

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH – I**

IA No. 2333/MB/C-I/2020

and

IA No. 2377/MB/C-I/2020

In

C.P. (IB) No. 1061/I&BP/2017

Under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 r/w Rule 11 of the National Company Law Tribunal Rules, 2016.

Filed by

In the Interlocutory Application bearing

IA No. 2333/MB/C-I/2020

**Maharashtra Housing And Area Development
Authority (MHADA) & Ors.**

...Applicant

Versus

Rajendra K. Bhuta,

Liquidator of M/s Guruashish Construction Pvt.

Ltd. (Under Liquidation)

...Respondents

In the Interlocutory Application bearing

IA No. 2377 of 2020

Rajendra K. Bhuta,

Liquidator of M/s Guruashish Construction Pvt. Ltd.

(Under Liquidation)

...Applicants

Versus

**Maharashtra Housing And Area Development
Authority (MHADA) & Ors.**

...Respondents

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I
IA NO. 2333/2020 and IA NO. 2377/2020 In C.P. (IB) No. 1061/I&BP/2017

In the matter of
CP (IB) No. 1061/I&BP/2017
Union Bank of India

...Financial Creditor

Versus
Guruashish Construction Private Limited

...Corporate Debtor

Order Pronounced on: 10.02.2023

Coram:

Hon'ble Member (Judicial) : Justice P. N. Deshmukh (Retd.)
Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

IA 2333/2020

For the Applicant : Mr. Janak Dwarkadas, Sr.
Advocate, a/w Adv. Shilpi Jain
a/w Adv Jaya Bagwe a/w Adv.
Anchita Nair

For the Respondent : Mr. D.B. Pereira, Advocate

and IA 2377/2020

For the Applicant : Mr. D.B. Pereira, Advocate

For the Respondent : Mr. Janak Dwarkadas, Sr.
Advocate, a/w Adv. Shilpi Jain
a/w Adv Jaya Bagwe a/w Adv.
Anchita Nair

ORDER

Per Coram:

IA No. 2333/MB/C-I/2020

1. IA. No. 2333 of 2020 ("**Implementation Application**") has been filed on behalf of the Applicant Maharashtra Housing And Area Development Authority ("**Applicant**"/"**MHADA**") for Guruashish Construction Pvt. Ltd. ("**Corporate Debtor**"/"**Guruashish Construction**").
2. The Applicant sought reliefs as follows:
 - a) Exclusion of the 47 acres of property "Siddharth Nagar Property" owned by MHADA from the Liquidation Estate of the Corporate Debtor;
 - b) I.A. No. 2377 of 2020 filed by the Liquidator ought to be disallowed.
 - c) Pass interim/ad-interim reliefs in terms of prayers (a) above.
 - d) Pass any other such order(s) as this Adjudicating Authority may deem fit and proper in the facts and circumstances of this case.
3. In the instant Application, the Respondent is the Liquidator of the Corporate Debtor ("**Liquidator**").
4. **LIST OF DATES AND EVENTS:**

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Sr. No.	Date	Particulars	Annexure
1.	1948	MHADA is the owner of property admeasuring 47 acres situated at Village Pahadi, Goregaon commonly known as “Siddharth Nagar Property”. The property was initially vested in the erstwhile Bombay Housing and Area Development Board (“Board”) who had in the year 1948 constructed 672 ground floor structures on the property and allotted them to various persons on rental basis.	Para 4 of the IA 2333- Page 5 of Volume I
2.	5 th December, 1977	The Board was dissolved by G.R. dated 5 th December, 1977 and MHADA was constituted and all property which vested in the Board was transferred to and vested in MHADA.	Para 5 of the IA 2333- Page 5 of Volume I
3.	1984	672 tenants formed a co-operative housing society in the name and style of “Goregaon Sidharth Nagar Grihan Nirman Sanstha Limited” (the “Society”).	Para 6 of the IA 2333 - Page 5 of Volume I
4.	8 th February, 1988	Upon a representation received from Society, State Government	Para 6 & 9 of the IA 2333 -

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		issued G.R. allotting 10 acres (gross 13.18 acres) of land for rehabilitation of 672 tenants.	Page 6 & 8 of Volume I
5.	18 th August, 2006	<p>The Society entered into a development Agreement with the Corporate Debtor for redevelopment of the land (i.e. 13.18 acres) allotted to the Society. MHADA is not a party to the Development agreement and is not bound by the terms and conditions contained in the Development Agreement.</p> <p>The terms of the Development Agreement dated 18.08.2006 acknowledge MHADA as owner of the property and acknowledges that the agreement is for authorizing and empowering the developer to follow up with MHADA for obtaining approvals/sanctions and the allotment of the land for re-development. The relevant clauses</p>	Para 8 @ page 6 of IA No. 2333 read with Annexure 1 @ Page 59 of IA 2333- Volume 1

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		being: Recital (vii) (Page 66), Recital (xi) (Page 67), Recital (xxi) (Page 69), Clause 5 (Page 72).	
6.	2007	The Society and the Corporate Debtor submitted a joint proposal to MHADA for redevelopment of the entire property admeasuring 47 acres by Corporate Debtor. The Joint proposal was accepted vide Resolution No. 6280 dated 01.11.2007 by MHADA, the material conditions at Clause 8, Clause 11, Clause 12, Clause 13, Clause 23 and Clause 27 (page 111 and Page 112 of I. A. No. 2333 of 2020) and the same received the State Government's approval on 03.03.2008.	Para 11 @ page 9 of the IA 2333- Volume I read with Annexure-2 @ Page 103 of IA 2333 - Volume 1
7.	10 th April, 2008	A Joint Development Agreement ("JDA") was executed between MHADA, the Society and the Corporate Debtor whereby a limited right by way of license was granted to the Corporate Debtor to carry out the redevelopment of the Society's component and MHADA component and in	Annexure 4 @ 127- 245 of the IA 2333- Volume II

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		<p>consideration for that Corporate Debtor was entitled to the free sale component.</p> <p>The entitlement of the Corporate Debtor to the free sale component was dependent on the completion of the rehabilitation component and MHADA component. Further, as per Clause 6.1 of the JDA, MHADA had the right to revoke the license granted in the event the Corporate Debtor fails to comply with the obligations under the JDA.</p>	<p>Page 144/ Annexure 4 of the IA 2333 - Volume II</p>
8.	9 th November, 2011	<p>In the year 2011 due to revision in the area of development and increase in the entitlement of tenants of rehabilitation component, the Deed of Confirmation and Modification (DCM) executed between MHADA, Corporate Debtor & Society whereby the built-up area for MHADA was increased from 1,11,476.87 to 1,48,151.07 sq. mtrs. and rehabilitation area of tenants increased from 540 square feet to 767 square feet built up</p>	<p>Para 26 of the IA 2333 @ Page 23</p> <p>Annexure 10 @ page 269 of IA 2333- Volume 2.</p>

		<p>area. As per the approved layout, the entire scheme was divided into 13 sectors:</p> <ul style="list-style-type: none">• R-1 to R-5 - MHADA Component• R-9 – Rehabilitation Component• R-6 to R-8 & R-10 to R-13 – Free Sale Component. <p>Further, As per clause 11 of the DCM (Page 276 of IA 2333/2020-Volume II), clause 2.1.2(xviii) of the JDA (Page 137 of IA 2333-Volume II) was modified to the limited extent to allow the Corporate Debtor to sell their free sale component but that too at their own risk and responsibility.</p> <p>Further, Clause 11 of the DCM categorically stipulates that <u><i>NOC to the Occupation Certificate for Free Sale Component shall not be issued by MHADA unless and until proportionate share of built-up area is handed over to MHADA.</i></u></p> <p>NOTE: Pursuant to the JDA and DCM, Corporate Debtor created</p>	
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		third party rights and sold away its entire FSI to 9 developers without fulfilling its obligation under JDA and DCM i.e, without constructing the MHADA component and rehabilitation component.	
9.	24 th July, 2017	The Hon'ble NCLT, Mumbai passed an Order admitting the Insolvency Petition filed by Union Bank of India against the Corporate Debtor. Upon the initiation of the CIRP, moratorium was declared under Section 14 of the IBC.	Para 35 of the IA 2333 @ Page 29- Volume I
10.	12 th January, 2018	MHADA terminated the JDA and DCM as the Corporate Debtor defaulted in its obligation to complete and hand over the construction of the rehabilitation component and MHADA component within the timelines stipulated under Clause 13 of the JDA. Vide the termination letter issued under clause 6.1 of the JDA, MHADA restrained the Corporate Debtor from entering the property since the license to	Annexure 13 @ Page 291 of IA 2333- Volume III, Para 35 @ Page 302 Para 33 & 34 of IA 2333- Page 29 – Volume I

