

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1590 of 2023

[Arising out of order dated 22.11.2023 passed by the Adjudicating Authority
(National Company Law Tribunal, Mumbai Bench – I), in I.A. No.1686/2020
in CP (IB) No.1632/MB/2019]

IN THE MATTER OF:

1. VISTRA ITCL (INDIA) LIMITED

Through Ms. Khushboo Kotadia (Authorized Person)

Regd. Office: IL & FS Financial Centre
Plot No. C-22, G Block, Bandra, Kurla Complex,
Mumbai, Maharashtra – 400051

Email: dipti.jain@vistra.com

...Appellant No. 1

2. PRATITI TRADING PRIVATE LIMITED

Through Mr. Shreyans J. Shah (Authorized Person)

Regd. Office: Aidan Building, 1st Dhobi
Talaolane, Mumbai, Maharashtra – 400002

Email: info@mjshahgroup.com

...Appellant No. 2

3. GAJENDRA INVESTMENT LIMITED

Through Mr. Shreyans J. Shah (Authorized Person)

Regd. Office: A-1/2, Floor-5, Plot-2, A wing,
Aidun Building, John Crasto Lane,
Dhobi Talao 1st Lane, Marine Lines,
Mumbai, Maharashtra – 400002

Email: info@mjshahgroup.com

...Appellant No. 3

Versus

1. IIFL HOME FINANCE LTD.

IIFL House, Sun Infotech Park, Road No.16V,
Plot NO. B23, MIDC, Thane Industrial Area,
Wagle Estate, Thane, Maharashtra – 400 604

Email ID: secretarialhfc@iiflhomeloans.com

...Respondent No. 1

2. SATRA PROPERTIES (INDIA) LTD.

Through Ms. Vaishali Arun Patrikar

(Resolution Professional)

Office at: A2 Shantidoot Society,
Parvati Darshan, Opp. Muktangan English School,
Pune, Maharashtra – 411009

Email: vapatrikar@gmail.com

...Respondent No. 2

Present:

For Appellant : **Mr. Devashish Chauhan and Mr. Paras Mithal, Advocates.**
For Respondents : **Mr. Sumesh Dhawan, Mr. Abhirup Dasgupta, Ishaan Duggal and Ms. Ruchi Goyal, Advocates for R-1.**
Mr. Pulkit Sharma, Advocate.

WITH

Company Appeal (AT) (Insolvency) No. 1592 of 2023

&

I.A. No. 5957 of 2023

[Arising out of order dated 05.12.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench – I), in I.A. No.1687/2020 in CP (IB) No.1632/MB/2019]

IN THE MATTER OF:

1. VISTRA ITCL (INDIA) LIMITED

Through Ms. Khushboo Kotadia (Authorized Person)
Regd. Office: IL & FS Financial Centre
Plot No. C-22, G Block, Bandra, Kurla Complex,
Mumbai, Maharashtra – 400051
Email: dipti.jain@vistra.com

...Appellant No. 1

2. PRATITI TRADING PRIVATE LIMITED

Through Mr. Shreyans J. Shah (Authorized Person)
Regd. Office: Aidan Building, 1st Dhobi
Talaolane, Mumbai, Maharashtra – 400002
Email: info@mjshahgroup.com

...Appellant No. 2

3. GAJENDRA INVESTMENT LIMITED

Through Mr. Shreyans J. Shah (Authorized Person)
Regd. Office: A-1/2, Floor-5, Plot-2, A wing,
Aidun Building, John Crasto Lane,
Dhobi Talao 1st Lane, Marine Lines,
Mumbai, Maharashtra – 400002
Email: info@mjshahgroup.com

...Appellant No. 3

Versus

1. ASSET RECONSTRUCTION COMPANY INDIA LTD.

(Assignee of IIFL Finance Ltd.)

The Ruby, 10th Floor, The Ruby, 29,
Senapati Bapat Marg, Dadar West,
Mumbai, Maharashtra 400028
Email ID: abhirup.dasgupta@hsalegal.com

...Respondent No. 1

2. SATRA PROPERTIES (INDIA) LTD.

Through Ms. Vaishali Arun Patrikar
(Resolution Professional)
Office at: A2 Shantidoot Society,
Parvati Darshan, Opp. Mukangan English School,
Pune, Maharashtra – 411009
Email: vapatrikar@gmail.com

...Respondent No. 2

Present:

For Appellant : Mr. Satvik Verma, Sr. Advocate with Mr. Devashish Chauhan, Mr. Paras Mithal, Ms. Gazal Ghai and Mr. Manas Syal, Advocates.

**For Respondents : Mr. Sumesh Dhawan, Mr. Abhirup Dasgupta, Ishaan Duggal and Ms. Ruchi Goyal, Advocates for R-1.
Mr. Pulkit Sharma, Advocate.**

J U D G M E N T

ASHOK BHUSHAN, J.

Comp. App. (AT) (Ins.) No. 1590/2023 has been filed by the Appellant who are Financial Creditors of the Corporate Debtor/Satra Properties India Limited (hereinafter referred to as `SPIL'), aggrieved by the order dated 22.11.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench – I) in I.A.1686/2020 in C.P. (IB) No.1632/MB/2019. I.A. No. 1686 of 2020 filed by the Respondent herein, IIFL Home Finance Limited has been allowed and the claim filed by IIFL Home Finance Ltd. in the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor has been directed to be admitted as a Financial Debt.

