shares which is different to the interest which is a return for any investment by way of a loan. Lastly, it was held that GVFL may be entitled to this claim under the SHA as a shareholder of Hubtown Mehsana but the claim cannot be termed as a financial debt under the Code.

3.10 The RP also submits that under the SSHA(s), the preference shares subscribed to by the Applicants automatically converted into 1 equity share at the end of 5 years from the date of issue without any further steps. The date of compulsory conversion under the respective SSHAs were :

Tranche	Date of SSHA & TOA	Date of compulsory conversion
1	02.09.2009	01.09.2014
2	22.03.2011	21.03.2016
3	13.12.2011	12.12.2016
4	17.12.2012	16.12.2017

3.11 It is stated that the Applicant's status is now that of equity investor/shareholder. This is further demonstrated by the liquidation preference clause under the SSHA(s) where the Investors were given priority over other shareholders to receive their share as per the exit price in case of any sale, lease or assets, liquidation, dissolution, sale/ divestment, or winding up. This leaves absolutely no room for ambiguity that the status of the Applicants, which was that of preference shareholders during the five years, was then and is now that of equity shareholders.

3.12 The Applicants submit that even if this Tribunal finds that the Applicants' investment was a loan, the funding was given to SRM Sites and not to the Corporate Debtor. Thus, the claim, if any, would lie against SRM Sites and not against the Corporate Debtor. It is also submitted that all the Applicants' correspondence indicate that the subscription of shares is in the nature of an equity investment and not in the nature of a borrowing/loan.

3.13 It is also submitted that the Corporate Debtor previously went into liquidation and a provisional liquidator was appointed in August 2017 i.e., prior to its admission to CIRP. Yet, at that time, the Applicants made no claim whatsoever to register their investment/ outstanding/interest against the Corporate Debtor. In another proceeding initiated under the SARFAESI Act by Indiabulls in May 2019, the Applicants made no claim/allegation of any claim and only resisted Indiabulls's sale of flats that were secured under the Escrow Agreements. The Applicants have also filed Commercial Suit (L) No. 4580 of 2021 before the Hon'ble Bombay High Court seeking reliefs in respect of the present subject matter. This shows that the present dispute is a civil dispute and cannot be adjudicated in this summary manner before this Tribunal as the Applicant already approached the Hon'ble Bombay High Court and the Applicants are estopped from making these claims before this Tribunal.

3.14 The RP also submits that under the Foreign Direct Scheme (FDI) of the FEMA provisions, it is impermissible to provide security for investment in equity of a resident investee company. The transaction whereby the 14 flats that belonged to the Corporate Debtor were secured under the Escrow Agreements and the Derived Transfer Price is specified as the exit price for the Applicants are in violation of the FEMA regulations. The buyback of certain shares by the Corporate Debtor is illegal and the Applicants have been enriched by the payments in this regard. It is further submitted that if the equity investment made by the Applicants is in the nature of a loan/ debt, the same would fall under the External Credit Borrowings scheme under the FEMA regulations. However, the investment is not in accordance with the permissible terms and conditions of the scheme and no requisite compliances have been carried out.

3.15 The equity investment made by the Applicant cannot be termed as a consideration for time value of money and this Tribunal vide multiple decisions has already held that equity cannot be held to be a debt and as such any contract for the acquisition of shareholding can never form a debt which is disbursed against time value for money.

3.16 The Applicant's claim against the Corporate Debtor is a claim for breach of contract by the Corporate Debtor of its obligations under the TOA(s), making it a claim in the nature of damages. It is well settled that damages are not debt due until the same are adjudicated by a competent court.

Submissions made by the Ld. Counsel on behalf of the Applicant vide Rejoinder

4.1 It is submitted that the cause of action in the present Application has continued till 24.11.2017 when the last demand notice was issued. The winding-up petition was admitted on 05.10.2016. However, there was a stay on the proceedings till 24.08.2017. Further, the Hon'ble Supreme Court extended limitation on 15.03.2020 on account of Covid-19. The CIRP was stayed on 27.10.2020 by Hon'ble Supreme Court and this stay continued to operate till 01.03.2021. Accordingly, the claim filed by the Applicant was within time and is not barred by limitation.