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		enter the property or remain thereupon was terminated.	
11.	5 th February, 2018	The Resolution Professional filed a Miscellaneous Application being M.A No. 96 of 2018 under Section 14(1)(d) of the IBC seeking orders against MHADA to refrain from taking over the possession of the said Property till completion of CIRP and seeking ad-interim order directing MHADA to continue with JDA and DCM till completion of CIRP.	Para 37 @ Page 30 of IA 2333- Volume I read with Annexure 14 @ Page 304, Vol. III
12.	2 nd April, 2018	The Hon'ble NCLT, Mumbai dismissed the MA No. 96 of 2018 filed by the Corporate Debtor by holding that no moratorium under Section 14(1)(d) be applied as the said Property is not an asset of the Corporate Debtor nor any possessory right vest in the Corporate Debtor.	Annexure 16 @ Page 325, Para 44 @ Page 349 of the IA 2333, Vol. III
13.	14 th December, 2018	The Hon'ble NCLAT upheld the Order of the NCLT, Mumbai dated 02.04.2018 and further affirmed the position of the Corporate Debtor as Licensee.	Annexure 19 @ Page 354 – Volume III, Para 14 @ Page 358- Volume III

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14.	19 th February, 2020	Hon'ble Supreme Court considered the question as to the correct interpretation of Section 14(1)(d) and set aside the NCLAT order holding that even though the Corporate Debtor could not be said to be in possession, it was nevertheless in occupation, albeit, under a license granted by MHADA to the Corporate Debtor and hence the statutory freeze under Section 14(1)(d) would be applicable till the completion of CIRP process.	Annexure 20 @ Page 360 of IA 2333- Volume III
15.	4 th September, 2020	The Hon'ble NCLT, Mumbai ordered liquidation of the Corporate Debtor under Section 33(1)(b)(i) of IBC and thereby appointed a liquidator. Hence, the statutory freeze under Section 14(1)(d) came to an end.	Annexure 22 @ Page 403 of IA 2333- Volume III read with Para 15 @ Page 410 of IA 2333- Volume III
16.	22 nd September, 2020	Pursuant to the order of the Hon'ble NCLT, Mumbai, Liquidator issued a notice to MHADA stating that as per Section 36(3)(b) & (h) of the IBC, the entire Siddharth Nagar Property of 47 acres should form	Annexure 23 @ Page 413 of the IA 2333- Volume III Refer Page 414 & 415 of the IA 2333- Volume

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		part of the Liquidation Estate of Corporate Debtor as the same was “vested” with Corporate Debtor on the day of commencement of CIRP.	III
17.	12 th September, 2020	In response to the aforesaid letter, MHADA replied to the Liquidator that “Siddharth Nagar Property” belongs to MHADA and as per Section 36(4)(a)(iv) and Section 18 of IBC, the same can never be part of the liquidation estate. Further, as per the Supreme Court judgement dated 19 th February, 2020, only the right of the Corporate Debtor as a licensee who was in occupation of the “Siddharth Nagar Property” was protected during the period of moratorium. Upon expiry of the period of moratorium, the statutory freeze has ceased to operate and since the license had been terminated by MHADA, even the right to enter as licensee has ended.	Annexure 24 – Page 417 of IA 2333/2020, Vol. III.
18.	20 th November,	Liquidator filed an IA No. 2377 of 2020 <i>inter alia</i> praying for	

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	2020	inclusion of the entire 47 acres of the MHADA's property in the Liquidation Estate of Corporate Debtor.	
19.	4 th December, 2020	MHADA filed an IA No. 2333 of 2020 <i>inter alia</i> seeking a declaration that the 47 acres of property is owned by MHADA and does not constitute an "asset" of the Corporate Debtor for the purpose of liquidation.	
20.	9 th July, 2021	State Government, on the basis of Joseph Committee Report, issued a G.R. dated 09.07.2021 directing MHADA to take over the entire project and complete the same subject to the order passed by this Hon'ble Tribunal and the Hon'ble High Court of Bombay. The G.R. further passed a resolution to form a Committee to decide on the liability of the third parties i.e, 9 builders towards the cost which will be incurred for developing MHADA and rehabilitation component.	Exhibit B at Page 15 of the Additional Affidavit dated 30 th July, 2021 filed by MHADA in IA 2333/2020.

5. The facts leading to the Application are that, MHADA is the owner of the "Siddharth Nagar Property" admeasuring 47 acres. Vide the Joint Development Agreement ("JDA") dated 10th April, 2008, a license was granted to the Corporate Debtor to enter upon MHADA's land and to construct and hand over MHADA and rehabilitation portion free of cost. To recover the cost, Corporate Debtor/ Developer was granted Free Sale Component. only upon the fulfilment of its obligations under the JDA i.e., upon the construction of rehab component and MHADA component and upon handing it over free of cost to MHADA and Goregaon Siddharth Nagar Sahakari Griha Nirma Sansthan Ltd. ("Society"). JDA read with DCM reflects the below mentioned rights and liabilities of the Corporate Debtor:

4.1 Under the JDA and DCM, it was the obligation of the Corporate Debtor to construct Rehabilitation component for 672 tenants and MHADA component of not less than 1,11,488.32 sq. mtrs. BUA. Further, the JDA also required the Corporate Debtor to provide rent to 672 tenants during the transit period.

- 4.2 In consideration to the obligation, Corporate Debtor was given right to Free Sale Component to recoup the construction cost for construction of MHADA and Rehabilitation component.
6. Clause 6.1 of the JDA gave right to MHADA to revoke the license granted to the Corporate Debtor in the event the Corporate Debtor failed to comply with the obligations under the JDA. The Corporate Debtor defaulted in completing the construction and handing over the rehabilitation portion and MHADA portion inspite of repeated extentions. After lapse of about nine years from the date of extention of the JDA and seven years from DCM, the Corporate Debtor had failed to complete the rehabilitation portion and MHADA's portion. As the Corporate Debtor was in breach of material terms of JDA, MHADA vide notice dated 12.01.2018 terminated the JDA.
7. Since the Corporate Debtor had the restrictive rights of entry upon the said land admittedly belonging to MHADA, vide the termination notice, the Corporate Debtor was put to notice that the Corporate Debtor will not be allowed to enter the said land and the authority/ license to enter the said land or remain thereupon is terminated. This termination notice has not been challenged by the Resolution Professional/ Liquidator in the appropriate forum and has attained finality.

8. Post the termination of the JDA and DCM, Resolution Professional has filed an M.A. No. 96 of 2018 before the Tribunal under Section 14(1)(d) of the IBC against MHADA to refrain from taking over the possession of the said Property till completion of CIRP and seeking ad interim order directing MHADA to continue with JDA and DCM till completion of CIRP. Both the NCLT and the NCLAT rejected the Application filed by the Resolution Professional under Section 14(1)(d) of the IBC. The Hon'ble SC after distinguishing "occupation" and "possession" used in Section 14(1)(d) of the IBC and after going through the JDA and DCM held that the construction of the JDA r/w the DCM shows that the right of the Corporate Debtor was only that of a licensee in occupation. However, it further held that since the Corporate Debtor was nevertheless in occupation, albeit, under a license granted by MHADA to the Corporate Debtor the statutory freeze under Section 14(1)(d) would be applicable till the completion of CIRP process.
9. Liquidator post the cessation of moratorium has filed the I.A. No. 2377 of 2020 claiming that the entire 47 acres of land should be part of the Liquidation Estate.