2. Appellants who are the Financial Creditors of the Corporate Debtor aggrieved by the admission of claim of IIFL Home Finance Ltd. as Financial Creditor has come up in this Appeal.

3. Comp. App. (AT) (Ins.) No. 1592/2023 has been filed by Appellant who are Financial Creditor of the Corporate Debtor/Satra Properties India Ltd.

(SPIL) challenging the order dated 05.12.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench – I) in I.A.1687/2020 in C.P. (IB) No. 1632/MB/2019, filed by IIFL Finance Ltd.

4. The Adjudicating Authority by the impugned order allowed the I.A. No. 1687/2020 filed by IIFL Finance Ltd. directing for acceptance of claim of IIFL Finance Ltd. as Financial Creditor of the Corporate Debtor/SPIL. Aggrieved by which order, Comp. App. (AT) (Ins.) No. 1592/2023 has been filed.

5. The facts and issues raised in these two Appeals being similar, both the Appeals have been heard together and are being decided by this common Judgment.

6. It shall be sufficient to refer to Comp. App. (AT) (Ins.) No. 1590/2023, pleadings therein for deciding both the Appeals.

7. Brief facts necessary to be noticed for deciding the Appeals are:

- i. IIFL granted a loan of ₹20 Crores to the Corporate Debtor/SPIL. Another loan of ₹5.21 Crores was granted by IIFL to SPIL on 27.07.2018.
- ii. IIFL extended loan facility of ₹60 Crores to SPIL on 17.11.2015 and further additional facility of ₹40 Crores was extended on 29.09.2016 to SPIL.
- iii. The loan facility granted by IIFL and IIFL Home Finance Ltd. being not serviced and both SPDPL and SPIL having failed to comply with the respective obligation under the facility Agreement. IIFL filed C.P. IB No. 175/2019 against SPDPL and C.P. IB No. 176/2019 against SPIL for initiating Insolvency Resolution Process against the Corporate Debtors.

- iv. On 09.09.2019, a Consent Term was entered between IIFL, IIHFL, SPDPL and SPIL, where outstanding amount of the loan facility extended by IIFL and IIHFL was acknowledged Agreement further noticed that SPDPL shall reserve an area of 2,00,000 sq. ft. carpet area of the project known as Satra Hills to be constructed by SPDPL and create a first and exclusive charge by way of registered mortgage in respect of the said area in favour of IIFL and IIHFL as additional security in respect of the loan extended to the Corporate Debtors.
- v. The outstanding amount was to be paid with effect from 01.09.2019, as per the repayment schedule set out in Annexure 1 and Annexure 2 of the Consent Terms.
- vi. On 09.09.2019, an Amendment Agreement was also executed to amend certain terms and conditions of the Facility Agreement, the Additional Facility Agreement and the relevant Security Agreement, to the extent provided therein.
- vii. Amendment Agreement contains acknowledgement by the Corporate Debtors of the outstanding liability which was to be paid with effect from 01.09.2019 as per the repayment schedule. Agreement also provided that parties were at liberty to pursue all recourse and actions available under the applicable laws in the event of non-compliance of the Consent Terms and the Amendment Agreement.
- viii. On 09.09.2019, a Security Release Agreement was also executed which is not relevant for issues raised in the Appeal.
- ix. On 20.03.2020, in furtherance of Consent Terms and Amendment Agreement, IIFL, IIHFL, SPDPL and SPIL entered into registered

Deed of Security for creation of the additional security i.e., first and exclusive charge by way of registered mortgage on Mortgaged Property.

- x. SPDPL agreed to provide security to IIFL and IIHFL on behalf of SPDPL and SPIL for payment of secured obligations. SPDPL confirmed that Mortgaged Property is sufficient to discharge the total debt of the Corporate Debtor as and when it becomes due and the Corporate Debtor shall not be required to pay any further amount.
- xi. The Agreement further noticed that SPIL shall stand discharged from its obligation, before parties could act on the Consent Term. CIRP was initiated against SPDPL by order dated 10.08.2020, and against SIPL by order dated 03.08.2020.
- xii. In CIRP of the SIPL, IIFL Home Finance Ltd. filed its claim for an amount of ₹25,62,25,566/- as Financial Creditor in `Form C`.
- xiii. IIFL filed its claim in `Form C` for sum of ₹185,54,92,575/- in CIRP of the Corporate Debtor/SPIL.
- xiv. The Resolution Professional (RP) vide its email dated 15.09.2020, intimated both IIFL and IIHFL that in view of registered Deed of Security dated 20.03.2020 claim cannot be admitted.
- xv. IIHFL filed I.A. No. 1686/2020 before the Adjudicating Authority seeking a direction to admit the financial claim. IIFL filed I.A. No. 1687/2020, seeking admission of its claim in the CIRP of SPIL.

As noted above, the Adjudicating Authority vide order dated 22.11.2023, allowed the I.A. No. 1686/2020 against which Comp. App. (AT) (Ins.) No. 1590

of 2023 has been filed and by an order dated 05.12.2023 I.A. No. 1687/2020 was allowed against which Comp. App. (AT) (Ins.) No. 1592 of 2023 has been filed.

