



**THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-I**

**IA 1864 of 2025**

Under Section 60(5) of Insolvency & Bankruptcy Code,  
2016 r/w Rule 11 of NCLT Rules, 2016

**Asset Reconstruction Company (India) Limited**

**...Applicant**

V/s

**Mr. Sanjay Vijay Jeswani,**

**Interim Resolution Professional**

**...Respondents**

In the matter of

C.P.(IB) No. 762 OF 2024

Tricon Infra Buildtech Private Limited

**...Petitioner**

Vs.

XRBIA North Hinjewadi Developers Private Limited

**...Respondent**

***Order delivered on: 09.09.2025***

***Coram:***

Shri. Prabhat Kumar  
Hon'ble Member (Technical)

Shri. Sushil Mahadeorao Kochey  
Hon'ble Member (Judicial)

***Appearances:***

For the Applicant

:

Mr. Navroz Seervai

For Respondent

:

Mr. Amir Arsiwala



**ORDER**

1. This Application IA 1864 of 2025 is filed in C.P. (IB) 762 (MB) 2024 by Asset Reconstruction Company (India) Limited, a Creditor, (“Applicant”) in the Corporate Insolvency Resolution Process (“CIRP”) of Xrbia North Hinjewadi Developers Private Limited (“Corporate Debtor”) under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (“Code”) read with Rule 11 of National Company Law Tribunal Rules, 2016 seeking following reliefs
  - a. *That this Hon’ble Tribunal be pleased to allow the present application;*
  - b. *That this Hon’ble Tribunal be pleased to direct the Respondent to verify and admit the claim of the Applicant to the INR 1279,92,52,271/- (Indian Rupees Twelve Hundred Seventy-Nine Crores Ninety-Two Lakhs Fifty-Two Thousand Two Hundred and Seventy One Only), which was rejected vide email dated 30' January 2025 by the Respondent, as a financial debt;*
  - c. *That in light of the conduct of the Respondent herein, this Hon’ble Tribunal be pleased to remove and replace the Respondent in light of the manner in which he has conducted the present corporate insolvency resolution process and appoint Mr. Birendra Kumar Agarwal as the Resolution Professional in the present matter or any other competent Resolution Professional this Hon’ble Tribunal may deem fit;*
  - d. *In the event that prayer(c) is not granted, this Hon’ble Tribunal be pleased to appoint an external auditor to assist the Resolution Professional for verifying claims of Creditors who shall verify the claims of each creditor who has filed their claims in the present Corporate Insolvency Resolution Process;*
  - e. *That pending the hearing and final disposal of the present Application, this Hon’ble Tribunal be pleased to stay the Corporate Insolvency Resolution Process in respect of the Corporate Debtor;*



- f. That pending the hearing and final disposal of this Application, this Hon'ble Tribunal be pleased to restrain the Respondent from implementing any decision taken by the present CoC;*
- g. That pending the hearing and final disposal of the present Application, this Hon'ble Tribunal be pleased to direct that no further CoC meetings be held in the present Corporate Insolvency Resolution Process and the voting share of the Applicant is revised accordingly;*
- h. Alternatively, pending the hearing and final disposal of the present Application, this Hon'ble Tribunal be pleased to direct the Respondent to give appropriate notice of the meetings of Committee of Creditors of the Corporate Debtor to the Applicant;*
- i. Alternatively, pending the hearing and final disposal of the present Application, this Hon'ble Tribunal be pleased to allow the Applicant to attend the meetings of Committee of Creditors of the Corporate Debtor:*
- j. Ad interim reliefs in terms of clause (e) to (i) above.*
- k. Any such further Order (s) as this Hon'ble Tribunal may deem fit in the facts and circumstances of the present case.*
2. The CIRP process commenced on 2<sup>nd</sup> January, 2025 in the case of Corporate Debtor and the Respondent, Mr. Sanjay Vijay Jeswani was appointed as the Interim Resolution Professional to carry on the CIRP process, and continuing as Interim Resolution Professional (“IRP/Respondent”).
3. The Applicant is an Asset Reconstruction Company (India) Ltd. incorporated under the Companies Act, 1956 and is registered as an Asset Reconstruction Company which carries on the business of asset reconstruction under Section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

#### **Applicant's Submissions**

4. L&T Finance Limited, L&T Housing Finance Limited and L&T Infrastructure Finance Company Limited- all since merged with L&T Finance Limited, (“



Original Lenders") had under various financing documents granted financial credit facilities ("Loan"/ "Financial Facilities") to the Xrbia Group to develop /housing in the form of residential townships backed by the securities detailed in the respective financing documents including mortgage of immovable properties, hypothecation of assets, pledge of shares, irrevocable guarantees furnished by the Mortgagors, Pledgors and Guarantors. On 29th March 2023, an Assignment Agreement was entered into between L&T Finance Limited and Asset Reconstruction Company (India) Limited (in its capacity as trustee of ARCIL-CPS-III-Trust) (" Arcil"), the Applicant herein. The entirety of Original Lender's rights, titles, and interests, inclusive of all associated benefits, pertaining to the extant financial facilities bestowed upon Xrbia Developers Limited and its group companies consisting of Xrbia Ambience Realty LLP, Xrbia Warai Developers Pvt. Ltd., Eiffel Lifespaces Pvt. Ltd., Xrbia Chakan Developers Pvt. Ltd. ("the Xrbia Group"), are stated to be irrevocably transferred to the Applicant.