Submissions on behalf of the Applicant:

A. MHADA is admittedly the owner of the "Siddharth Nagar Property" and the same cannot be part of the Liquidation

Asset of Corporate Debtor:

10. The following Recitals in the Joint Development Agreement (JDA) acknowledges that MHADA is the owner of the “Siddharth Nagar Property”:

Recital (a), (b) & (c) - Page 130/131 of the IA 2333/2020. The extracts of the same is as below:

“ a. *Bombay Housing and Area Development Board, the owner, for the sake of brevity referred to as “the Board” a state corporation constituted under the Bombay Housing Board Act, 1948 was seized and possessed of and /or otherwise well and sufficiently entitled to a piece or parcel of land situate and lying at Goregaon (West), Taluka Andheri, District Bombay Suburban and now in the Registration District and Sub-District of Bombay City and Bombay Suburban of Revenue Village Pahadi- Goregaon (West) and which were given corresponding City Survey Nos. 260, 260/1 to 100, 261, 261/1 to 104, 264, 264/1 to 296, 265, 265/1 to 40, 267, 267/17 to 24, 268 (part), 268/45 to 86, 347, 347/1 to 16, 363, 36/1 to 56 and bearing C.T. Survey Nos. 22, 22/1 to 95, 23, 23/1 to 32, 24, 24/1 to 48 and 27 (part) of village Goregaon, admeasuring 40 acres i.e, 1,65,805.80 square meters, (hereinafter for the sake of brevity , referred to as “ the said Land”)* and more particularly described in the First Schedule hereunder written:

b. *By a Government Notification being the Public Works and Housing Development No. ARP 1077 (1) Desk-44 dated 5th*

December 1977 the Board established under the Bombay Housing Board Act, 1948 (BOM-LXIX of 1948) was dissolved and MHADA was constituted;

*c. Under clauses (a) and (b) of Section 189 of the said Act, **all the property rights, liabilities and obligations of the said dissolved Board including those arising under any agreement or contract have become the property rights, liabilities and obligations of MHADA;***”

11. Development Agreement dated 18th August, 2006 (**Annexure 1 at Page 59 of I.A. 2333- Volume 1**) executed between the Corporate Debtor and the Society also acknowledges MHADA as the owner of the property and further acknowledges that the agreement is for authorizing and empowering the developer/ corporate debtor to follow up with MHADA for obtaining approvals/sanctions and the allotment of the land for re-development.

B. Under the Joint Development Agreement (JDA) dated 10th April, 2018 only a limited right by way of license was granted to the Corporate Debtor:

12. Vide the Joint Development Agreement dated 10th April, 2018 executed between the MHADA, Corporate Debtor and the Society, only a limited right by way of license was granted to the Corporate Debtor to enter upon the land and carry out the construction of the tenants' and MHADA's

component. The relevant clauses which clearly evidences
the aforesaid are as below:

(i). Clause 1.1.9 at **(Page 133 of IA 2333- Volume II)**

"License Agreement shall mean and include an agreement by which license will be granted in favour of the Developer to enter upon the said Land, to demolish the existing structures, to construct and erect new structure and all of tenements in such constructed structures to the Tenants and to do all other acts as are necessary for implementation of the Project."

(ii). Clause 2.1.2 (xxvi)- **(Page 138 of IA 2333- Volume II):**

"It is agreed that the license will be granted to the Developer as per the requirement of the Project. After completion of the development, the beneficiaries housing societies will have to enter into Lease Deed with MHADA."

(iii). Clause 2.1.2(xxxix) **(Page 140 of the IA 2333- Volume II):**

"For the purpose of rehabilitation of the Tenants and implementing the Project, MHADA hereby grants a license in favour of the Developer to enter upon the said Land, to demolish the existing structures, to construct and erect new structures, to allot tenements

in such constructed structures to the Tenants and to do all other acts as are necessary for implementation of the Project. After completion of the Project by the Developer and recovery of all dues by MHADA, MHADA shall execute separate Lease Deeds in favour of the Society and in favour of society of free sale tenements constructed by the Developer. All the tenements both Rehab and Sale will have to be allotted on ownership basis."

C. The entitlement of the Corporate Debtor to its share of Free Sale Component as per the JDA was Conditional and not Absolute:

13. Under the JDA, Corporate Debtor's entitlement to its share in Free Sale Component was conditional upon the fulfilment of its obligations under the JDA i.e., upon the construction of Rehab component and MHADA component and successful handing over of the same free of cost to MHADA and Society. The scope of the work of the Corporate Debtor under the JDA as well as conditional entitlement is stipulated in the following recitals:

(i). Clause 2.1.1 (a) & (b) – **(Page 135 of IA 2333- Volume**

II):

"2.1.1. The Scope of the Project (the Scope of the Project)" shall mean and include:

(a) performance and fulfilment of the obligations of the Parties in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all the obligations of the parties to this Agreement and shall include the provisions contained in the Approval.

(b) The obligations cast upon the Developer in terms of this Agreement relate only to the component of the project accruing to the benefit of MHADA and tenants which component has been ascertained in terms of this Agreement and has been specified in the Plan annexed hereto and marked as Annexure '2'."

(ii). Clause 2.1.2 (iii) – a, b & c & Clause 2.1.2 (iv)- **(Page 135/136**

– **Volume II):**

“(iii) the assumptions as per para No. (a) & (n) in the Item Note is approved and applicable to the Project contemplate which is as under..

(a) As per GR, out of net land of 10.00 Acres (gross land 13.18 acres) 2.00 acres of land is to be allotted as per the current market value and this rate is to be thereafter got confirmed from the Town Planning and Valuation Department in order to make the Project financially viable, the balance land of 26.82 acres is included in a

proposal which is to be implemented by the Society, the Developer and MHADA.

- (b) *The Tenants shall be allotted tenements having carpet area 53.15 square meters (555.00 sq. ft.) in multi-storied building/s free of cost.*
- (c) *As per presumption and assumption of para No. 9 (a) to (n) in the Item Note as specified in the approval, the Developer shall be entitled to sell balance built-up area required for recovering Project cost. For this purpose, instead of considering Ready reckoner rate as per usual practice, it is proposed to consider the current market rate.*

2.1.2(iv) After deducting the built-up area required for (b) and (c) above from the total FSI approved and sanctioned for the Project, the balance built-up area shall be shared equally (50: 50 basis) between MHADA and the Developer. The Developer shall, as per specifications decided by MHADA, give MHADA's share of constructed area free of cost to MHADA which shall not be less than 1,11,488.32 sq. meters”

(iii). Clause 2.1.2(xviii)- **(Page 137 of IA 2333/2020-
Volume II):**

“Prior to execution of Sale Deed or Conveyance Deed, the Developer shall obtain a No Objection Certificate from the Chief Officer of

MHADA”

(iv). Clause 2.1.2(x)- **(Page 136 – Volume II):**

“The Developer shall implement the Project as per the Proposal No. 1 comprising of 2.5 FSI, and in case 2.5 FSI is not made available by MHADA, in that case as per the Proposal No. 2 comprising of 1.0 FSI and 1.0 TDR as indicated in Annexure-3. The Calculation sheet of the proposal 1 & Proposal 2 is attached as per Annexure-3. The developer shall hand over constructed area free of cost to the MHADA as per Annexure -3 and which shall not be less than 1,11,488.32 sq mtrs.”

(v). Clause 2.1.2(xx)- **(Page 137- Volume II):**

“The Developer agrees that they shall obtain the Completion Certificate of MHADA before execution of third party agreement for sale of tenements from free sale quota.”

(vi). Clause 2.1.2(xxvi)- **(Page 138 – Volume II):**

“It is agreed that the license will be granted to the Developer as per the requirement of the Project. After completion of the development, the beneficiaries housing societies will have to enter into Lease Deed with MHADA.”

(vii). Clause 2.1.2(xlii)- **(Page 140- Volume II):**

“The built up area (“BUA”) is to be handed over to MHADA free

of cost. The redevelopment of existing transit tenements shall be included having each transit tenement of 225,00 sq. ft. carpet area. The total BUA under such transit tenements shall be about 10,525.00 m2 and these newly constructed transit tenements shall be handed over by the Developer to MHADA on priority basis.”

14. All the aforesaid clauses show that the right to the Free Sale Component was conditional upon construction of the Rehab Component and MHADA component free of Cost. Since, Corporate Debtor has admittedly failed to perform its obligation under the JDA, it cannot claim any right under the JDA and DCM. On the contrary, Corporate Debtor has already sold the entire FSI (even more than what was accrued under the JDA and DCM) to nine (9) builders.
15. Learned Liquidator in its I.A. No. 2377/ 2020 (at Para 11) has himself admitted that the Free Sale Component was conditional upon fulfilment of the obligations under the JDA and the relevant extracts of the same is as below **(Page 12-13 of the IA Volume I)**:
“11. In consideration of obligations Guruashish Constructions Pvt. Ltd. shall be entitled to sell balance built up area required for recovering project cost estimated to be Rs. 809.08 Cr @ Rs. 13,500/- per sq mts. To recover this cost the developer was granted BUA of 161816.55 square meters.....”