8. We have heard Mr. Krishnendu Dutta, Sr. Advocate appearing on behalf of the Appellant in Comp. App. (AT) (Ins.) No. 1590 of 2023 and Mr. Satvik Verma, Sr. Advocate appearing on behalf of the Appellant in Comp. App. (AT) (Ins.) No. 1592 of 2023. Learned Counsels Mr. Sumesh Dhawan and Mr. Abhirup Das Gupta have appeared for Respondents in both the Appeals.

9. The submission advanced by Learned Sr. Counsel appearing on behalf of the Appellant being similar, we proceed to notice submission in both the Appeals as submissions advanced on behalf of the Appellants.

10. Learned Counsel for the Appellant challenging the impugned order submits that in view of Deed of Security dated 20.03.2020, the SPIL was discharged from its obligation to make payment to IIFL and IIFL Home Finance Ltd. and the obligation was only of SPDPL. Thus, no claim could have been admitted against SIPL of the IIFL and IIFL Home Finance Ltd. The Adjudicating Authority erred in not correctly construing the Deed of Security dated 20.03.2020. The Adjudicating Authority, relying on principle of harmonious construction of Deed of Security has directed for admission of the claim which is nothing but rewriting the Agreement between the parties. The recital in Deed of Security, Clause G clearly mentioned that after execution of Deed of Security, SPIL/obligor henceforth shall not be liable for the said due and it shall stand discharged from its obligation to make the payment under the Loan Agreement read with Amendment Agreement as well

as Consent Terms. Mortgager i.e., SPDPL had represented that mortgage properties are sufficient to discharge the secured obligation of the obligor as and when becomes due. Learned Counsel for the Appellant relying on the Judgment of the Hon'ble Supreme Court in '**Shree Ambika Medical Stores & Ors.' Vs. 'The Surat People's Cooperative Bank Limited & Ors.'**, **Civil Appeal No. 562 of 2020**, submits that Court through its interpreted process cannot rewrite or create a new contract between the parties.

11. Further, reliance has been placed on the Judgment of the Hon'ble Supreme Court in '**Venkatraman Krishnamurthy & Anr.' Vs. 'Lodha Crown Buildmart Pvt. Ltd.'**, **Civil Appeal No. 971 of 2023** for the proposition that when the parties committed themselves to written contract same would be binding upon them. Learned Counsel for the Appellant has also placed reliance on Section 41 of the Indian Contract Act, 1872 and submits that when a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor. Relying on Section 62 of the Indian Contract Act, 1872 it is submitted that effect of novation/rescission and alteration of contract is that the original contract cannot be performed. Learned Counsel for the Appellant submits that claim has already been admitting in CIRP of SPDPL, and by admitting the claim as a Financial Debt, the Respondents are trying to take double benefit.

12. Learned Counsel appearing on behalf of the Respondents refuting the submission of the Appellant submit that the Consent Terms dated 09.09.2019 between the parties clearly acknowledged the debt both by SPDPL and SPIL and both undertook to make the repayment as per the schedule set out in Annexure 1 and Annexure 2. It is submitted that Amendment Agreement *Comp. App. (AT) (Ins.) Nos. 1590 & 1592 of 2023*

entered on 09.09.2019 also contained the clear acknowledgement and undertaking to repay the outstanding debt. The Agreement dated 20.03.2020 was a Deed of Security for creation of additional security i.e., first and exclusive charge by way of registered mortgage on the Mortgaged Property. SPDPL agreed to provide security to IIFL and IIHFL for payment of secured obligations. SPDPL confirmed that Mortgaged Property is sufficient to discharge a total debt of the Corporate Debtor as and when it becomes due. It is submitted that Appellants are wrongly reading clauses of Deed of Security to indicate that Deed of Security has discharged SIPL from its secured obligation.

13. Further, Consent Terms could not be implemented nor payments would be made to the IIFL and IIHFL on account of initiation of CIRP against SPIL and SPDPL on 03.08.2020 and 10.08.2020 respectively. The claim filed in CIRP of both the Corporate Debtors was filed as a Financial Creditor which was wrongly refused to be accepted by RP on 15.09.2020, which led the IIFL and IIHFL filing the application before the Adjudicating Authority. It is submitted that financing documents clearly reflects the Financial Debt within a meaning of Section 5 sub-Section (8) of the IBC. Deed of Security dated 22.03.2020, cannot be read as discharged of secured obligation of SIPL.

14. Reliance on Section 41 of the Indian Contract Act, 1872, by the Appellant is misplaced since under the Deed of Security, there was no discharge given to SIPL of its liability which stood acknowledged and affirmed by Consent Terms and Amendment Agreement. The Deed of Security was executed for creation of mortgage as additional security and the Adjudicating

Authority has rightly read the clauses of Deed of Security to come to the conclusion that SIPL was not discharged from its secured obligation.

15. Section 62 of the Indian Contract Act, 1872, is also not attracted since Deed of Security did not novate the terms of the facility document.

16. The submission of the Appellant that Respondent are taking double benefit is wholly erroneous in the CIRP of SPDPL claim was admitted as other Creditor, in view of the mortgage. It is further submitted that Appellants who are Financial Creditor of the Corporate Debtor having an independent claim cannot be said to be prejudiced by admission of legitimate claim of IIHFL and IIFL.