5. On 17<sup>th</sup> January, 2025, the Applicant submitted its claim under Form C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 to the tune of INR 1279,92,52,271/- (Indian Rupees Twelve Hundred Seventy-Nine Crores Ninety-Two Lakhs Fifty-Two Thousand Two Hundred and Seventy-One Only) along with interest covered by security interest created by the Corporate Debtor by way of mortgage, personal guarantees, share pledge agreements furnished against the various term loan facilities (1 to 10 Loan Agreements) availed by the Xrbia Developers Limited and its group companies from 2016 to 2021
6. It is further stated that, on 30<sup>th</sup> January, 2025, the Respondent rejected Applicant's claim as a financial creditor and instead admitted the same as Other Secured Creditor of the Corporate Debtor by placing reliance upon an undated legal opinion.



7. It is further stated that, the Applicant through its legal counsel, on 12th February 2025 wrote to the Respondent seeking detailed reasons on the rejection of the claim filed by the Applicant, however, it remained unanswered as stated in the application.

### **Respondent's Reply**

8. The Respondent RP filed the Reply stating that –
  - a. All disbursements were made exclusively to entities under the Xrbia Group- not to the Corporate Debtor in question.
  - b. The role of the Corporate Debtor was limited solely to providing mortgage security; it was neither a direct borrower nor a guarantor under any of the loan agreements or sanction letters forming the basis of the claim. The Corporate Debtor merely created a security interest over its assets in favor of the lenders.
  - c. Since there was no direct disbursal of funds to the Corporate Debtor, the essential element of 'time value of money' is absent, and the claim fails to meet the statutory definition of financial debt under Section 5(8) of the IBC.
  - d. While the Supreme Court in China Development Bank v. Doha Bank QPSC recognized that a deed of hypothecation may, in certain circumstances, amount to a guarantee, it emphasized that such classification depends on the specific terms of the document and the intention to assume liability. In the present case, no such intention or obligation is evident in the mortgage deed.

### **Discussion and Decision**

9. Heard the Learned Counsel and perused the material on record.
10. In the present case, the Respondent RP has rejected the claims of the Applicant as Financial Debt on the ground that the Loan Agreements read with Mortgage Documents only contemplate creation of mortgage over its assets in favor of the Lender to secure the debt availed and disbursed to the other Xrbia Group companies and no contract of guarantee can be read in those documents. The



Applicant has contended that all such loan agreement read with security trustee agreement contains a covenant obligating the Corporate Debtor also to pay the outstanding amounts due from the borrowing companies over and above the mortgage over assets of Corporate Debtor created in Applicant's favor to secure such debts. The Applicant has heavily relied upon the decision of Hon'ble Supreme Court in case of *China Development Bank vs. Doha Bank (2024) ibclaw.in 340 SC*.

11. Per contra, the Respondent RP has relied on the covenants contained in such agreements to contend that such loan agreements do not constitute a guarantee in favor of the lenders, and hence, the decision as laid down in the case of *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited vs Axis bank Limited and Others SCC (2020) 8 SC Cases 401* to contend that, in the absence of any guarantee, the disbursement of debt to the Corporate Debtor is sine qua non for constituting such debt as Financial Debt qua Corporate Debtor. The Respondent RP has also relied upon the decision of Hon'ble Constitution Bench in *National Insurance Company Limited v. Pranay Sethi (2018) 16 SCC 680*, wherein the Hon'ble Supreme Court noted its another decision (Constitution Bench) in case of *Pradip Chandra Parija v. Pramod Chandra Patnaik* wherein it was held that "In our view, judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances, can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. ..." to contend that the earlier co-ordinate bench's decision in case of Anuj Jain (Supra) can not said to have been overruled by the later decision of co-ordinate bench in case of China Development Bank (Supra).

12. The following issues emerges in the present case for our consideration :



- (a) Whether the decision in case of China Development Bank (Supra) does away with the requirement of disbursement of debt in case of simpliciter mortgage agreements so as to constitute such debts as Financial Debt;
- (b) Whether the terms of Loan Agreements read with Mortgage Agreement and Security trustee agreement, in case where the Corporate Debtor has only mortgaged its assets to secure the debt disbursed to its group companies, constitute a guarantee extended by the Corporate Debtor;

### **Definition of Financial Debt and Judicial Precedents**

13. Before we proceed to examine the covenants contained in each of Loan Agreements, Mortgage Agreement and Security Trustee Agreements, it is pertinent to examine what constitutes a Financial Debt?

14. Section 5(8) of the Code defines a Financial Debt to mean “*a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*”

(a) *money borrowed against the payment of interest;*

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

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

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

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

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

*Explanation : .....*

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



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

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

15. In case of *Phoenix ARC Pvt. Ltd. v. Spade Financial Services Ltd., (2021) 3 SCC 475*, the Hon'ble Division Bench held as under :

44. In this context, it would be relevant to discuss the meaning of the terms "disburse" and "time value of money" used in the principal clause of Section 5(8) of the IBC. This Court has interpreted the term "disbursal" in *Pioneer Urban Land and Infrastructure Ltd vs. Union of India (2019) 8 SCC 416* in the following terms:

"70. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in *Black's Law Dictionary (10th Edn.)* to mean:

"1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose."