16. Even Learned Resolution Professional before the Supreme Court in Section 14(1)(d) proceedings (Order dated 19th February, 2020) has admitted that FSI was granted to only recover the cost of the project and now the Learned Liquidator is claiming the entire 47 acres of land which is completely contrary to the terms of the JDA. The relevant extracts of the Supreme Court Judgment dated 19th February, 2020 is as below:
- “2....According to him, if these two documents were read as a whole, it is clear that legal possession was actually handed over to him in order to do three things:(1) construct tenements which were to be handed over to MHADA free of cost;(2) construct tenements in which the 672 occupiers of the erstwhile tenements were to be housed; and (3) thereafter recoup costs and make profit by sale of what was called the “free sale component” that would be left over....”*

D. Clause 11 in the Deed of Confirmation and Modification (DCM) dated 09.11.2011 did not create any right in the land under the free sale component or granted any interest arising therefrom:

17. Learned Liquidator has contended that vide Deed of Confirmation & Modification dated 09.11.2011, an absolute right to sell the free sale component was granted to the Corporate Debtor and that even without

performance of its obligation under the JDA, Corporate Debtor is entitled to its Free Sale Component under the JDA.

18. It is submitted that Deed of Confirmation and Modification was executed due to revision in the area of development and the increase in the entitlement of the tenants of the rehabilitation component whereby the built up area for MHADA increased from 1,11,476.87 to 1,48,151.07 square meters and rehabilitation area of the tenants increased from 540 square feet to 767 square feet built up area. (Refer Para 26 @ Page 23-24 of I.A. No. 2333/2020). The relevant clauses of the DCM:

18.1 Clause 6/ (**Page 275/ Volume II of IA 2333/2020**) - Rehabilitation area of Tenants increased.

18.2 Clause 8/ (**Page 275-276/ Volume II of IA 2333/2020**) - MHADA's portion increased.

19. As per the approved layout the entire scheme was divided into following 13 sectors and the Corporate Debtor was entitled to the free sale component subject to completion of MHADA's as well as Rehabilitation Component. The approved layout is as below:

(1). R-1 to R-5 - MHADA Component

(2) R-9 - Rehabilitation Component

(3) R-6 to R-8 and R-10 to R-13 - Free Sale Component. (**Refer Para 21 at Page 19 of the I.A. No. 2333/2020, Volume I**)

20. DCM also amended original clause 2.1.2(xviii) in the JDA and substituted it with Clause 11 of DCM. The extracts of the original clause 2.1.2(xviii) of the JDA and Clause 11 of DCM are reproduced as below:

Clause 2.1.2(xviii) of JDA: *“Prior to execution of Sale Deed or Conveyance Deed, the Developer shall obtain a No Objection Certificate from the Chief Officer of MHADA.”*

Clause 11 of DCM: Clause 2.1.2(xviii) shall be replaced with the following:

“11. Prior to execution of Lease Deed of the said land or part thereof to the organization of various unit holders, the Developer shall obtain no objection certificate from the Chief Officer of MHADA.

It is further expressly agreed and understood between the parties thereto, that in case the Developer desires to sell the free sale component on its own terms and responsibility either in its entirety or in part including the sale of flats / units that would be constructed in the free sale building component then the Developer may do so provided however, MHADA shall not be responsible for any liability that may arise from the same and the Developer shall not exceed

the FSI that is allotted to it under the Joint Development Agreement, and shall further ensure that the share of MHADA and rehabilitation component for the Tenants is not adversely affected and for that purpose the Developer may either enter into arrangements/ agreements/ deeds or any such kind of writings as it may deem fit where there will be no requirement of signatory either from MHADA or Society on the documents/writings that would be executed and registered in regard to free sale component of the Developer. However, it is agreed that the NOC to the Occupation Certificate for Free Sale Component shall not be issued by MHADA unless and until proportionate share of built-up area is handed over to MHADA.”

21. Vide clause 11 of the DCM, no absolute right to free sale component was granted to the Corporate Debtor. As per clause 11 of the DCM, clause 2.1.2(xviii) of the JDA (**Page 137 of IA 2333- Volume II**) was modified to the limited extent to allow the Corporate Debtor to sell their free sale component but that too at their own risk and responsibility. Further, Clause 11 of the DCM categorically stipulates that NOC to the Occupation Certificate for Free Sale Component shall not be issued by MHADA unless and until proportionate share of built-up area is handed over to MHADA.

22. The right to sell the free sale component was only given so that Corporate Debtor can recover its cost but again subject to the completion of MHADA's component and 672 tenants' rehabilitation component. Clause 11 of the DCM can never be interpreted to mean that Corporate Debtor got the absolute right over the Free Sale Component or the entire 47 acres of land as alleged. As per the arrangement, the entitlement of the Corporate Debtor for the free sale component arose only subject to the carrying out of the obligation of construction of rehabilitation tenements and MHADA's Component. The said entitlement was only in lieu of recovering the cost of construction of the rehabilitation tenements of MHADA's Component. In the absence of complying with the aforesaid obligations no interest of any nature whatsoever inured to the benefit of the Corporate Debtor. Further, as per Clause 2 of the Deed of Confirmation and Modification, it is stipulated that all the obligations under the JDA will continue and that Deed of Confirmation and Modification shall form part of the Joint Development Agreement and both the documents to be read and construed together. The clauses of the DCM did not discharge the Corporate Debtor from the primary obligation and the scope of the project as was defined under the JDA. Further, Clause 11 in the Deed of Modification is also subject to

termination clause under Clause 6.1 of the JDA. The relevant extracts of Clause 2 of the DCM is as below:

"2. This Deed of Confirmation And Modification shall form part of the said Joint Development Agreement dated April 10, 2008 and both the said Joint Development Agreement read with letter dated January 28, 2010 and this Deed of Confirmation And Modification shall be read together and construed accordingly..."

23. As per clause 12, the CEO of MHADA had given permission to the Corporate Debtor to avail loan for implementation of project against the security of Corporate Debtor's free sale component. It is submitted that the aforesaid clause cannot be of any aid to the Corporate Debtor. The fact that Corporate Developer was allowed to take loan can in no way be interpreted to mean that MHADA's control over the land was taken away. MHADA has always maintained and also reiterated in Clause 11 of the DCM that no NOC will be given provided the obligations are fulfilled by the Corporate Debtor. Also, it is the Corporate Developer who had taken the loan and the same has to be repaid by it and it is the risk which the Financial Institutions have taken knowing fully the terms and conditions under the JDA and DCM.

24. Reliance is placed on the order of Hon'ble Supreme Court in *Municipal Corporation of Greater Mumbai v/s. Abhilash Lal & Ors. – (2020) 13 SCC 234 decided on November 15th, 2019*, in a similar matter pertaining to MCGM's land where No objection letter issued by MCGM for creation of interest with respect of the MCGM properties, held that whatever documents Corporate Debtor may have created with the banks and Financial Institutions, MCGM cannot be bound by the same.
25. Learned Liquidator has also relied on Clause 15 of the DCM to state that Corporate Debtor shall be promoter under MOFA & RERA with respect to building constructed out of its share of development and this shows that rights in the property was transferred. It is once again submitted that all the rights given to the Corporate Debtor were subject to the fulfilment of its obligations under the JDA and DCM and that the aforesaid clause in no way suggests that absolute rights was granted to the Corporate Debtor.

E. Corporate Debtor has already alienated the entire FSI and there is no Free Sale Component remaining to be included in the Liquidation Estate:

26. Applicant submits that the Corporate Debtor has already alienated the entire FSI arising out of the free sale component falling to the share of the Corporate Debtor in favour of nine (9) builders and there is no Free

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Sale Component remaining to be included in the Liquidation Estate. In fact, as per the M.A. No. 96 of 2018 in Company Petition No. 1061 of 2017, the Resolution Professional himself has admitted that the Corporate Debtor has alienated 3,11,745.45 square meters of the constructed area which is way more than the free sale component which was available to the Corporate Debtor i.e, 2,70,697.51 square meters under the DCM. Developers have in turn constructed and sold away flats to homebuyers and further created encumbrances on this land.