17. We have considered the submissions of the Counsel for the parties and perused the record.

18. As noted above that after filing of the Petition under Section 7 by IIFL against SPDPL and SPIL, a Consent Term was entered between the Financial Creditor and the Corporate Debtor i.e., SPDPL and SPIL.

19. Under the Consent Term, parties arrived at mutually agreed settlement. The consent term clearly provides for creation of additional security by SPDPL by reserving 2,00,000 sq. ft. carpet area of the project Satra Hills in respect of loans extended by IIFL and IIFL Home Finance Ltd.

20. Para 2(a) of the Consent Terms is as follows:

“2. It is agreed between the Parties, and the Parties hereby undertake that:

(a) Forthwith upon filing these Consent Terms and no later than 90 days from the date of execution of these Consent Terms, SPDPL shall reserve an area of 2,00,000 square feet carpet area of the project to be known as ‘Satra Hills’ to be constructed by SPDPL on the land situated at Amrut Nagar, Ghatkopar (West),

*Mumbai bearing Survey No. 136 (Part) and CTS No. 1 (Part) of village Ghatkopar, within the registration sub — district of Kurla and District Mumbai Suburban along with pro-rata car parking space (in accordance with extant development control regulation as applicable in the state of Maharashtra) and create a first and exclusive charge by way of registered mortgage in respect of the said area (“**Mortgaged Property**”), in favour of the Financial Creditor and IIFL Home Finance Limited (a group entity of the Financial Creditor), as additional security in respect of the loans extended by the financial Creditor and IIFL Home Finance Limited to SPIL.”*

21. Clause 2b contains clear undertaking that Financial Debt is due to IIFL and IIFL Home Finance Ltd. Clause 2b and 2c is as follows:

“b. The Parties agree, and confirm that:

(i) As on 31 August 2019, SPIL has an outstanding financial debt due to the Financial Creditor amounting to INR 1,48,68,19,504. The Parties admit, accept and confirm that this amount is due and payable to the Financial Creditor.

(ii) SPIL shall pay the aforesaid sum of INR 1,48,68,19,504 to the Financial Creditor, along with interest thereon starting from 1 September 2019, as per the repayment schedule, set out in Annexure I to these Consent Terms and the same shall be first recovered from Mortgaged Property (defined herein) / the cash flows generated from the Mortgaged Property (defined herein).

(iii) As on 31 August 2019, SPIL has an outstanding financial debt due to IIFL Home Finance Limited amounting to INR 22,80,76,772. The Parties admit, accept and confirm that this amount is due and payable to IIFL Home Finance Limited.

(iv) SPIL shall pay the aforesaid sum of INR 22,80,76,772 to IIFL Home Finance Limited (a group entity of the Financial Creditor) along with interest thereon starting from 1 September 2019, as per the repayment schedule, set out in Annexure II to these Consent Terms, and the same shall be first recovered from Mortgaged

Property (defined herein) / the cash flows generated from the Mortgaged Property (defined herein).

(v) The Financial Creditor shall not initiate legal proceedings / actions against SPIL and/or its directors and/or its promoters, except as provided in clause 6 of these Consent Terms. The Financial Creditor shall also ensure that IIFL Home Finance Limited does not initiate legal proceedings / actions against SPIL and/or its directors and/or its promoters, except as provided in clause 6 of these Consent Terms.

(c) The Parties agree and acknowledge that as on 31 August 2019, SPDPL has an outstanding financial debt due to the Financial Creditor amount to INR 1,09,08,59,532. The Parties, accept and confirm that this amount is due and payable to the Financial Creditor. SPDPL agrees acknowledges and unconditionally undertakes to repay the outstanding financial debt due to the Financial Creditor amounting to INR 1,09,08,59,532 along with interest thereon at 16% per annum starting from 1 September 2019, as per the repayment schedule, set out in Annexure III to these Consent Terms.”

22. Clause 4 of the Consent Term refers to the Amendment Agreement for amending certain terms of the Facility Agreement, financing documents. The Agreement further clearly provides for repayment of the outstanding as per repayment schedule Annexure 1 and Annexure 2 which we have already noticed as contained in Clauses 2b and 2c.

23. Clause 6 of the Consent Term also contemplated that in event, the financing document as amended are not complied with, other party shall be free to pursue all recourse and actions available under applicable law. Clause 6 is as follows:

“6. The Parties agree and undertake that either Party shall be at liberty, in the event that these Consent Terms or the original facility agreements / financing

documents as amended by the Amendment Agreements are not complied with by the other Party, to pursue all recourses and actions available to it under applicable laws and the relevant facility agreements / financing documents, as amended by the Amendment Agreements. In case of non-compliance of these Consent Terms by the Corporate Debtor/s, the Financial Creditor / IIFL Home Finance Limited shall also be at liberty to file fresh applications under Section 7 of the Insolvency and Bankruptcy Code, 2016 against the non-compliant Corporate Debtor/s.”