4.2 The Applicant has relied on ***SRM Exploration Pvt. Ltd v. N&S&NConsultantsS.R.O. : 2012 (129) DIU 113, Division Bench of Delhi High Court***, wherein it was held that although provisions of FERA prohibited entering into transactions/contracts which are in violation of the said Act, FEMA did not contain any provision which voided the transaction entered in contravention thereof.

4.3 The Applicant has relied on the judgement in ***HDFC Ventures Trustee Company Ltd. v. Kakade Estate Developers Ltd.*** decided by this Tribunal wherein it was held that -

"...We feel that the nature of a transaction is to be decided in the context of relevant statute and allured contravention, if any taken place or bar under FEMA cannot be a ground to characterize a transaction to hold it not be in nature of a debt, if it otherwise qualifies to be so under the definition(s) of Financial Debt contained in the Code."

4.4 It is also submitted that while the conversion period may have expired, SRM Sites has taken no corporate action for the conversion and hence no automatic conversion has taken place. The funding was given for the construction of the Palais Royale Project, even though routed through SRM Sites. The recitals to the 4th SSHA make it clear that the Corporate Debtor required funds for the construction of the project which were made available by the Applicants.

Findings

5. Heard learned Counsel and perused the material available on record.

6. The Corporate Debtor was admitted into CIRP on 06.11.2019. The RP constituted the CoC on 07.10.2020. The Applicants filed their claim with the RP on 07.12.2020. The Applicant's claim was provisionally admitted on 19.04.2021 and was later, on 17.06.2022, rejected by the RP.

7. It is not disputed that the Applicants invested Rs. 299,99,99,777/- vide subscription of 550 equity shares and 5,09,318 Compulsorily Convertible Preference Shares ("**CCPS**") of SRM Sites, a wholly owned subsidiary of the Corporate Debtor vide 4 SSHA(s), and 4 TOA(s) executed between SRM Sites, the Corporate Debtor and the

Applicants. A charge on 14 units of the Corporate Debtor's Project was also created in favor of the Applicants vide 4 Escrow Agreements, wherein IDBI Trusteeship Services Limited was designated as the Escrow Agent.

8. It is the Applicant's case that the Corporate Debtor had agreed to act as a guarantor under the SSHA(s), guaranteeing the obligations taken up by SRM Sites. Additionally, the Corporate Debtor also agreed to act as a put option provider under the TOA(s) and agreed to indemnify the Applicants in terms of the Escrow Agreement. In accordance with its obligations as mentioned above, the Corporate Debtor expressed its willingness to buy back 162,016 CCPS of SRM Sites held by Applicants under the 1st SSHA read along with the 1st TOA. Pursuant to the same, in part performance of its obligation the Corporate Debtor paid an amount of Rs. 116,92,36,515/- to the Applicants. On 07.01.2013, the Applicants invoked their put option under Clause 3.9 of the 1st TOA. The Corporate Debtor did not honour the put option and hence defaulted in payment of the debt due to the Applicants.

9. The Applicants have contested the rejection of their claim on the following grounds -

   a) Applicants are the financial creditors of the Corporate Debtor.
   b) Applicants' claim is valid and subsisting.
   c) The role of RP is not to adjudicate the claim.

10. Per contra, the RP has justified the rejection of the Applicant's claim on the following grounds –
   a) The claim of the Applicant was belatedly filed and is time-barred.
   b) The applicants are not financial creditors of the Corporate Debtor.

11. We shall begin by first examining whether the Applicant's claim is time-barred.

11.1 The RP submits that the Applicant's claim was filed on 09.12.2020, more than a year after the last date of submission of proof of claim and hence, it is time barred. Further, the Applicants' reliance on the fact that the Corporate Debtor had undertaken to purchase the remaining shares of SRM Sites by 31.12.2015, making the present claim time barred.