71. In the present context, it is clear that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money...." (emphasis supplied)



45. *The report of the Insolvency Law Committee dated 26 March 2018 has discussed the interpretation of the term “time value of money” and stated:*

*“The current definition of ‘financial debt’ Under Section 5(8) of the Code uses the words “includes”, thus the kinds of financial debts illustrated are not exhaustive. The phrase “disbursed against the consideration for the time value of money” has been the subject of interpretation only in a handful of cases under the Code. The words “time value” have been interpreted to mean compensation or the price paid for the length of time for which the money has been disbursed. This may be in the form of interest paid on the money, or factoring of a discount in the payment.” (emphasis supplied)*

46. *The above discussion shows that money advanced as debt should be in the receipt of the borrower. The borrower is obligated to return the money or its equivalent along with the consideration for a time value of money, which is the compensation or price payable for the period of time for which the money is lent.....*

16. In case of **Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. v. Axis Bank Ltd. & Ors., (2020) 8 SCC 401**, the Hon’ble Division Bench was held that –

*“46. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become ‘financial debt’ for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursement against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and*



*(h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of ‘disbursement’ against ‘the consideration for the time value of money’ could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said sub-clauses (a) to (i) of Section 5(8) would be falling within the ambit of ‘financial debt’ only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursement, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as ‘financial debt’ within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursement against consideration for the time value of money. (emphasis supplied)*


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



\* \* \*

*49.1 The use of the expression “means and includes” in these clauses, on the very same principles of interpretation as indicated above, makes it clear that for a person to become a creditor, there has to be a debt i.e., a liability or obligation in respect of a claim which may be due from any person. A “secured creditor” in terms of Section 3(30) means a creditor in whose favour a security interest is created; and “security interest”, in terms of Section 3(31), means a right, title or interest or claim of property created in favour of or provided for a secured creditor by a transaction which secures payment for the purpose of an obligation and it includes, amongst others, a mortgage. Thus, any mortgage created in favour of a creditor leads to a security interest being created and thereby, the creditor becomes a secured creditor. However, when all the defining clauses are read together and harmoniously, it is clear that the legislature has maintained a distinction amongst the expressions ‘financial creditor’, ‘operational creditor’, ‘secured creditor’ and ‘unsecured creditor’. Every secured creditor would be a creditor; and every financial creditor would also be a creditor but every secured creditor may not be a financial creditor. As noticed, the expressions “financial debt” and “financial creditor”, having their specific and distinct connotations and roles in insolvency and liquidation process of corporate persons, have only been defined in Part II whereas the expressions “secured creditor” and “security interest” are defined in Part I.*

*50. A conjoint reading of the statutory provisions with the enunciation of this Court in Swiss Ribbons (supra), leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression ‘financial creditor’ is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in*



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*restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor. (emphasis supplied)*

**50.1.** *Keeping the objectives of the Code in view, the position and role of a person having only security interest over the assets of the corporate debtor could easily be contrasted with the role of a financial creditor because the former shall have only the interest of realising the value of its security (there being no other stakes involved and least any stake in the corporate debtor's growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in rejuvenation, revival and growth of the corporate debtor. Thus understood, it is clear that if the former i.e., a person having only security interest over the assets of the corporate debtor is also included as a financial creditor and thereby allowed to have its say in the processes contemplated by Part II of the Code, the growth and revival of the corporate debtor may be the casualty. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution. (emphasis supplied)*



*50.2. Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third party securities), even if falling within the description of ‘secured creditor’ by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of ‘financial creditors’ as per the definitions contained in sub-sections (7) and (8) of Section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of ‘debt’ under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a ‘financial debt’ within the meaning of Section 5(8) of the Code. (emphasis supplied)*

*51. Indisputably, the debts in question are in the form of third party security; said to have been given by the corporate debtor JIL so as to secure the loans/advances/facilities obtained by JAL from the respondent-lenders. Such a ‘debt’ is not and cannot be a ‘financial debt’ within the meaning of Section 5(8) of the Code; and hence, the respondent-lenders, the mortgagees, are not the ‘financial creditors’ of the corporate debtor JIL. (emphasis supplied)”*

17. In case of **Phoenix Arc Private Limited Vs Ketulbhai Patel (2021) ibclaw.in 04 SC**, the Hon’ble Three Judge Bench took note of the Division Bench decision in case of Anuj Jain (Supra) and noted that the decisions in case of Swiss Ribbons (P) v. Union of India, (2019) 4 SCC 17 and Pioneer Urban Land & Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416 were taken note of by Division Bench. It held that “30. This Court held that a person having only security interest over the assets of corporate debtor, even if falling within the description of ‘secured creditor’ by virtue of collateral security extended by the corporate debtor, would not be covered by the financial creditors as per definitions contained in sub-section (7) and (8) of Section 5. What has been held by this Court as noted above



*is fully attracted in the present case where corporate debtor has only extended a security by pledging 40,160 shares of GEL. The appellant at best will be secured debtor qua above security but shall not be a financial creditor within the meaning of Section 5 sub-sections (7) and (8).”*

18. In case of China Development Bank (Supra), the Division Bench of Hon’ble Supreme Court considered whether the Deed of Hypothecation executed by four Reliance Group Companies i.e. Reliance Communication Infrastructure Limited, Reliance Communications Limited, Reliance Telecom Ltd. and Reliance Infratel Limited can be read to constitute a guarantee obligation in terms of clause 5(iii) thereof to secure debt owed by Reliance Telecom Limited and Reliance Communication Limited, and thus the beneficiary of such guarantee obligations can be held to be financial creditor in CIRP of Reliance Infratel Limited in terms of such deed of hypothecation. The Hon’ble Supreme Court, after analysing the clauses of Deed of Hypothecation, held that –