24. Amendment Agreement entered into 09.09.2019 contains the undertaking in paragraph 2 which contains acknowledgement of payment of dues from 01.09.2019 as per repayment schedule which shall be first recovered from Mortgaged Property/Cash Flow generated from the Mortgaged Property. Paragraphs 2, 2.1, 2.2, 2.3, 2.4, 2.5 which are relevant are as follows:

“2. UNDERTAKING BY THE PARTIES

Each of the Parties hereby represents, covenants, undertakes and agrees to abide by and ensure continued compliance of the following on or from the date of this Agreement till the termination of this Agreement in accordance with Clause 5.9, hereof:

2.1 As on 31 August 2019, the Company has an outstanding financial debt due to the IIFL amounting to Rs 148,68,19,504 (Rupees One hundred forty eight crores sixty eight lakhs nineteen thousand five hundred and four). Each Party admits, accepts and confirms that this amount is due and payable by the Company to IIFL.

2.2 The Company shall pay the aforesaid sum of Rs 148,68,19,504 (Rupees One hundred forty eight crores sixty eight lakhs nineteen thousand five hundred and four) to IIFL, along with interest thereon compounded quarterly at 16% (sixteen percent) per annum starting from 1 September 2019, as per the repayment schedule, set out in Schedule I hereto and the same shall be first recovered from Mortgaged Property / the cash flows generated from the Mortgaged Property.

2.3 As on 31 August 2019, the Company has an outstanding financial debt due to IIFL amounting to Rs 22,80,76,772 (Rupees Twenty two crores eighty lakhs seventy six thousand seven hundred and seventy two). Each Party admits, accepts and confirms that this amount is due and payable by the Company to IIFL.

2.4 The Company shall pay the aforesaid sum of Rs 22,80,76,772 (Rupees Twenty two crores eighty lakhs seventy six thousand seven hundred and seventy two) to IIFL along with interest thereon compounded quarterly at 16% (sixteen percent) per annum starting from 1 September 2019, as per the repayment schedule, set out in Schedule II hereof, and the same shall be first recovered from Mortgaged Property / the cash flows generated from the Mortgaged Property.

2.5 the cash flow/ proceeds generated from the Mortgaged Property/recovered from the Mortgaged Property shall be first utilised for repayment of the outstanding financial debts due to the Lenders.”

25. Clause 2.9 contained an Agreement that in event Consent Terms, financing documents or Amendment Agreement is not complied with other party shall be at liberty to pursue all recourses and actions available.

26. Clause 2.10 further noticed that financing documents stand amended to the extent provided in the Amendment Agreement all other terms and Facility Agreement shall continue to remain valid and subsisting. Clause 2.10 is as follows:

“2.10 Each of the Parties jointly and severally agree and confirm that the Facility Agreements and all other financing and security documents (collectively “Financing Documents”) in relation thereto shall stand amended to the extent provided herein. All other terms of the Facility Agreements and the Financing Documents shall continue to remain valid and subsisting.”

27. Now we come to the Security Agreement dated 20.03.2020 which is basis of submission of the Appellant. The Security Agreement was entered between SIPL, SPIL, IIFL and IIFL Home Finance Ltd.

28. Clauses A to J of the Security Agreement on which reliance has been placed which have been referred by both the parties are as follows:

“A. The Mortgagor is engaged in the business of, inter alia, construction and development of real estate projects.

B. Pursuant to the (i) rupee loan agreement dated 17 November 2015 for a financial assistance of INR 60,00,00,000 (Indian Rupees Sixty Crores only); (ii) rupee loan agreement dated 29 September 2016 for a financial assistance of INR 40,00,00,000 (Indian Rupees Forty Crores only) ("IIFL Loan 1") executed, inter alia, between the Obligor and India Infoline Finance Limited (hereinafter collectively referred to as the "IIFL Loan Agreements 1"); and (iii) loan agreement dated 28 March 2015 for a financial assistance of INR 20,00,00,000 (Indian Rupees Twenty Crores only) ("IIFHL Loan") executed, inter alia, between the Obligor and IIFL Home Finance Limited (hereinafter referred to as the ("IIFHL loan Agreement") which shall include all accession, amendments, modifications and supplements thereto, including the amendment agreement dated 9 September 2019, executed amongst Obligor, India Infoline Finance Limited and IIFL Home Finance Limited ("Amendment Agreement 1") and amendment agreement dated (9th September, 2019), executed between SPDPL and India Infoline Finance Limited ("Amendment Agreement 2").

C. The Obligor in terms of their respective Loan Agreements had defaulted in making the payments/ repayments in respect of the loans pursuant to which the Lenders declared the default under their respective Loan Agreements.

D. However, based on the mutual discussions, the Obligor and the Lenders entered into the consent terms dated 9 September 2019 filed in the National Company Law Tribunal, Mumbai Branch ("Consent Terms"), which, inter alia, states that the Obligor shall repay (i) a principal amount of INR 227,84,90,568/- (Indian Rupees [Two Hundred and Twenty Seven Crore Eighty Four Lakhs Ninety Thousand Five Hundred and Sixty Eight]) and an interest amount of INR 43,48,68,807/- (Indian Rupees Forty Three Crores Forty Eight Lakhs Sixty Eight Thousand Eight Hundred and Seven) to India Infoline Finance Limited; and (ii) a principal amount of INR 37,02,76,224 (Indian Rupees Thirty

Seven Crores Two Lakhs Seventy Six Thousand Two Hundred and Twenty Four) and an interest amount of INR 6,60,81,627/- (Indian Rupees [Six Crores Sixty Lakhs Eighty one Thousand Six Hundred and Twenty Seven]) to IIFL Home Finance Limited (hereinafter referred to as the “Revised Loans”).