11.2 Regulation 12(1) of the Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 provides that a creditor who fails to submit their claim with proof within the stipulated time period in the public announcement, may submit their claim to the interim resolution professional or the resolution professional up to the date of issue of request for resolution plans under Regulation 36B or ninety days from the insolvency commencement date, whichever is later. In the present case, the request for resolution plan has not yet been issued and hence, the claim is valid and not time-barred.

11.3 In light of the above discussion, we are of the considered opinion that the Applicants' claim is valid and is not time-barred.

12. We shall now ascertain ***whether the Applicants qualify to be financial creditors of the Corporate Debtor.***

a. The code defines a ***financial creditor*** as –

5(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

b. The Code defines a ***financial debt*** as –

5(8) "financial debt" means means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–

(a) money borrowed against the payment of interest;

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

(c) any amount raised pursuant to any note purchase facility or the issue of bonds,

notes, debentures, loan stock or any similar instrument;

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

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

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

[Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

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

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

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

13. The Code defines ***debt*** as –

3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

14. The Applicants have placed reliance on the Judgment of this Tribunal in ***HDFC Ventures Trustee Company Ltd. v. Kakade Estate Developers Ltd. in CP(IB) No. 747/2022 [Order dated 29.03.2023].*** The issue before this Tribunal in this matter was to determine whether an investment in CCPS of Corporate Debtor and obligation to provide on the part of Corporate Debtor as well as its promoters gives rise to a financial or other debt.

    a. In case of ***Kakade Developers Ltd. (supra),*** this Tribunal had held that a financial debt existed qua the Promoters as they were liable to provide an exit option to the Applicants therein, in accordance with the definitive agreements between the parties. The Corporate Debtor's liability arose as a guarantor under the consent award.

    b. However, the Hon'ble NCLAT upholding the decision of this Tribunal, went on to opine that the Corporate Debtor was liable not only under the consent award but also the previous definitive agreements, and accordingly subscription to CCPS constituted a financial debt qua Corporate Debtor dehors its obligation in consent decree as well. The Hon'ble NCLAT relied on ***Pioneer Urban Land and Infrastructure Limited and Anr. vs. Union of India and Ors. [(2019) 8 SCC 416]*** wherein the Hon'ble Supreme Court had occasion to consider the meaning of financial debt. The

Hon'ble Supreme Court opined that sub-clause (f) of Section 5(8) would subsume within it amounts raised under transactions which are not necessarily loan transactions so long as they have the commercial effect of borrowing.

15. The Ld. Counsel of the RP of the Corporate Debtor has submitted that since the funds were disbursed to SRM Sites for its use, and not to the Corporate Debtor, no claim lies against the Corporate Debtor. However, we are of the view that the Applicants invested in the shares of SRM Sites based on representation and assurances provided by the Corporate Debtor as well as SRM Sites and these funds were ultimately used for the benefit of the Corporate Debtor. Further, Section 5(8)(i) specifically includes the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause. The requirement of time vale of money and disbursal applies to Clause (a) to (h). In other words, it applies in relation to the Principal Borrower and not the Guarantor. Accordingly, there is no substance in this argument.

16. We consider that for holding amount to be in nature of debt, there has to exist a liability or obligation and to constitute it as financial debt, there must exist disbursal as well as consideration for time value of money. The inclusive part of definition in Section 5(8) specifically includes any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing. In other words, the transaction of disbursement against a consideration for time value of money can be said to be financial debt if such transaction has a commercial effect of borrowing. It is undisputed fact that the amount in question were disbursed to the Principal Borrower against consideration for time value of money in the form of IRR. Even if the transaction had not contemplated IRR, the same could still have constituted financial debt as held by the Hon'ble Supreme

Court in ***M/s. Orator Marketing Private Limited vs. M/s. Samtex Desinz Private Limited (2021) ibclaw.in 68 SC***. Accordingly, it is necessary to examine whether the transaction of subscription to CCPS has the commercial effect of borrowing. In the present case, the Applicants have relied on various clauses of the SSHA(s), TOA(s) and the Escrow Agreements to substantiate their contention that the Corporate Debtor was liable under these Agreements to provide an exit route to the Applicants by buying the CCPS of SRM Sites held by the Applicants on occurrence of default or other certain events as described in these Agreements. The nature of transaction is such that it requires all of the above-mentioned Agreements to be read together to ascertain the sum and substance of this claim since they have been executed for the same purpose.