*“58. Sub-clause (iii) of clause 5 of the DoH further provides that each of the Chargors agree to accept the Security Trustee’s account of sales and realisation as sufficient proof of the amount realised and relative expenses and to pay on demand by the Security Trustee and/or receiver any shortfall or deficiency thereby shown. Under the DoH, even the Corporate Debtor hypothecated its goods. The last part of sub-clause (iii) of clause 5 means that if after the sale of hypothecated assets, there is any shortfall in the discharge of the liabilities of RCom or RTL, the Corporate Debtor is under an obligation to pay the shortfall or deficiency. Therefore, the latter part of clause 5(iii) of the DoH indicates that RITL-Corporate Debtor, who is not the borrower of the appellants, agreed to discharge the liability of the third parties (RCom and RTL) to the appellants in the case of default of RCom or RTL. Therefore, the second part of clause 5(iii) of the DoH amounts to a guarantee provided by the Corporate Debtor to the appellants in terms of Section 126 of the Contract Act.”*




19. It is pertinent to note that the Hon'ble Supreme Court held the appellant to be the financial creditor after concluding the terms of Deed of Hypothecation whereby Reliance Infratel Limited had undertaken to pay the short fall or deficiency, if any remains, after sale of the hypothecated assets to be a promise to pay whole of debt due from Rcom and RTL therein thus constituting it to be a contract of guarantee. It is noteworthy that a contract of guarantee or indemnity falls under clause (h) and the Hon'ble Supreme Court in its earlier decisions in case of Anuj Jain (Supra), Spade Financial Services Ltd. (Supra) and Ketulbhai Patel (Supra) have consistently held that the existence of disbursement for time value of money is not a requirement for a contract of guarantee and indemnity to constitute a Financial Debt. In this regard, it is pertinent to refer to Para 59 of the decision in case of China Development Bank (Supra), where the Hon'ble Supreme Court considered and distinguished the decision in case of Ketulbhai Patel (Supra) as under :

**59.** *In the case of Phoenix ARC Pvt. Ltd. (2021) 2 SCC 799, in paragraphs 24 and 25, this Court held thus:*

*"24. Chapter VIII of the Contract Act, 1872 deals with "Of Indemnity and Guarantee". Section 124 defines "Contract of indemnity" and Section 126 defines "Contract of guarantee". Section 126 which is relevant for the present case is as follows:*

*"126. "Contract of guarantee", "surety", "principal debtor" and "creditor".—A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written."*

*25. As is clear from the definition a "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The present is not a case where the corporate debtor has entered into a contract to perform the promise, or discharge the liability of borrower in case of his default. The pledge agreement is limited to pledge 40,160 shares as security. The corporate debtor has never promised to discharge the liability of the borrower. The facility agreement*



*under which the borrower was bound by the terms and conditions and containing his obligation to repay the loan security for performance are all contained in the facility agreement. A contract of guarantee contains a guarantee “to perform the promise or discharge the liability of third person in case of his default”. Thus, key words in Section 126 are contract “to perform the promise”, or “discharge the liability”, of a third person. Both the expressions “perform the promise” or “discharge the liability” relate to “a third person”.*

*In this case, from the last part of clause 5(iii) of the DoH, it is very clear that the Corporate Debtor has undertaken to discharge the liability of the RCom and RTL, the borrowers of the appellants. RCom and RTL are third parties as far as Corporate Debtor is concerned.*

20. In case of Spade Financial Services Limited (Supra), the issue whether the mortgagor is a financial debtor of the beneficiary creditor or nor was not before the Hon’ble Supreme Court. In case of Anuj Jain (Supra), the Hon’ble Supreme Court discussed at length whether the mortgage simpliciter creates any promise to pay the debt on the part of the mortgagor. However, there was no promise to pay the remainder amount of debt after appropriation of proceeds of mortgaged property by the mortgagor in that case. The Hon’ble Supreme Court in that case observed that *“With reference to Section 128 of the Contract Act, the Court pointed out that the liability of a surety is ordinarily coextensive with that of the debtor but in the case at hand, such liability of the surety was as otherwise provided by the contract; and such liability of the respondent was to the extent of securing the dues by creation of mortgage.”* There was no argument in that case that there existed any covenant to pay the remainder amount of debt after appropriation of proceeds of mortgaged property by the mortgagor thereby distinguishing it from simpliciter contract for mortgage.

21. Upon careful reading of these decisions, we are of considered view that the decision in case of China Development Bank does not lay down any new proposition as can be said to be in divergence with the earlier decisions on the issue. It is for the reason that the Deed of Hypothecation in that case was held to be contract of guarantee, the Hon’ble Supreme Court held that the obligations upon chargors arising under the Deed of Hypothecation constitute financial debt.



22. From the above judicial precedents and analysis, the following propositions emerge :

- a. The disbursal of a debt for time value of money is sine qua non for constituting such debt as financial debt for debts falling under clause (a) to (i);
- b. For debts falling under clause (h) i.e. liability in respect of any of the guarantee or indemnity for any of debts under clause (a) to (i), the existence of disbursal and time value of money is not required;
- c. What constitutes a contract of guarantee or indemnity is a question to be determined on the basis of covenant contained in the financing documents;
- d. Mortgagor, per se, is not a financial debtor of the beneficiary of a contract of Guarantee or indemnity as the liability of mortgagor in such case is to the extent of securing the dues by creation of mortgage;
- e. Whether the mortgagor can be said to be a guarantor as well depends on the language employed in the deed creating mortgage or charge.