E. Pursuant to the consent terms the Obligor and the Lenders entered into (i) the amendment agreements dated 09 September 2019, with the lenders (“Amendment Agreements”) and one of the condition of the Amendment Agreements and Consent Terms is that the Secured Obligations shall be secured, inter alia, by a first ranking mortgage and charge over the properties, more particularly described in Clause 4.1 and Schedule III hereunder (“Security”).

F. In consideration of the Lenders having agreed to the terms of the Amendment Agreement and the Consent Terms further extended vide Extension letter dated 17 January 2020, the Mortgagor has agreed to execute this Indenture/deed in favour of the Lenders for and on behalf of the Obligor/SPIL as security for the payment of the Secured Obligations payable to the Lenders in accordance with the Consent Terms read with Amendment Agreements and Extension Letter and other Financing Documents, on the terms and conditions in the manner hereinafter appearing.

G. The Mortgagor agreed that the Security will be created for the benefit and in favour of the Lenders or an on behalf of the Obligor. The Mortgagor hereby represents, declares and confirms to the Lenders that Mortgaged Properties including the units/premises to be constructed by utilizing the 2,00,000 lakh sq. ft FSI is sufficient to discharge the total debt of SPIL/Obligor as and when it becomes due and accordingly on execution of this deed/agreement i.e. in compliance of the consent terms (read with the extension letter dated 17.01.2020) as well as the Amendment Agreement, and as such SPIL/Obligor henceforth shall not be liable for the said dues (as specified in the consent terms) and shall stand discharges from its obligations to make the repayment under the Loan Agreement read with Amendment Agreement as well as Consent Terms.

H. The Mortgagor through its authorised signatory Mr. Nagendra Angihotri pursuant to the board resolution passed by a majority of its directors dated 28th

February 2020, has been authorized to create the Security and represents that the Mortgagor has the full authority and the title to execute this deed in favour of the Lenders to offer the Mortgaged Properties in terms of this deed.

I. Accordingly, the Mortgagor has agreed that the Security to be created on the properties of the Mortgagor, as set out in Recital (E) above shall be by way of a mortgage without possession form being these presents.

J. Believing upon the aforesaid representations, confirmation, declarations and covenants as true and correct and the same have been duly accepted by the Lenders and accordingly, in furtherance of the Consent Terms and amendment Agreement to the Loan Agreement, the Lenders have agreed to receive the security of the Mortgaged Properties from the Mortgagor, at the behest of SPIL/Obligor against the debt of SPIL/Obligor to enable the Lenders to satisfy its dues (SPIL's dues) as specified in the consent terms.”

29. Clause 5.2 records that the security is a continuing security and is additional security which is clear from Clause 5.2 and 5.3 which are as follows:

“5.2 Continuing Security

The Security created by or pursuant to these presents is a continuing security and shall remain in full force and effect, notwithstanding any intermediate payment or thing whatsoever and in particular the intermediate satisfaction of the whole or any part of the Secured Obligations in accordance with the Financing Documents and is in addition and without prejudice, to any other surety, guarantee, lien, indemnity or other right or remedy which the Lenders may now or hereafter hold for the Secured Obligations or any part thereof.

5.3 Other Security

This Security Interests in addition to, and shall neither be merged in, nor in any way exclude or prejudice or be affected by any other Security Interest, right of recourse or other right whatsoever (or the invalidity thereof) which the Lenders may now or at any time

hereafter hold to have (or would apart from this Security Interest hold or have) as regards the Mortgagor or any other person in respect of the Secured Obligations.”

30. Clause 11.1 provided that security interest in favour of the lender shall become enforceable by lenders upon the occurrence of the event of default in accordance with the provisions of the Loan Agreement. Clause 11.1 is as follows:

“11.1 The Security Interest created hereunder in favour of the Lenders shall become enforceable by the Lenders upon the occurrence of an Event of Default (in accordance with the provisions of the Loan Agreements).”

31. We have noticed that relevant Clauses of Consent Terms, Amendment Agreement and Deed of Security dated 20.03.2020. The main question to be answered in this Appeal is as to whether by virtue of Deed of Security dated 20.03.2020 SPIL was discharged from its obligation of the financing document, Consent Term, and Amendment Agreement and no claim of Financial Debt of the Financial Creditor survived after Deed of Security dated 20.03.2020.

32. We have noticed that relevant Clauses of the Consent Term which clearly acknowledged the outstanding dues payable to IIFL and IIFL Home Finance Ltd. and the payment schedule was also provided therein which repayment schedule was provided for.

33. The basis of submission of the Appellant that debt of SIPL was stand discharged by virtue of Deed of Security is based primarily on Clause G of the Deed of Security. For ready reference, Clause G of the Deed of Security is reproduced herein:

“G. The Mortgagor agreed that the Security will be created for the benefit and in favour of the Lenders or an on behalf of the Obligor. The Mortgagor hereby represents, declares and confirms to the Lenders that Mortgaged Properties including the units/premises to be constructed by utilizing the 2,00,000 lakh sq. ft FSI is sufficient to discharge the total debt of SPIL/Obligor as and when it becomes due and accordingly on execution of this deed/agreement i.e. in compliance of the consent terms (read with the extension letter dated 17.01.2020) as well as the Amendment Agreement, and as such SPIL/Obligor henceforth shall not be liable for the said dues (as specified in the consent terms) and shall stand discharges from its obligations to make the repayment under the Loan Agreement read with Amendment Agreement as well as Consent Terms.”