16.1 The recitals of the 4th SSHA dated 17.12.2012 are reproduced below –

"……

*D. SRUIL is currently developing a multi-storey residential building christened as "Palais Royale, which includes other amenities like parking facilities, club house etc., on about 6 (six) acres of plot of land with a total development area of 3.9 million square feet ("**Project**").*

E. The land on which the Project is being developed is solely owned by SRUIL.

*F. The Company had entered into its first construction contract dated September 2, 2009 ("**First Construction Contract**") with SRUIL, for the construction of around 0.61 million square feet in the Project. In order to fulfil its obligation under the First Construction Contract, the Company was in requirement of the funds. The Company and SRUIL had, therefore, requested the Investors to make*

*investments in the Company. Accordingly, the Parties had entered into a Share subscription and shareholders' agreement dated September 2, 2009 ("**First SSHA**"), pursuant thereto, the Investors had jointly invested an aggregate amount equal to Rs. 110,00,00,000/- (Rupees One Hundred and Ten Crore only) in the Company and subscribed to the Investor Shares (as defined in the First SSHA) on the terms and conditions more particularly set out in the First SSHA.*

G. *The Company had then entered into its second construction contract dated March 22, 2011 ("**Second Construction Contract**") with SRUIL, for the construction of around 0.28 million square feet in the Project. In order to fulfil its obligation under the Second Construction Contract, the Company was in requirement of further funds. The Company and SRUIL had, therefore, again requested the Investors to make investments in the Company. Accordingly, the Parties had entered into a second share subscription and shareholders' agreement dated March 22, 2011 ("**Second SSHA"**), pursuant thereto the Investors had jointly invested an aggregate amount equal to Rs. 55,00,00,000/. (Rupees Fifty Five Crore Only) in the Company and subscribed to the Additional Investor Shares (as defined in the Second SSHA) on the terms and conditions more particularly set out in the Second SSHA.*

H. *The Company thereafter entered into its third construction contract dated December 13, 2011 ("**Third Construction Contract**") with SRUIL, for the construction of around 0.5 million square feet in the Project. In order to fulfil its obligation under the Third Construction Contract, the Company was in requirement of certain additional funds. The Company and SRUIL had, therefore, again requested*

*the Investors to make investments in the Company. Accordingly, the Parties had entered into a third share subscription and shareholders' agreement dated December 13, 2011 ("**Third SSHA**"), pursuant thereto the Investors had jointly invested an aggregate amount equal to Rs. 100,00,00,000/- (Rupees One Hundred Crore only) in the Company and subscribed to the Third Tranche Investor Shares (as defined in the Third SSHA) on the terms and conditions more particularly set out in the Third SSHA.*

I. *The. Company is now desirous of entering into fourth construction contract with SRUIL for the construction of around 0.36 million square feet in the Project ("**Fourth Construction Contract"** hereto annexed as Annexure 1).*

J. *In order to undertake the Fourth Construction Contract, the Company is in need of further funds and has, accordingly, approached the Investors along with SRUIL with a request to make further investment in the Company, on the terms and conditions mutually agreed between them. At the request of SRUIL and the Company, the Investors have agreed to subscribe to the Fourth Tranche Investors Preference Shares (as defined below), on terms and subject to conditions contained herein.*

K. *The Parties are entering into this Agreement in order to set out the terms and conditions of the investment by the Investors as well as their mutual rights and obligations in the Company, and other matters in connection therewith, which they agree will be interpreted, acted upon and governed in accordance with the terms and conditions of the First SSHA, Second SSHA, Third SSHA, this Agreement and the Charter Documents (as defined below) of the Company, which shall be modified to reflect the provisions of this Agreement. The Parties have also agreed that the terms and conditions agreed between the Parties*

under this Agreement shall be deemed to be effective in addition to, and not in substitution of, the provisions of the First SSHA, Second SSHA and Third SSHA.