### **Guarantee vs. Mortgage**

23. Before examining the Loan Agreements, Mortgage Agreements and Security Trustee Agreements in relation to various credit facilities forming part of claim of the Applicant herein, it is pertinent to discuss what are necessary ingredients of a contract of guarantee or indemnity.

24. Section 126 of the Indian Contract Act, 1872 defines “Contract of guarantee”, which is relevant for the present case is as follows:

*“ Section 126. “Contract of guarantee”, “surety”, “principal debtor” and “creditor”.—A “contract of guarantee” is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the “surety”; the person in respect of whose default the guarantee is given is called the “principal debtor”, and the person to whom the guarantee is given is called the “creditor”. A guarantee may be either oral or written.”*



25. As noted in China Development Bank (Supra), *“A contract becomes a guarantee when the contract is to perform the promise or discharge the liability of a third person in case of default. Thus, when a person enters into a contract to perform or discharge the liability of a third party, the contract becomes a contract of guarantee.”*

26. Section 58(a) of the Transfer of Property Act, 1882 defines “Mortgage”, “mortgagor”, “mortgagee”, “mortgage-money” and “mortgage-deed” as follows :

*“(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.*

*The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.*

27. On reading of definition of ‘Guarantee’ and ‘Mortgage’, it becomes clear that while a Guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default, a Mortgage is a contract for transfer of interest in specific immovable properties for security payment of money. Though, both creates security in favor of lender (surety/mortgagee) for a debt, but while contract of guarantee is a personal promise to pay, there is no such promise to pay under the Mortgage and it conveys the interest in the property to securitise such debt. In terms of Section 60 of the Transfer of Property Act, 1882, the Mortgagor has a right to redeem the Mortgage by paying the mortgaged debt after it becomes due subject to reasonable notice to mortgagee (lender) before payment or tender of such (mortgage) money. In other words, a Mortgage simpliciter does not create a personal obligation upon the Mortgagor to pay the



debt due under Mortgage unless the Mortgage wish to exercise its right of redemption to pay such debt and have the mortgaged property released.

### **Covenant under the Loan Agreement, Analysis thereof and Decision**

28. We shall now examine the relevant clauses of Loan Agreements/Indenture of Mortgage, to the extent placed on record, pertaining to various credit facilities, from which the amounts claimed as financial debt are arising.
29. The erstwhile lenders had extended following credit facilities to Xrbia Group of Companies, to which the Corporate Debtor had mortgaged its properties to secure the loans –

Sl. No.	Loan Disbursed to	Type and amount of facility	Relevant Indenture of Mortgage (IoM)
1.	Xrbia Developers Limited (XDL)	Loan _ Rs. 250 Crores	IoM No. 1839/2021 dt. 16.04.2021(Annexure K)
2.		ECLGS Facility 2.0 of Rs. 29	IoM No. 4341/2021 dt. 12.11.2021(Annexure Q)
3.		ECLGS Facility 2.0 of Rs. 30	IoM No. 2527/2021 dt. 24.06.2021(Annexure N)
4.	Xrbia Developers Limited (XDL), Xrbia Warai Developers Private Limited (XWL) and Xrbia Ambience Realty LLP (XAR)	Loan_370 Crores_Divided into three loans of Rs. 150 crores, 125 Crores and 95 Crores disbursed to these entities	IOM No. 3762/2018 dt. 18.09.2018 (Annexure G) and IoM No. 1030/2020 dt. 18.6.2020 (Annexure I)
5.	Xrbia Developers Limited (XDL)	Supplemental Loan for Rs. 15 Crores in addition to Principal Loan Facility dated 29.06.2018 for Rs. 370 Crores	IoM No. 5912/2022 dt. 14.12.2022 (Annexure S)
6.	Xrbia Ambience Realty LLP (XAR)	ECLGS Facility 2.0 of Rs. 6.00 Crores	IoM No. 4339/2021 dt. 12.11.2021(Annexure O)
7.		ECLGS Facility 2.0 of Rs. 10 Crores	IoM No. 2528/2021 dt. 24.06.2021(Annexure M)
8.	Eiffel Lifespaces Private Limited (ELL)	Loan Facility 2.0 of Rs. 35 Crores	IoM No. 2174/2020 dt. 6.11.2020 (Annexure J)
9.		ECLGS Facility 2.0 of Rs. 6.99 Crores	IoM No. 4340/2021 dt. 12.11.2021 (Annexure P)
10.	Xrbia Warai Developers Private Limited (XWL)	ECLGS Facility of Rs. 10 Crores	IoM No. 2526/2021 dt. 24.06.2021 (Annexure L)



11.		ECLGS Facility of Rs. 13 Crores	IoM No. 4342/2021 dt. 12.11.2021 (Annexure R)
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30. The credit facilities in relation to which the applicant has filed its claim as financial creditors was disbursed to four legal entities of Xrbia Group, namely, XDL, XAR, XWL and ELL and neither any amount out of these loans was disbursed to the Corporate Debtor nor the Corporate Debtor is co-borrower in any of these facilities. The Applicant has contended that the Indentures of Mortgage (IoMs) executed in relation to these loan agreements for creating Mortgage over properties of the Corporate Debtor constitute a contract of guarantee in favor of Applicants on part of the Corporate Debtor accordingly, the loan amounts due from these four legal entities fall in clause (h) of Section 5(8) of the Code.