Sr.	PLOT	DEVELOPER	BUILT UP AREA (m2)
1.	R-6	Ekta Everglade Homes Pvt. Ltd.	45,191.32
2.	R-8	Kiyana Ventures LLP	65,470.00
3.	R-7/B-2	KBJ Developers Pvt. Ltd.	13,395.78
4.	R-7/B-3, R-7/A-9	RNA NG Infra And Dev Pvt. Ltd.	20,590.00
5.	R-7/A-4	Preet Gruh Nirman Pvt. Ltd.	6,393.93
6.	R-7/A-5	Gold Finger Realty Investors Pvt. Ltd.	7,956.00
7.	R-7/B-4	Fist Infra Pvt. Ltd.	2,808.84
8.	HD/PH-PART	Pinky Skyscrappers Real Estate LLP	8,243.23
9.	R-12 PART	Bhoomi Shashwat Estate Pvt. Ltd.	11,111.11

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10.	R-10	MEADOWS- GURU ASHISH	58,643.98
TOTAL BUILT UP AREA (OUT OF 4,20, 816.35 m2)			2,39,804.19
ADD 30 % TO ARRIVE AT CONSTRUCTION AREA (OUT OF 5,47,061.25 m2)			3,11,745.45

27. Due to these acts committed by the Corporate Debtor, MHADA was constrained to file six suits against the developers. On the other hand, the nine developers to whom Corporate Debtor had sold away the FSI have also filed suits in the Bombay High Court which is still pending. Due to the aforesaid situation which had been created by the Corporate Debtor, the State Government of Maharashtra, on the basis of the Joseph Committee Report, issued a Government Resolution ("G.R.") dated 09.07.2021 directing MHADA to take over the entire project and complete the same subject to the order passed by this Hon'ble Tribunal and the Hon'ble High Court. -Clause 1(a) of GR- Page 18-19 of the Additional Affidavit filed by MHADA in IA 2333/2020 dated 30.07.2021. The relevant extract of the GR is as below:

"1. MHADA should itself carry out the entire work of this project as a developer:- Subject to the orders of this Hon. High Court/ Hon'ble National Company Law Tribunal, MHADA shall carry out development of the entire

project. While doing this:-

(a) the construction of rehabilitation component of the original 672 tenement holders at Patrachawl shall be completed and shall be handed over them.

(b) MHADA shall urgently carry out the remaining work of the buildings of 306 flats of MHADA's share of which lottery was drawn and shall duly handover possession of the flats to the concerned.

(c) Since development work of the entire project is to be carried out by MHADA, upon commencement of the project work, the liability of payment of rent to the residents rests upon MHADA. Therefore MHADA is being authorized to take appropriate decision in this regard. Similarly regarding arrears of rent of original residents, the final order of the Hon. Company Law Tribunal is awaited, as mentioned by MHADA in its letter bearing O.N.E.O/G.D/M.B./450/2021 dated 05/03/2021. Further MHADA shall constantly pursue the said matter with the Hon. Company Law Tribunal."

F. MHADA has already terminated the JDA vide termination letter dated 12th January, 2018 by invoking clause 6.1 of the JDA and the same has attained finality:

28. Clause 6.1 of the JDA gives right to MHADA to revoke the license granted in the event the Corporate Debtor fails to comply with the obligations under the JDA. The extracts of the termination Clause 6.1 read as below:
- "Clause 6.1- That in spite of levying compensation as per clause 7 of the project completion schedule of annexure 1 of the technical brief and if the*

construction work as per the terms and conditions is not completed and if MHADA's share is not handed over as per agreement then VP & CEO/MHADA reserves the right to cancel the agreement and in such situation the land will be taken over by MHADA and the balance work and project will be completed by MHADA at the risk and cost of the Developer and no expenses or compensation will be given by MHADA to the Developer and Developer will not have any claim against MHADA. Before termination of agreement 30 days' notice will be given to the Developer which can be extended upto 60 days at the discretion of VP & CEO/MHADA"

29. On 12th January, 2018, MHADA terminated the Joint Development Agreement as Corporate Debtor defaulted in its obligations to complete and hand over the construction of the rehabilitation component (R-9) and MHADA component (R-1 to R-5) within timelines stipulated in the JDA & DCM and failure to pay the rent during the transit period. Post termination of JDA on 12th January, 2018, the entire 47 acres of Siddharth Nagar Property is in complete possession of the MHADA and that no challenge had been made against the termination in any Competent Court. Hence the termination letter has attained finality qua the Corporate Debtor.

G. In the proceedings taken out by the Resolution Professional in the context of Section 14(1)(d) of IBC, Hon'ble Supreme Court vide order dated 19th February, 2020 has given the finding that Corporate Debtor was mere licensee under the JDA and DCM:

30. Post the termination of JDA & DCM on 12th January, 2018, Resolution Professional filed a Miscellaneous Application being M.A. No. 96 of 2018 under section 14(1)(d) of the IBC seeking orders against the MHADA to refrain from taking over the possession of the said Property till completion of CIRP and to continue the JDA and DCM till the completion of CIRP. The Tribunal dismissed the M.A. No. 96/2018 filed by the Resolution Professional by holding that no moratorium under Section 14 be applied as the said Property is not an asset of the corporate debtor nor any possessionary right vest in the Corporate Debtor. **(Refer page 325 of the IA 2333/2020- Vol III).** The Hon'ble NCLAT upheld the order of the NCLT, Mumbai and further affirmed the position of the Corporate Debtor as Licensee. **(Refer Page 354 of IA 2333/2020- Volume III).** The relevant paragraph of the NCLAT order is extracted hereinbelow:
- “14. On perusal of record, we find that pursuant to the “Joint Development Agreement” the land of the “Maharashtra Housing and Area Development Authority” was handed over to the “Corporate Debtor” and “except for development work” the ‘Corporate Debtor’ has not accrued any right over the*

land in question. The land belongs to “Maharashtra Housing and Area Development Authority” which has not formally transferred it in favour of the “Corporate Debtor”. Hence, it cannot be treated to be the asset of the “Corporate Debtor” for application of provisions of Section 14(1)(d) of the I & B Code.”

31. The matter travelled to the Hon'ble Supreme Court (Order dated 19th February, 2020). Hon'ble SC after distinguishing "occupation" and "possession" used in Section 14(1)(d) of the IBC and after going through the JDA and DCM held that the construction of the JDA r/w the DCM shows that the right of the Corporate Debtor was only that of a licensee in occupation. However, **it further held that since the Corporate Debtor was nevertheless in occupation, albeit, under a license granted by MHADA to the Corporate Debtor the statutory freeze under Section 14(1)(d) would be applicable till the completion of CIRP process.**
32. As per the SC judgement, the moratorium under Section 14(1)(d) was only applicable till the completion of CIRP. With the cessation of the moratorium under Section 14(1)(d) of the IBC, Corporate Debtor's right to enter the premise as a licensee also ended.

33. Learned Resolution Professional while arguing the Application under Section 14(1)(d) has also admitted the correct interpretation of the Section that any recovery of a property by an owner where such property is 'occupied by' the Corporate Debtor would clearly fall under Section 14(1)(d) of IBC. In other words, by relying on Section 14(1)(d) of IBC, Learned Resolution Professional had conceded that MHADA is the owner of the property.
34. The Hon'ble Supreme Court while deciding the issue under Section 14(1)(d) of the IBC after considering the JDA and DCM, gave a finding that a license was granted to the Corporate Debtor to enter upon the land for redevelopment. Hon'ble SC held that they do not need to go into the question of whether any interest is created but at the least a license was granted for the three purposes (structures demolished, tenements allotted free of cost to MHADA and then recover and recoup costs from free sale component). It is pertinent to note here that even the Hon'ble Supreme Court has observed that free sale component was given to the Corporate Debtor to recoup and recover cost of construction of MHADA and Rehabilitation component. The issue before the Supreme Court was that since moratorium had kicked in and as per Section 14(1)(d), Corporate Debtor was in occupation of the property and MHADA could not

have taken back the property. In this context, the Supreme Court had to consider whether Corporate Debtor was in “occupation” or “possession” as both these words are used in Section 14(1)(d) of IBC. However, SC categorically held that Corporate Debtor is only occupier by reason of license and there is no question of possession at all.

35. With the passing of the liquidation order on 4th September, 2020, moratorium under Section 14(1)(d) of the IBC has ceased to operate and thereafter as per the Supreme Court order dated 19th February, 2020, even the limited right of the Corporate Debtor as a licensee to enter the “Siddharth Nagar Property” has expired.
36. Despite the clear order of the Supreme Court that moratorium would cease to operate on the date of liquidation and Learned Liquidator issued a notice dated 22nd September, 2020 (**Ref Page 413 of the IA 2333- Volume II**) MHADA stating that as per Section 36(3)(b) & (h) of the IBC, the entire Sidharth Nagar Property of 47 acres should form part of the Liquidation Estate of Corporate Debtor as the same was “vested” with Corporate Debtor on the day of commencement of CIRP. It is submitted that the aforesaid notice is in complete contravention of the Supreme Court Order as well as the IBC which has already been part of this submissions.