16.2 As per the SSHA, the Company has been defined to be SRM Sites, SRUIL is the Corporate Debtor, the Applicants in the present Application are the Investors, Investor Shares are the Investor Equity Shares and Investor Preference Shares, i.e the Equity Shares allotted to the Investors by the Company and the Compulsorily Convertible Preference Shares allotted to the Investors by the Company. On a bare reading of these recitals, it is clearly established that the Corporate Debtor had engaged SRM Sites for carrying out construction of flats on its land and SRM Sites required funds to augment its working capital required to fulfil its obligation towards said construction. In order to raise such funds for SRM Sites, the Corporate Debtor and SRM Sites requested the Applicants herein to invest in SRM Sites. In effect, these funds were meant to fund the construction of flats over the land owned by the Corporate Debtor under the Construction Contract entered into between SRM Sites and Corporate Debtor. The relevant Clauses in the Agreements in this relation are quoted in the following paragraphs for its examination.

16.3 Clause 6 of the SSHA titled "**INVESTOR EXIT MECHANISM**" provides two rights that the Applicants can exercise to exit the Company. Clauses 6.1 to 6.3 provide for an Exit Transaction and Clauses 6.4 to 6.8 provide for Investors Buy-Back Mechanism. These Clauses are reproduced below for reference –

"…

Exit Transaction

*6.1 Subject to Clause 5.5, Clause 5.6, other terms of this Agreement and Applicable Law, the Investors will have the right anytime to liquidate its investment in the Company ("**Exit Transcation**"). SRUIL and the Company undertake to provide an exit to the Investors by most efficient means including but not limited to strategic sale. Mergers, Initial Public Offering, buy back, etc.*

Investors Buy-Back Mechanism

*6.2 Subject to Applicable Law, the Company hereby grants to the Investors the right (exercisable at Investors sole discretion) to require the Company to buy-back any of the Investors Shares held by the Investors ("**Investors Buyback Option**") upon the occurrence of one or more of the following events:*

*6.4.1. A breach of the provisions of any agreement/ contractual arrangement by SRUIL and/or the Company ("**Defaulting Party**") with the Investors;*

6.4.2. A misrepresentation by the Company and/or by SRUIL or a material breach of any of the representations and Warranties by the Company and/or by SRUIL under this Agreement, unless waived by the Investors in writing.

6.4.3. Any default by the Company under the Construction Contract having a Material Adverse Effect where such default is not cured within 90 (ninety) days of receipt of notice thereto.

6.4.4. On the occurrence of any event listed in Clause 3.5.

6.4.5. On the completion of 36 (thirty-six) months from the Closing Date of Tranche- 1.

6.3 ……..

6.4 ……..

6.5 ……..

6.6 In case the Company fails to honour the Investors Buyback Option within the period specified herein above, SRUIL hereby agrees to purchase the Investors Shares at such price as may be agreed between the Parties, within 30 (thirty) days of receipt of notice to that effect from the Investors."

16.4 Clause 3.7 and 3.8 of TOA reads as under -

"….

3.7 SRUIL hereby agrees that in case the Company fails to honour its buy back obligations under the SSHA, it shall purchase all the Investors Shares at a price that provides the Investors IRR of 3% (three percent) above the IRR calculated to arrive at the Derived Transfer Price.