31. It is noted that the Applicant has placed on record only one Loan Agreement dated 29.06.2018 (Annexure E) and Security Trustee Agreement dated 29.06.2018 (Annexure F), which pertain to Loan facility extended to XDL, XWDL and XAR, however, there are certain loan agreements placed before us in IA 1302 in C.P. (IB) 281 of 2024 which was also heard along with this application. Accordingly, we shall refer to those agreements as well in following paras.

**(I)Debt arising from Loan Agreement dated 26.10.2016 for Rs. 250 Crs disbursed to XDL. :**

32. This Agreement was entered on 26.10.2016 (Annexure E of IA 1302 of 2025) between the erstwhile Lenders (L&T) and Xrbia Developer Limited (XDL) for extending 250 Crs. Loan to XDL and Rahul R Nahar is stated to be co-borrower to the said facility. The security details stated in Annexure 1 “*Terms and Conditions of Financial Assistance*” to the Agreement does not state that any of the property of the Corporate Debtor is to be mortgaged under the said Agreement and only stipulate (i) Registered Mortgage on Project Xrbia Vangani, excluding specified units, (ii) Charge on Borrower’s moveable assets and Project




receivables, and (iii) Personal Guarantee of Rahul Nahar and Vishal Nahar. Clause 3.1.(o) of said Agreement provides that “*Appointment of Security Trustee - A security trustee may be appointed by the Lenders, at any time, in their sole discretion, for managing and monitoring the Project Receivables in respect of the Project under the Facility. All the expenses and fees in respect of such Security Trustee shall be borne by the Borrower*”.

33. However, the Corporate Debtor is a party as Mortgagor to Indenture of Mortgage entered on 16.4.2021 (Annexure K of the Application) pursuant to addendum to sanction letter vide Term Sheet(s) dated 31.1.2019 and 2.8.2019 wherein the Corporate Debtor is defined as Mortgagor 7 and owner of Mortgage Property VII creating a registered mortgage over such property to secure the debt under this agreement.

34. It is pertinent to refer recital D, E & F to the said Indenture, which reads as follows :

*D. In accordance with the terms of the Loan Documents, the said Loan has been secured by executing a duly and adequately stamped indenture of mortgage dated 26/10/2016 bearing registration no. 2551/2016 {the "Primary Indenture" } in favour of the Security Trustee acting on behalf and for the benefit of the Lender with the purpose of creating an exclusive charge upon the "Primary Mortgaged Properties" (as defined in the said Primary Indenture),*

*E. Further, one of the conditions of the Loan Documents is that on the instruction received from the Lender, the Borrower/s/Mortgagor shall secure the Loan by creating an exclusive charge over the said mortgage properties as mentioned in Schedule I (hereinafter referred to as the "Collateral Mortgaged Properties") provided as an additional security/ collateral to the above-mentioned Primary Mortgaged Properties, in order to secure the Loan together with all interest, further interest, default interest, prepayment premium, commission, costs, charges, expenses and*



*all other present or future obligations and liabilities, whatsoever stipulated in or payable by the Borrower/s under the Loan Documents, including all costs, charges and expenses including it not limited to the costs, legal expenses and costs of preserving the securities and/or enforcement thereof, incurred by Lender under the Loan Documents.*

*F. To secure the repayment of the Mortgage Debt {(as defined below), the Mortgagor has agreed to create a simple mortgage on the Collateral Mortgaged Properties in favour of the Security Trustee acting on behalf and for the benefit of the Lender in the manner hereinafter .....”*

35. The above recital clearly establishes that the Corporate Debtor had mortgaged its property to collaterally secure the existing debt owed from the XDL and it had not taken any personal liability to repay the said debt.

36. In this context, it is also pertinent to note Clause 5.1 of the Indenture of Mortgage which provides that “*On the happening of one or more of the events specified as "Event(s) of Default" {hereinafter called "the Event{s) of Default"}), Security Trustee may at its discretion, by a notice to the Borrower/s and /Mortgagor/s, shall call upon the Borrower/s and/ Mortgagor/s to remedy the breach and if the Borrower/s and/Mortgagor/s fails to remedy the same within 30 (Thirly) days of such notice, Security Trustee shall declare the entire Mortgage Debt payable forthwith and the security created hereunder shall become enforceable: .....*”

This clause also unequivocally declares that, in case of occurrence of event of default, the mortgage debt shall become due and payable. In other words, the consequences, arising from maturity of mortgage debt, in respect of mortgaged property has to follow and no personal promise to pay can be inferred therefrom.

37. It is also pertinent to note Clause 6.7 of the Indenture of Mortgage further which provides that “*On occurrence of the trigger event, Security Trustee acting upon the instructions of the Lender shall have the right to demand from the Borrower/Mortgagor’s to provide alternate receivables / cash flows such that the expected future cash flows in the account provides a margin in line with the*



*current cash flows for the balance tenure of the Loan. In case the Borrower/s / Mortgagor/s is unable to do so, Security Trustee shall have the right to demand the Borrower/s/ Mortgagor/s to prepay the Loan. In case additional receivables/cash flows are provided and Security Trustee acting upon the instructions of the Lender is satisfied with the cash flow cover including such other parameters, which at the discretion of Lender is conducive for continuity of the Loan then the Loan may be continued accordingly.”* This clause only gives an opportunity to Mortgagor to save the Mortgage property from foreclosure in case of default and no promise to pay on part of the Corporate Debtor can be inferred therefrom. Further, there is obligation to pay the remainder debt, as was in case of China Development Bank (Supra). In our considered view, the agreement has to be read completely and all clauses have to be read in conjunction to assign the meaning to particular sentence or word appearing in the agreement.