H. "Siddharth Nagar Property" cannot be included in the Liquidation Estate of the Corporate Debtor even as per provisions of the IBC.

37. Learned Liquidator has relied upon Section 36(3)(b) and 36(3)(h) of the Insolvency and Bankruptcy Code, 2016 to contend that since the "Siddharth Nagar Property" was in possession of the Corporate Debtor when the CIRP was initiated, the same vests in the Corporate Debtor and shall form part of the Liquidation Estate. The reliance placed on Sections 36(3)(b) and (h) is wholly misconceived in as much as both these sub-sections are expressly made subject to the provisions of sub-section (4) of Section 36. Further, as per Section 36(4)(a)(iv) of IBC, the assets owned by the third party which are in the possession of Corporate Debtor because of any contractual arrangements is excluded from the Liquidation Estate. Since the "Siddharth Nagar Property" is admittedly owned by the MHADA and was merely "occupied" by the Corporate Debtor as a Licensee for a specific purpose under the JDA as already held by Hon'ble Supreme Court, the same is specifically excluded under Section 36(4)(a)(iv) of the IBC.
38. Further, Hon'ble Supreme Court vide order dated 19th February, 2020 has held that Siddharth Nagar Property was only under the "occupation" of the Corporate Debtor and not under "possession". Hence, the invocation of Section 36(3)(b) by the Liquidator which

states that “assets that may or may not be in possession of the corporate debtor” for inclusion of Siddharth Nagar Property is completely misplaced.

39. It is further submitted that the provision of Section 36 of the IBC 2016 has to be read along with the provision of Section 18 which permits the Interim Resolution Professional to take control and custody of only those assets over which the Corporate Debtor has ownership right. The explanation to Section 18 makes it clear that the term “assets” shall not include assets owned by third party in possession of the Corporate Debtor held under contractual arrangements. It is thus clear that when Interim Resolution Professional is barred from taking custody of assets owned by third party in liquidation which is in continuation of the insolvency process, the Liquidator cannot take possession of such assets.
40. Under Section 53 of the IBC, the Liquidator is empowered to distribute “proceeds from the sale of the liquidation assets” in accordance with the waterfall mechanism laid down thereunder. It is obvious that the sale can only be of what is defined to be the liquidation assets as defined by section 36(3) which as stated hereinabove by reason of Section 36(4)(a)(iv) excludes by statute - assets owned by a third party which may be in possession of the

Corporate Debtor. Since MHADA is the owner of the Siddharth Nagar Property, the same can never be liquidated for the purpose of Section 53 of the IBC as Liquidator will never be able to pass a good title to any purchaser of the property from the liquidation. In other words, if the Liquidator were to exercise its powers under Section 53 of the IBC, 2016, it will not be able to liquidate the proceeds of the sale of the said property in question as part of the liquidation estate.

I. Under Section 52 of the Indian Easement Act, 1882 Corporate Debtor is a Licensee

41. As per Section 52 of the Indian Easement Act, 1882, "License" is defined as *“Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.”*
42. As per the JDA & DCM, Corporate Debtor was given the limited right to enter upon MHADA’s land for the purpose of redevelopment. The Corporate Debtor was entitled to the right to the free sale component only upon completion of its obligation under the JDA and DCM and hence, it is a Licensee as per Section 52 of the Indian Easement Act.

J. IA No. 2377/2020 is barred by Res judicata as well as the

**constructive Res judicata under Section 11 and Explanation IV
to Section 11 of CPC:**

43. Section 11 of the Civil Procedure Code, 1908 provides that no suit can be tried again in which the matter was directly or substantially in issue in a former suit between the same parties and has already been decided by the Competent Court. Further Explanation IV to Section 11 CPC provides that any matter which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been matter substantially in issue of such suit and cannot be tried again.
44. It is submitted that I.A. No. 2377/2020 filed by the Learned Liquidator is barred under both under Section 11 and Explanation IV to Section 11 of CPC as the Judgment of Supreme Court dated 19th February, 2020 would operate as Res judicata. The issue with regard to the interpretation of JDA and DCM as to whether Corporate Debtor was a licensee or not, has already been decided by the Hon'ble Supreme Court in the judgment dated 19th February, 2020. Hence, since the issue of the interpretation of JDA and DCM has already been decided in the earlier proceedings, I.A. No. 2377/2020 would be barred under Section 11 of CPC. Thus, it is not open to the Liquidator after specifically conceding and admitting before this Hon'ble Court,

NCLAT or the Hon'ble Supreme Court that the land belongs to MHADA. This plea is therefore barred by Res judicata.

K. MHADA's case is squarely covered by the SC judgment in Municipal Corporation of Greater Mumbai v/s. Abhilash Lal & Ors. – (2020) 13 SCC 234 decided on November 15th, 2019:

45. By a contract dated 20th December, 2005, Seven Hills agreed to develop MCGM's land in Andheri (West) and construct a 1500 bed hospital within a period of 60 months. The project however, could not be completed within the stipulated time. In terms of Clause 15(g), the lease deed had to be executed within one month after completion. However, the deed was not executed as the project was not completed. Further Seven Hills even defaulted in payments towards annual lease rentals. MCGM issued show cause notice on 23rd January, 2018 proposing termination of the contract. On the strength of the contract, Seven Hills even created encumbrances on the land by borrowing from banks and financial institutions. On 13th March, 2018, before the period given by MCGM's show cause notice ended, CIRP was initiated at the instance of Axis Bank. A resolution plan was approved by COC which proposed payout to the tune of 102 crores to MCGM against the total claim of 140 crores and also committed to provide 20% beds in the hospital as per the agreement originally executed between Seven Hills and MCGM. Initially, MCGM agreed for the

resolution plan but later it opposed the resolution plan arguing that being a public body as well as a planning authority, it had to comply with the provisions of MMC Act. Further it stated that the provisions of Section 14(1)(d) of the Code could not prevent MCGM from terminating the contract.

46. Both the NCLT and NCLAT rejected the plea of MCGM and approved the Resolution Plan with MCGM's land by stating that plan filed along with application met with the requirements of Section 30(2). The Hon'ble Supreme Court reversed the NCLAT order and held as below:

"32. A cumulative reading of the stipulations reveals that the contract/agreement contemplates that the lease deed was to be executed after the completion of the project. The contract reveals that:

(a) the project period was for 60 months starting from the date excluding the monsoon period;

(b) by Clauses 5 and 17, Seven Hills could mortgage the property for securing advances from financial institutions for the construction of the project and thereafter towards its working. Such mortgage/charge or interest was subject to approval by MCGM.

In the event the contract was to be terminated, it was agreed that MCGM would not in any manner be liable towards the mortgaged amount and all its

*rights and ownership would continue to vest in it free from encumbrances
(Clause 17).*

33. The show-cause notice in this case preceded admission of the insolvency resolution process. In view of the clear conditions stipulated in the contract, MCGM reserved all its rights and its properties could not have therefore, in any manner, been affected by the resolution plan. Equally in the opinion of this Court, the adjudicating authority could not have approved the plan which implicates the assets of MCGM especially when SevenHills had not fulfilled its obligations under the contract.”

47. With regard to Section 238 of the IBC Code, Hon’ble Supreme Court in paragraph 47 held that section 238 cannot be read as overriding MCGM’s right.

L. Reliance placed by the Learned Liquidator on Division Bench judgement of Bombay High Court in Chedda Housing Development Corp. Vs. Bibijan Shaikh & Ors., 2007 (3) MhLJ is completely misplaced.

48. Learned Counsel for the Liquidator relied upon para 12A & 13 of the Bombay High Court judgement in Chhedda Housing to bring home the point that since the Corporate Debtor was granted the rights to sell the FSI to recoup the construction cost under the JDA and DCM, it is not a just a mere licensee/ contractor and that interest was created in favour of Corporate Debtor. Learned Counsel for the Liquidator has

completely misapplied the ratio of the decision in the case of Chheda Housing. The Division bench in Chheda Housing was only considering which are the types of agreement where compensation in money will not be sufficient and specific performance can be sought. Further, Division bench observed that the parties must aver the readiness and willingness to perform the contract for seeking specific performance.