Transfer Options

3.8 ……

*3.9 In case SRUIL fails to send the SRUIL Transfer Notice on the aforesaid stipulated date ("**SRUIL Transfer Option Trigger Date**"), notwithstanding the Investors' other exit rights granted under SSHA, the Investors shall have the option (exercisable at the Investors sole discretion) to require SRUIL to buy the Transfer Shares on a proportionate basis at the Derived Transfer Price ("**Investors Transfer Option**") by sending a notice at least 7 (seven) days prior to each Transfer Date with a copy to the Escrow Agent ("**Investors Transfer Notice**"). If the Investors issue the Investors Transfer Notice, SRUIL shall be bound to acquire the Transfer Shares from the Investors, on proportionate basis, at the Derived Transfer Price and the Completion of the Investors Transfer Option shall take place in the manner as set out in Clause 4 hereto.*

…"

16.5 Besides, these Clauses, the Clause 12 of the SSHA and Clause 8 of Escrow Agreement contemplates indemnification by the Corporate Debtor in case of loss suffered by the Applicant on account of default by SRM Sites.

16.6 The Clauses reproduced above clearly establish that the Agreements between the parties in relation to subscription of CCPS mandated SRM Sites as well as the Corporate Debtor, i.e. SRUIL to provide an exit to the Applicants herein at any time they choose to exercise this right in order to liquidate their investment in the SRM Sites. The Corporate Debtor had agreed to require the Applicant to sell CCPS to it in tranches and it did so by acquiring part of the CCPS in 2012. Alternatively, the Applicant had a right to call upon the Corporate Debtor to buy it shares on occurrence of event of default or on failure of SRM Sites to provide exit to the Applicant in relation to CCPS shares in the form of put option. These stipulations in the Agreements clearly establish the existence of an obligation or a liability in respect of a claim as against SRM Sites as well as Corporate Debtor. Undisputedly, the amount was raised by issuance of CCPS for enabling SRM Sites to carry out construction of flats on the plot of land owned by the Corporate Debtor and in terms of the obligations stipulated in the Agreements, SRM Sites as well as Corporate Debtor have guaranteed the repayment of said amount along with the interest in the form of IRR to be arrived at in the manner stated in TOA. Accordingly, we have no hesitation to say that the amount paid under the transaction of subscription to CCPS had the commercial effect of borrowing.

16.7 Undisputedly, the Applicant herein had exercised the put option calling upon the Corporate Debtor to pay the amount

due in terms of Agreement and take the CCPS back. On commencement of Buyback Exercise Period in accordance with Clause 6.4.5 of the 1st SSHA and failure of the Corporate Debtor to fulfil its obligations, the Applicants issued a notice dated 07.01.2013 exercising the transfer option under Clause 3.9 of the TOA calling upon the Corporate Debtor to fulfil its obligation and to purchase the balance CCPS held by the Applicants by 15.01.2013. The Applicants sent several reminders to which the Corporate Debtor replied vide letter dated 05.03.2015, acknowledging its obligation to provide an exit route to the Applicants and repay the investment amounts. Accordingly, the Corporate Debtor had become obligated to pay the amount paid towards subscription to CCPS along with the IRR contemplated in Clause 3.6 of the SSHA which provides that the Investors Exit Price as calculated under the SSHA should provide the Investors with IRR of at least 30% and if it doesn't then the Corporate Debtor shall purchase all the Investors Shares at such price which provides the Investors with IRR of at least 30%. Since the amount of any liability in respect of guarantee or indemnity, which undoubtedly was provided by the Corporate Debtor in terms of various Clauses quoted herein above, for any amount raised under a transaction having the commercial effect of borrowing is also included in the definition of financial debt, we have no hesitation to hold that the amount in question is financial debt qua Corporate Debtor as well.

16.8 It is also to be noted that the Corporate Debtor had, in part performance of its obligation under Clause 6.1 of the SSHA and 3.8 of the TOA, purchased 83,333 CCPS on 29.11.2011, being the first tranche of CCPS under the 1st SSHA. Thereafter, the Corporate Debtor purchased 35,104 CCPS,

6,441 CCPS and 41,788 CCPS on 29.03.2012, 06.09.2012 and 14.12.2012 respectively. These purchases further amounted to part purchase of the investment, by way of second tranche of CCPS under the 1st SSHA. However, the Corporate Debtor failed to fulfill its obligation to purchase the balance part of the first and the entire second, third and fourth tranche of the Investors Shares and the 550 equity shares under the SSHA(s).