34. The Consent Term between the parties dated 09.09.2019, in para 2(a) clearly contemplated creation for first and exclusive charge by way of registered mortgage in respect of 2,00,000 sq. ft. carpet area in favour of IIFL and IIFL Home Finance Ltd. as additional security in respect of the loan extended by the Financial Creditor. The Deed of Security dated 20.03.2020 is clearly in reference to Consent Term paragraph 2(a) and i.e., a Deed of Additional Security.

35. Clause E of the Deed of Security clearly referred to creation of first ranking mortgage and charge over the property described in Clause 4.1 and Schedule 3. Clause F also referred to same obligation by mortgagor to execute this indenture/deed in favour of the lender on behalf of the obligor/SPIL as security for the payment of the secured obligation payable to the lenders in accordance with the Consent Terms and this Amendment Agreement. Clauses E and F are again reproduced which are as follows:

“E. Pursuant to the consent terms the Obligor and the Lenders entered into (i) the amendment agreements dated 09 September 2019, with the lenders

*(“Amendment Agreements”) and one of the condition of the Amendment Agreements and Consent Terms is that the Secured Obligations shall be secured, inter alia, by a first ranking mortgage and charge over the properties, more particularly described in **Clause 4.1** and Schedule III hereunder (“**Security**”).*

F. In consideration of the Lenders having agreed to the terms of the Amendment Agreement and the Consent Terms further extended vide Extension letter dated 17 January 2020, the Mortgagor has agreed to execute this Indenture/deed in favour of the Lenders for and on behalf of the Obligor/SPIL as security for the payment of the Secured Obligations payable to the Lenders in accordance with the Consent Terms read with Amendment Agreements and Extension Letter and other Financing Documents, on the terms and conditions in the manner hereinafter appearing.

36. In Clause 4.1 it is clearly mentioned that for discharge of secured obligation, additional continuing security is executed. Clause 4.1.1 is as follows:

*“4.1.1 All the rights, title and interest over the floor space index admeasuring 2,00,000 (two lakh) square feet on the land situated at Amrut Nager, Ghatkopar (West), Mumbai along with pro-rata car parking space more particularly described in Schedule III (the **“Mortgaged Properties) TO HAVE AND TO HOLD** all and singular the First Mortgaged Properties unto and to use and benefit of the Lenders absolutely **UPON TRUST and** subject to the powers and provisions herein declared and contained herein and in the Financing Documents.”*

37. We now come to Clause G which is sheet anchor of the submission of the Appellant. Appellant relies on following words in the latter part of Clause G i.e., *“on execution of its Deed/Agreement i.e., in compliance of the Consent Terms (read with extension letter 17.01.2021) as well as the Amendment Agreement, and as such SPIL/obligor henceforth shall not be liable for the said dues under the Consent Terms and shall stand discharge from its obligation to*

make the repayment under the Loan Agreement read with Amendment Agreement as well as Consent Term”.

38. It is relevant to notice that above stipulation in Clause G has been made in wake of earlier statement, which is contained in the earlier part of Clause G i.e., *“the mortgager hereby represent declares and confirms to the lenders that Mortgaged Properties including the units/premises to be constructed by utilising the 2,00,000 sq. ft. FSI is sufficient to discharge the total debt of SPIL/obligor as and when becomes due”.* The second part of Clause G which mentioned that on execution of this Deed Agreement, the SPIL/obligor henceforth shall not be liable for the said dues and shall stand discharge, is premised on first part where it was represented that Mortgaged Property was sufficient to discharge the total debt of SPIL/obligor.

39. The present is case where from the Mortgaged Properties debt and dues of SPIL has not been discharged and SPIL is claiming discharge only on basis of execution of Security Agreement dated 20.03.2020, which is unacceptable. When all the Clauses E, F, G, I and J are read, it is clear that the Deed of Security was nothing but additional security by creating a mortgage of the assets i.e., 2,00,000 sq. ft. carpet area in the Project.

40. The submission of the Appellant that Deed of Security discharged its obligation under the financial documents cannot be accepted. The deed of security was not an Amendment Agreement to the financial documents, Consent Terms or Amendment Agreement already executed.

41. The Deed of Security was only a Deed for Additional Security as was contemplated in Consent Terms paragraph 2(a) as noted above. The

submission of the Appellant that the execution of Deed of Security, SPIL was discharged from its all obligations is wholly incorrect and cannot be accepted.

42. Now we may notice two more submissions advanced by Learned Counsel for the Appellant on basis of Section 41 and Section 62 of the Indian Contract Act, 1872. Section 41 of the Indian contract act provides as follows:

“41. Effect of accepting performance from third person. — *When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.*”

43. There is no applicability of Section 41 in the present case, since the Deed of Security dated 20.03.2020, cannot be read as discharge by the lenders to the obligations of SIPL. SIPL, who continued to be responsible for repayment which were never discharged from its obligation.

44. We have already noticed the relevant Clauses of Consent Terms and Amendment Agreement. Amendment Agreement clearly recorded that parties are at liberty to pursue all recourses and actions in event of non-compliance of the Consent Terms and the Amendment Agreement.