38. The Applicant has relied upon clause 3.3 of Indenture of Mortgage, which reads as “3.3. *The Borrower/s/Mortgagor/s jointly and severally agree, undertake and covenant to the Security Trustee acting on behalf and for the benefit of the Lender, to comply with and perform all the terms and conditions of these presents, Loan Documents and such other documents as may be entered between the Security Trustee acting on behalf and for the benefit of the Lender and the Borrower/s/Mortgagor/s from time to time.*” It is pertinent to refer to clause 3.2 of this Indenture, which reads as “3.2 *The Borrower/s hereby covenants personally to pay to Lender on the Due Date, the Mortgage Debt.*” It may be noted that clause 3.2 only obligates the Borrower to pay to the lender and obligation on part of Mortgagor can not be deduced from clause 3.3 which is a general clause making Mortgagor to comply with and perform all the terms and conditions of these presents, Loan Documents and such other documents. Had the parties intended so, the Mortgagor could have been obligated to pay personally also in clause 3.2 of the Indenture. In our considered view, the



promise to pay is a positive act and can not be inferred or deduced from the general clauses.


39. Since, there is no promise to pay the debt and it is a case of simpliciter creation of mortgage in favor of the erstwhile lender(s) to further securities their debt owed by XDL, we are of considered view that said Indenture of Mortgage does not bring into existence any contract of Guarantee in relation to debt component of Rs. 250 crores, thus the said debt can not fall within clause (h) of Section 5(8). In such case, disbursal of debt to the Corporate Debtor is sine qua non to constitute the debt outstanding from XDL as financial debt qua Corporate Debtor. Accordingly, we do not find any infirmity in the decision of the Respondent RP in relation to this Loan Agreement.

**(II) Debt arising from Loan Agreement dated 29.06.2018 for Rs. 370 Crs.**

**Disbursed to XDL, XWL and XAR:**

40. This Loan Agreement was entered on 29.06.2018 (Annexure E of the Application) between the erstwhile Lenders (L&T) and (a) Xrbia Developer Limited (XDL), (b) Xrbia Warai Developers Private Limited, and (c) Xrbia Ambience Realty LLP (XAR) for extending 370 Crs. Loan to these three companies and Rahul Nahar and Vishal Nahar are stated to be Guarantors to the said facility. Clause 1.1.(iv) states that “*Borrower*” shall be the person(s) named as Borrower in the Schedule 1A as may be amended from time to time. Schedule 1A names (a) Xrbia Developer Limited (XDL), (b) Xrbia Warai Developers Private Limited, and (c) Xrbia Ambience Realty LLP (XAR) as Borrower. It is pertinent to refer to definition of various terms under this Agreement :

- a. Clause 1.1.(xii) defines “*Disbursement*” to mean the act of Lender(s) of making available to the Borrower amounts of the Loan in accordance with the Disbursement Schedule subject to terms of this Agreement”.
- b. Clause 1.1.(xxvi) defines Guarantors to mean “*the Guarantor, whose name/s is/are mentioned in Schedule II. Key Terms of this Agreement, in his/its/their*



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*capacity as the Guarantors, guaranteeing the Borrower's obligations, under his/its/their guarantees”.*

- c. Clause 1.1.(lvii) defines Security to mean *“the Mortgage, guarantee or any other security interest or any other agreement or arrangement having the effect of conferring security in favour of the lenders in relation to the Loan as per the terms detailed in Article IV, herein including but not limited to lien, charge, assignment, hypothecation or mortgage”.*
- d. Clause 2.10(b) states that *“Upon expiry of the Moratorium Period, the Borrower agrees and undertakes to repay the Outstanding Amount in accordance with the Repayment Schedule, as set out in Schedule IV hereto”.*
- e. Article IV deals with “Security” and clause 4.1 thereunder states that *“The Loan together with all interest, taxes, liquidated costs, charges, expenses and other sums whatsoever due and payable to Lender(s) hereunder shall be secured by the Security as set out in Schedule III (Security & Security Related Covenant)”.*

41. Clause 2.18 of the said Agreement only makes the Borrower(s) jointly and severally liable to the fullest extent of the liability or obligation towards the lenders under the respective Financing Documents and not the mortgagor. The Applicant has contended that clause 3.1, 3.2 and 3.3 of the IoMs (Annexure I), latest IoM in relation to this debt, constitutes a contract of guarantee. The said clause(s) reads as under :

*“3.1 The Borrower's do and each of them doth hereby covenant's to the Security Trustee acting on behalf and for the benefit of the Lender that the Borrower's shall repay to Lender, on the Due Date or on such earlier date as demanded by Lender, the Mortgage Debt, in accordance with this Indenture or the Loan Documents.*

*3.2 The Borrower/s hereby covenant's personally to pay to Lender, on the Due Date, the Mortgage Debt.*



*3.3 The Borrower/s/Mortgagors jointly and severally agree, undertake and covenant to the Security Trustee acting on behalf and for the benefit of the Lender, to comply with and perform all the terms and conditions of these presents, Loan Documents and such other documents as may be entered between the Security Trustee acting on behalf and for the benefit of the Lender and the Borrower/s/Mortgagors from time to time.”*

42. It may be noted that clause 3.2 only obligates the Borrower to pay to the lender and obligation on part of Mortgagor can not be deduced from clause 3.3 which is a general clause making Mortgagor to comply with and perform all the terms and conditions of these presents, Loan Documents and such other documents. Had the parties intended so, the Mortgagor could have been obligated to pay personally also in clause 3.2 of the Indenture. In our considered view, the promise to pay is a positive act and can not be inferred or deduced from the general clauses.
43. Since, there is no promise to pay the debt and it is a case of simpliciter creation of mortgage in favor of the erstwhile lender(s) to further securities their debt owed by XDL, XWL and XAR, we are of considered view that said Indenture of Mortgage does not bring into existence any contract of Guarantee in relation to debt component of Rs. 370 crores, thus the said debt can not fall within clause (h) of Section 5(8). In such case, disbursal of debt to the Corporate Debtor is sine qua non to constitute the debt outstanding from XDL, XWL and XAR as financial debt qua Corporate Debtor. Accordingly, we do not find any infirmity in the decision of the Respondent RP in relation to this Loan Agreement.