49. The judgement cannot be of any assistance to Learned Liquidator as neither any specific performance of the JDA is sought nor any readiness and willingness shown to perform the contract. On the contrary, Liquidator is claiming the vested right in the 47 acres of land through JDA and DCM despite the JDA/DCM being terminated on account of breach of material terms of the contract.
50. In the case of Chedda Housing, the Court was not called upon to decide whether the Plaintiff in that case had committed any breaches of its obligation under the agreement in question and therefore, the Hon'ble Bombay High Court there has not decided that a Plaintiff who had committed breaches of the agreement would nevertheless be entitled to seek Specific Performance. Hence, the ratio of this judgement is inapplicable to the facts of the present case.

SUBMISSIONS ON BEHALF OF THE RESPONDENT THROUGH IA
NO. 2377/MB/C-I/2020

51. The Respondent submits that on 18th August, 2006 a Development Agreement was signed between Corporate Debtor and the said Society, pursuant to which the Society appointed the Corporate Debtor to develop the 40 acres of land including the rehabilitation of the 672 tenements. Clause 20 of this Development Agreement gave rights to the developers to sell the remaining premises to any other person or persons (save and except the 672 flats to be allotted to the said 672 Tenants) on a principal to principal basis without holding the Society liable for the performance thereof. Under Clause 21, on the building being completed and Occupation Certificate being obtained, the developer would approach MHADA to execute the necessary Indenture of Lease and/or Deed of Confirmation as per rules applicable. Clause 27 and 42 gives rights to the developer to avail and utilise floating FSI, Transfer Development Right (TDR) or any other F.S.I. arising from the land.
52. It is further submitted that Stamp Duty on this document was paid under Article 5(ga) of the Bombay Stamp Act.

53. Pursuant to this Development Agreement on 29th October, 2007, MHADA took a decision to allow Development of the larger land of 47 acres i.e. 1.65,800 sq. mtr. By the said decision after making the project viable for rehabilitation of the tenants/ members of the Said Society and after deciding the project cost of construction and development of the layout MHADA agreed to share the constructed components in the said layout. The Corporate Debtor decided to undertake Development of the land on a Joint Venture Basis.
54. Vide resolution 6280 dated 1st November, 2007 MHADA allowed development of entire 40 acres of land on terms and conditions mentioned in the said resolution. This resolution was further approved by the Government of Maharashtra on 3rd March, 2008. The decision taken unanimously that net 10 acres out of the 40 acres land occupied by the 672 tenements of the Said Society would be allotted to the Said Society vide Govt. resolution no. HSG/3381/4118/1313ka dated 8th February, 1988 and permission was given to execute Joint Venture Agreement between the Developer, the said Society and MHADA on the remaining 26.82 acres on terms mentioned in the said resolution. Accordingly, undoubtedly and indisputably the Corporate Debtor is Joint Owner of the land under Joint Venture with MHADA.

55. Pursuant to the said resolution no. 6280 issued by MHADA and Government of India Approval on 3rd March, 2008 a Tri-partite Development Agreement dated 10th April, 2008 was entered into between MHADA, the said Society and the Corporate Debtor. Over and above this the Corporate Debtor as developer committed to pay 25 crores to the Said Society towards Corpus Fund and provide alternate accommodation to the existing tenants. In consideration of obligations the Corporate Debtor was allowed to sell the balance built up area required for recovering Project cost estimated to Rs. 809.08 crores calculated at 13,500 per sq. mtr. To recover this cost, the Developer was granted (BUA) of 1,61,816.55 sq. mtrs. This document was duly stamped and registered on the total consideration value of Rs.178,75,14,500 and stamp duty of Rs.2,46,91,270 was paid by the Corporate Debtor.
56. On 26th July, 2011, MHADA gave the Corporate Debtor permission to sell free Sale Components wherein Signatures of MHADA Officers is not required.
57. On 9th November, 2011 a Deed of Modification and Confirmation was executed between the Said Society, MHADA and the Corporate Debtor which recorded that the Corporate Debtor has appointed and obtained approvals and sanctions for the entire 40 acres of land from

the Municipal Corporation of Greater Mumbai. On survey of land, parties have learnt that measurement of the said land has been enhanced from 1,65,805.80 sq. mtrs. to 1,93,599.90 sq. mtrs. In the meantime, DCR 33(5) was amended and as a result thereof MHADA is entitled to get share proportionately increased which should not be less than 1,48,151.07 sq. mtrs.

58. The Agreement clearly brings forth that the terms of the Agreement made the Corporate Debtor owner of the free sale Component. The interest this created by virtue of the Agreement dated 10th April, 2008 and 9th November, 2011 is an asset of the Corporate Debtor and hence should form part of the Liquidation estate that the Liquidator is required to protect during the Liquidation Process.
59. It is submitted that the possession of the land was not given to the Corporate Debtor as a contractor. The Joint Development Agreement is entered into with the Corporate Debtor as a developer on a 50:50 basis. An agreement is a Joint Development Agreement on which the developer paid Stamp Duty as required under Stamp Act. The amount of consideration was determined and stamp duty was paid at the Market Value for the purpose of payment of stamp duty. If the agreement is of a contractor there would not be any stamp duty payable on such agreement of the contractor.

60. On execution of JDA, the land and development rights become composite assets cannot be segregated as two separate assets of the JDA joint venture. One part of the land apportioned to Society with FSI of buildings to the Society having 672 flats to be built on that land, the second part of the land along with FSI is apportioned and provided to MHADA for MHADA buildings, and the third part of the land along with FSI is made available to Corporate Debtor to compensate the cost of construction of buildings for Society and MHADA as a consideration. The land was made available to the Corporate Debtor to construct buildings for self-development and/or allowed to sell FSI with land to other builders. FSI cannot be sold without rights on the land. The Joint venture has provided the rights and obligations of each party. MHADA has the right to get constructed buildings free of cost from the Corporate Debtor, the Society to get constructed buildings to house 672 tenant members, the buildings to be constructed free of cost by the Corporate Debtor and the Corporate debtor has development rights for self-development and free sale component as consideration for providing buildings free of cost to Society and MHADA. The members whose contractual obligations are not satisfied can file claims with the IRP/RP/Liquidator.

61. Respondent submits that as per reports submitted by engineers of MHADA 40.44% of the work is completed and 59.56% of the construction is yet to be completed the cost for completion estimated to be 337.06 crores. This claim can be satisfied from the available development rights and from the sale of flats from the meadows and further balance money can be recorded from the balance amount from the flats that are already sold and from Free Sale Components available and development rights available with the Corporate Debtor. As per the balance sheet of 30th September 2017, the Corporate Debtor has shown inventory work-in-progress of Rs 890 crores.
62. During the CIRP, on 12th January, 2018, MHADA unilaterally without taking the approval from the Said Society “Goregaon Siddharth Nagar Grihan Nirman Sansthan Ltd.” issued Termination Notice to terminate the Joint Development Agreement 10th April, 2008 and Deed of Modification Cum Confirmation dated 9th November, 2011 and sought recovery of land, property and standing structures on the said land built by the Corporate Debtor. The Liquidator filed MA No.96 of 2018 and challenged the said action of MHADA for issuing Termination Notice dated 12th January, 2018 before the NCLT, Mumbai seeking declaration that during the moratorium no action of termination of Joint Development

Agreement and Deed of Modification cum Confirmation dated 09th November, 2011 could be done. The NCLT, Mumbai vide order dated 2nd April, 2018 dismissed the said application filed by the Resolution Professional/Applicant. Aggrieved by the said order dated 2nd April, 2011 the Applicant preferred Company Appeal (AT)(Insolvency) 119 of 2018 before NCLAT, New Delhi.

63. NCLAT vide order dated 14th December, 2018 stated that pursuant to the 'Joint Development Agreement' the land of the MHADA was handed over to the Corporate Debtor 'except for development work' the Corporate Debtor has not accrued any right over the land in question. The land belongs to MHADA which has not formally transferred it in favor of the Corporate Debtor. Hence it cannot be treated to be the asset of the Corporate Debtor. For application of provisions of section 14(1) (d) of the 'I&B Code'. This apart, since 270 days of the CIRP have lapsed on 19th April 2018 and the period of Moratorium in any case has come to an end, the question raised has become academic. Accordingly, Appeal filed by the Resolution Professional was dismissed by NCLAT. The Resolution Professional aggrieved with the above order filed Civil Appeal No. 12248 of 2018 before the Hon'ble Supreme Court of India.