16.9 The Ld. Counsel for Respondent placed reliance on various decisions which are distinguishable on the facts.

i. In the case of ***IFCI Limited vs. Sutanu Sinha and Others (2024) 248 Comp Cas 217 : 2023 SCC OnLine SC 1529***, the Hon'ble Supreme Court came to the conclusion that there is no obligation on the SPV i.e. ITCL. Accordingly, there is no debt.

ii. In case of ***Ansal Housing Limited (Erstwhile Ansal Housing & Construction Limited) vs. Samyak Projects Private Limited (2023) ibclaw.in 804 NCLAT***, the Hon'ble NCLAT reached a conclusion that there are unmistakable signs of reciprocal rights and obligations contained in JVA and ICD besides evidence of common participation as well as sharing of profits and losses and accordingly held that transaction is in nature of investment for profit and not for disbursement of loan against time value of money.

iii. In the case of ***Radha Exports (India) Private Limited vs. K.P.Jayaram and Another (2020) 10 Supreme Court Cases 538***, the payment was made for shares and accordingly it was held to not be debt in the absence of any obligation to provide exit to the investor.

iv. The decision in ***Hubtown Limited vs GVFL Trustee Company Private Limited (2021) SCC OnLine NCLT 3103***

has already been considered and distinguished in the case of Kakade Estates by this Tribunal and the said decision in Kakade Estate was upheld by the Hon'ble NCLAT.

v. In the case of ***Silver Bank Limited vs. BLA Power Private Limited***, decided by this Tribunal, there was no obligation on the Corporate Debtor to buy back the CCD(s). Accordingly, the CCD(s) were not held to be financial debt.

16.10 The facts in the present case are similar to the facts in the case of ***Kakade Estate Developers (supra)***. We are bound to follow the ratio of said decision as laid down by the Hon'ble NCLAT.

17. The Ld. Counsel for the RP has submitted that the shares subscribed by the Applicants have automatically been converted to equity shares of SRM Sites under the SSHA(s) upon expiry of 5 years from date of issuance and the Applicants' status is now that of an equity investor/shareholder. However, we find that SRM Sites has not taken any corporate action to convert said CCPS into equity shares. Nonetheless, the Agreements between the parties does not specify that the exit mechanism or indemnification qua Corporate Debtor shall cease to have effect after conversion of CCPS into equity shares.

18. As regards the RP's contention that the Applicant's investment in SRM Sites is in violation of the FEMA regulations and void ab initio, we reiterate the stand taken in ***Kakade Estate Developers (supra)*** that the nature of a transaction is to be decided in the context of relevant statute and alleged contravention, if any taken place, or bar under FEMA cannot be a ground to characterize a transaction to hold it not be in nature of a debt, if it otherwise qualifies to be so under the definition(s) of Financial Debt contained in the Code.

19. The RP has also submitted that the Applicants made no claim with the Official Liquidator in the winding up proceedings when the Corporate Debtor was admitted earlier into liquidation in terms of Orders passed by Hon'ble Bombay High Court. We find no force in this argument as mere non-exercise of a right available to the Applicants' cannot act as a waiver of the claim against the Corporate Debtor and accordingly, cannot prejudice the Applicants' right to make a claim in the process under the Code.

20. The Applicants' have also argued that the RP had no right to adjudicate the claim. We are of the considered view that the duty to verify claim in terms of Regulation 13 of the CIRP Regulations requires the IRP/RP to verify each claim received form the proof of claim in order to ascertain the claim amount and the class under which such claim is admissible because if the verification does not encompass the determination of class of a creditor, this will disable the IRP/RP to decide the class of claimant which may render the exercise of verification of claim futile.

21. In light of the above findings, we are of the opinion that the Applicants are financial creditors of the Corporate Debtor and have a valid and subsisting claim that ought to be admitted by the Resolution Professional.

22. Accordingly, IA No. 614/2023 is **allowed**.

Sd/-
Prabhat Kumar
Member (Technical)

Sd/-
Justice V.G. Bisht
Member (Judicial)

/SP/