45. We, thus are of the view that no benefit can be taken by the Appellant on the basis of the Section 41 of the Indian Contract Act, 1872. Learned Counsel for the Appellant has further relied on Section 62 of the Indian Contract Act, 1872, which is as follows:

“62. Effect of novation, rescission, and alteration of contract. — *If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed.*

Illustrations

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at

an end, and a new debt from C to B has been contracted.

(b) A owes B 10,000 rupees. A enters into an arrangement with B and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into.”

46. We have already noted the relevant Clauses of Consent Terms and Amendment Agreement and Deed of Security. We have already held that Deed of Security does not novate the terms of the facility document. Facility document were amended by the Amendment Agreement which recorded that terms of the Loan Agreement and Additional Loan Agreement shall be amended only to the extent provided therein. Deed of Security was executed as the additional security document and is not novation of financial documents or Consent Term.

47. Learned Counsel for the Appellant has also placed reliance on the Judgment of the Hon'ble Supreme Court in '**Shree Ambika Medical Stores & Ors.**' (*Supra*), **Civil Appeal No. 562 of 2020** decided on 28.01.2020.

Reliance has been placed on paragraph 20 which is as follows:

“20. This Court, while interpreting the contract of insurance must interpret the words of the contract by giving effect to the meaning and intent which emerges from the terms of the agreement. In a Constitution Bench decision of this Court in General Assurance Society Ltd v Chandumull Jain, AIR 1966 SC 1644, it was observed thus:

“11. ...In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is

expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves...”

The court through its interpretative process cannot rewrite or create a new contract between the parties. The court has to simply apply the terms and conditions of the agreement as agreed between the parties.”

There can be no dispute to the proposition laid down by the Hon’ble Supreme Court in the above case. Present is not a case where Court is rewriting or creating a new contract between the parties. The contract between the parties has reflected by the various documents which have been read and correctly interpreted by the Adjudicating Authority. The ratio laid down by the Hon’ble Supreme Court in the above Judgment is clearly not applicable in the facts of the present case.

48. The next Judgment relied by the Counsel for the Appellant is **‘Venkatraman Krishnamurthy & Anr.’ (Supra), Civil Appeal No. 971 of 2023** decided on 22.02.2024, where relying of the Judgment of the Hon’ble Supreme Court, **‘Shree Ambika Medical Stores’ (Supra)** following was laid down in paragraph 17:

“17. More recently, in Shree Ambika Medical Stores vs. Surat People's Coop. Bank Ltd., (2020) 13 SCC 564, it was observed that, through its interpretative process, the Court cannot rewrite or create a new contract between the parties and has to simply apply the terms and conditions of the agreement as agreed between the parties. Again, in GMR Warora Energy Ltd. vs. Central Electricity Regulatory Commission, (2023) 10 SCC 401, it was observed that Courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. It was held that the explicit terms of a contract are always the final word with regard to the intention of the parties.”

The Hon'ble Supreme Court in the above case held that NCDRC could not have ignored the binding covenants in the Agreement and ought not to have given its own logic and rationale to decide as to whether future course of action of the parties should be. In paragraph 22 of the Judgment following has been held:

“22. On the above analysis, we have no hesitation in holding that the NCDRC overstepped its power and jurisdiction in ignoring the binding covenants in the Agreement and in introducing its own logic and rationale to decide as to what the future course of action of the parties and more particularly, the appellants, should be. As we are informed that the appellants did not choose to act upon the belated offer of the respondent-company, in its letter dated 29.11.2017, and are still intent on terminating the Agreement as per Clause 11.3 of the Agreement, we set aside the order dated 09.11.2022 passed by the NCDRC and allow Consumer Complaint No. 35 of 2018, directing the respondent-company to refund the deposited amount of 2,25,31,148 ₹ /- in twelve equal monthly installments, through post-dated cheques, with simple interest thereon @ 12% p.a., from the date of receipt of the said amount or parts thereof till actual repayment. The first such installment shall be payable on the 5th of April, 2024, and the succeeding installments shall be payable on the fifth of each calendar month thereafter, till fully paid.”

The above Judgment of the Hon'ble Supreme Court was on its own facts and present is not a case where Adjudicating Authority has created any terms of Agreement for the parties. The Adjudicating Authority has after noticing the relevant Agreement between the parties have only interpreted them in the facts and backgrounds of the case. The Judgment of the Hon'ble Supreme Court in '**Venkatraman Krsihnamurthy & Anr.**' (Supra) thus is clearly distinguishable and has no application in the present case.

49. In view of the foregoing discussions and our conclusion, we are of the view that the Adjudicating Authority did not commit any error in allowing the I.A. No. 1686/2020 and I.A. No. 1687/2020. The Adjudicating Authority has rightly held that the Security Agreement was to provide for Additional Security only.

50. We are of the view that no error has been committed by the Adjudicating Authority, in directing for admission of the claim of the Financial Creditors. In result, order passed by Adjudicating Authority in I.A. No. 1686/2020 dated 22.11.2023 and as well as order dated 05.12.2023, allowing the I.A. No. 1687/2020 are affirmed.

In result, both the Appeals are dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

NEW DELHI

15th April, 2024

himanshu