64. Vide order dated 4th January, 2019 Supreme Court ordered status quo in respect of the share of the Corporate Debtor and vide order dated 19th February, 2020 the Apex Court confirmed the applicability of Moratorium under section 14(1)(d). Supreme Court did not decide on ownership and termination notice issued by MHADA. On the day of pronouncement of the Liquidation order by the Hon'ble NCLT i.e. 4th September 2020 the Siddharth Nagar Property is in occupation and vested with Resolution Professional/Liquidator. Applicant referred to section 36(3)(h) of the IBC which states that "any other property belonging to or vested in the Corporate Debtor as on Insolvency commencement date shall form part of the Liquidation estate." On the day of commencement of Insolvency i.e. on 24 July 2017 the property of Siddharth Nagar was vested with Corporate Debtor. The property of Siddharth Nagar should form part of Liquidation Estate. In view of the above Siddharth Nagar, Goregaon property is part of the Liquidation estate.
65. In paragraph 30 of the Interlocutory Application 2333 of 2020 MHADA has provided a tabular form of the Built Up Area of the respective and argued that the Corporate Debtor has exceeded the free sale construction area. MHADA has further concluded in this paragraph that it is evident from the above tabular statement that the

Corporate Debtor has already alienated the entire FSI arising out of the free sale component falling to the share of the Corporate Debtor in favor of third-party builder and there is no FSI of the Free Sale Components remaining to be included in the Liquidation Estate. This statement confirms MHADA's submission that the Free Sale Component and the entire FSI are being held by the Developers who are listed in the above table. Accordingly, based on this admission it is concluded that MHADA accedes to the fact that the FSI of 270698 sq. mtrs. vests with the Corporate Debtor and this requires to be included in the Liquidation Estate.

66. At present MHADA has unauthorizedly taken the occupation of the aforesaid property and is thereby hindering the process of Liquidation of the Corporate Debtor This shall further affect the interest of the stakeholders such as the home buyers who have already purchased the said flats, the developers who have sold flats in their respective buildings.
67. With respect to why RP has not filed a suit against the Termination Notice, Respondent submits that all the matters during CIRP are to be referred to Adjudicating Authority, No other court has jurisdiction, hence Resolution Professional has not filed suit. Later on, this view got support from the order of the Hon'ble Supreme Court.

68. When the matter was referred to NCLAT, NCLAT had passed the order dated 12 7 2018 in the last Para it was directed that *“We make it clear that the ‘agreement for development ‘executed between the MHADA and the ‘Corporate Debtor’, which has been cancelled legality and propriety of such cancellation cannot be decided by the Adjudicating Authority or by this Appellate Tribunal (NCLAT). Such question can be decided only by a Court of competent jurisdiction; therefore, the Adjudicating Authority will not deliberate on such issue and leave it open.”*
69. It is submitted that NCLAT has not dealt with whether the subject that the Termination Notice is valid or not valid. It has dealt with the subject of moratorium under section 14(1)(d)., which was referred to the Hon’ble Supreme Court. If the moratorium is accepted it means the Termination Notice is discarded invalid ab initio.
70. On 9th July, 2021, Government of Maharashtra passed another Resolution to carry out the entire work subject to orders of the NCLT and Hon’ble Bombay High Court. In breach of this Resolution the Liquidator found that MHADA entered upon the property and started construction in blatant disregard of directions in the GR. Hence, the Liquidator was constrained to take out Interlocutory Application No. 2575 of 2022. In this I.A. the Liquidator has annexed the Liquidators Report along with photographs of site which is at **Annexure 14 from page 127 to 149.**

Findings:

71. The following facts are undisputed:
- (a). JDA read with DCM reflects the rights and liabilities of the Corporate Debtor to construct Rehabilitation component for 672 tenants and MHADA component which should not be less than 1,48,151.07 sq. mtrs. and provide rent to 672 tenants during the transit period.
 - (b). Clause 11 of the DCM conferred a right on the Corporate Debtor to sell its Free Sale Component, it was at the risk and responsibility of the Corporate Debtor.
 - (c). Clause 6.1 of the JDA gave right to MHADA to revoke the license granted to the Corporate Debtor in the event the Corporate Debtor failed to comply with the obligations under the JDA.
 - (d). Not even a single tenant has been rehoused till date and there are arrears of rent due to the tenants amounting to crores of rupees.
72. Before we decide on the pleadings regarding the sustainability of the termination letter and the status of the assets under liquidation estate, we must first look into the status of the Corporate Debtor *vis-à-vis* the said asset. Useful reference in this context can be taken from the judgement of the *Hon'ble Supreme Court in the matter of Rajendra K. Bhutta Vs. Maharashtra Housing And Development Authority and Another* in order dated 19.02.2020 the relevant portion reproduced herein below:
- “15. The conspectus of the aforesaid judgements would show that the expression “occupied by” would mean or be synonymous with being in actual physical possession of or being actually used by, in contra-distinction to the expression*

“possession” which would connote possession being either constructive or actual and which in turn would include legally being in possession though factually not being in possession. Since it is clear that the Joint Development Agreement read with Deed of Modification has granted a license to the developer (Corporate Debtor) to enter upon the property, with a view to do all the things that are mentioned in it, there can be no gainsaying that after such entry, the property would be “occupied” by the developer.”

73. Further, the Respondent has failed to produce any document creating any right in favour of the Corporate Debtor by MHADA. Unless a document which is required to be compulsorily registered and stamped is executed and a right is created, there can never be a vesting of any immovable property in favour of any party under the Transfer of Property Act, 1882, Indian Registration Act, 1908 and Indian Stamp Act, 1899.

74. Thus, based on the above we conclude that the status of the Corporate Debtor to be that of a “Licensee” and that no ownership rights have been conferred upon it by the JDA read with DCM, by further relying on the Hon’ble Supreme Court’s observations as reproduced below:

“The aforesaid provisions of the Joint Development Agreement would show that, at the very least, a license is granted in favour of the developer to enter upon the land to demolish existing structures, construct and erect new structures, and allot

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to erstwhile tenants, tenements in such constructed structures in three categories – (1) the earlier tenants/licensees of structures that were demolished (2) tenements to be allotted free of cost to MHADA and (3) what is referred to as “free sale component” which the developers then sell and exploit to recover or recoup cost and make profits. It is wholly unnecessary for us to refer to any other clauses of the Joint Development Agreement. It is also not necessary for the purpose of this case to state as to whether an interest in property is or is not created by the said Joint Development Agreement.

15. Since it is clear that the Joint Development Agreement read with Deed of Modification has granted a license to the developer (Corporate Debtor) to enter upon the property, with a view to do all the things that are mentioned in it”

75. The Hon’ble Supreme Court vide its order dated 19th February, 2020, directed status quo to be maintained during CIRP, subsequently this bench has passed an order for commencement of liquidation on 4th September 2020 under Section 33 of the IBC. Upon reading the first proviso to Section 14(1) of the IBC it is evident that the statutory moratorium shall cease to exist once an order under Section 33 of the IBC is passed authorizing commencement of liquidation.

76. Based on the above, we reproduce the relevant portion of Section 36 of the IBC that defines Liquidation Estate to exclude:

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“(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation: -

(a) assets owned by a third party which are in possession of the corporate debtor, including -

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor

and any creditor.”

Hence from the above it is clear that the Liquidator cannot include as a part of the liquidation estate, an asset that is not owned by the Corporate Debtor.

77. We cannot rely on the judgement of the Hon'ble Supreme Court cited in the case of *Municipal Corporation of Greater Mumbai v/s. Abhilash Lal & Ors. – (2020) 13 SCC 234 dated November 15th, 2019* as the facts of the case clearly state that The show-cause notice in the case preceded admission of the insolvency resolution process. We did not find any such show cause notice produced pre-CIRP in this case.
78. On the Respondent's own admission, 40.44% of the work is completed and 59.56% of the construction is yet to be completed, thus it appears that the corporate debtor has violated the JDA read with DCM. While the issue of the legality of the termination notice issued during the CIRP period has been decided, the Petitioner is well within its rights to terminate the arrangement under Clause 6.1 of the JDA.
79. Application bearing **IA No. 2333/MB/C-I/2020** is thus **disposed of** as **Allowed** in above terms.

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80. Application bearing **IA No. 2377/MB/C-I/2020** is thus **disposed of** as
Dismissed in above terms.

Sd/-

SHYAM BABU GAUTAM

Member (Technical)

10.02.2023

SAM

Sd/-

JUSTICE P. N. DESHMUKH

Member (Judicial)