**(III) Debt in form ECLGS Facility disbursed to XDL, XWL, XAR and ELL**

44. The applicant has filed claims in relation to loans disbursed as ECLGS facility under ECLGS 2.0 promulgated by NCGTCL established by the Department of Financial Services, Ministry of Financial, Government of India to XDL as



financial debt qua Corporate Debtor. The Applicant has not filed relevant loan agreement(s) as well as term sheet referred in the respective Indenture(s) of Mortgage (IoMs), however each of respective agreement has been entered between the borrowing entity and the erstwhile lender(s) only and the Corporate debtor is neither party to such loan agreement or Erstwhile loan agreement dated 29.06.2018, which is defined as Erstwhile loan in relevant IoMs to be Rs. 370 crores facility. The security details stated in Schedule II defines the term “Project” wherein one of the Project of Corporate Debtor is included. The Applicant has contended that clause 3.1, 3.2 and 3.3 of the IoMs executed in relation to these facilities constitute a contract of guarantee. The details of such facilities are as follows :

- a. Loan amounting to Rs. 29 Crores and 30 Crores disbursed to XDL in terms of Agreements dated on 03.11.2021 (Annexure J of IA 1302 of 2025) and dated 24.06.2021 (Annexure I of IA 1302 of 2025) between the erstwhile Lenders (L&T) and Xrbia Developers Private Limited (XDL) and Rahul R Nahar is also stated to be borrower to the said facility in Schedule IA. The Corporate Debtor along with other Xrbia Group Companies had executed IoMs No. 4341/2021 dt. 12.11.2021(Annexure Q) in relation to ECLGS Facility of Rs. 29 Crores and IoM No. 2527/2021 dt. 24.06.2021(Annexure N) and in relation to ECLGS Facility of Rs. 30 Crores;
- b. Loan amounting to Rs. 10 Crores and 6.00 Crores disbursed to XAR in terms of agreement(s) dated 24.06.2021 (Annexure M of IA 1302 of 2025) and dated 03.11.2021 (Annexure N of IA 1302 of 2025) between the erstwhile Lenders (L&T) and Xrbia Ambience Realty LLP (XAR). The Corporate Debtor along with other Xrbia Group Companies had executed IoMs No. 2528/2021 dt. 24.06.2021(Annexure M) in relation to ECLGS Facility of Rs. 10 Crores and IoM No. 4339/2021 dt. 12.11.2021(Annexure O) in relation to ECLGS Facility of Rs. 6 Crores;



- c. Loan amounting to Rs. 6.99 Crores and 35 Crores disbursed to ELL in terms of agreement(s) dated 03.11.2021 (Annexure S of IA 1302 of 2025) and dated 01.03.2018 (Annexure Q of the Application) between the erstwhile Lenders (L&T) and Eiffel Lifespaces Private Limited (ELL). The Corporate Debtor along with other Xrbia Group Companies had executed IoM No. 4340/2021 dt. 12.11.2021 (Annexure P) in relation to ECLGS Facility of Rs. 6.99 Crores and IoM No. 2174/2020 dt. 6.11.2020 (Annexure J) in relation to ECLGS Facility of Rs. 35 Crores; and
- d. Loan amounting to Rs. 10.00 Crores and 13 Crores disbursed to XWL in terms of agreement(s) dated 24.06.2021 and dated 04.11.2021 as stated in Schedule 1 to IoMs between the erstwhile Lenders (L&T) and Xrbia Warai Developers Private Limited (XWL). The Corporate Debtor along with other Xrbia Group Companies had executed IoM No. 2526/2021 dt. 24.06.2021 (Annexure L) in relation to ECLGS Facility of Rs. 10 Crores and IoM No. 4342/2021 dt. 12.11.2021 (Annexure R) in relation to ECLGS Facility of Rs. 13 Crores
45. The clause 3.1, 3.2 and 3.3 in all IoMs in relation to credit facility, except in IoM No. 2174/2020 dt. 6.11.2020 executed for credit facility of Rs. 35.00 crores disbursed to ELL, are identically worded and reads as under :

*“3.1 The Mortgagor do and each of them doth hereby covenant/s to Security Trustee that the Mortgagor shall repay to Lender, on the Due Date or on such earlier date as demanded by Lender, the Mortgage Debt, in accordance with this Indenture or the Loan Documents.*

*3.2 The Mortgagor hereby covenant/s personally to pay to Lender, on the Due Date, the Mortgage Debt.*

*3.3 The Mortgagor agree, undertake and covenant to Security Trustee acting for the benefit of the Lender, to comply with and perform all the terms and conditions of these presents. Loan Documents and such other*



*documents as may be entered between Lender and the Mortgagor from time to time.”*

46. The clause 3.1, 3.2 and 3.3 in IoM No. 2174/2020 dt. 6.11.2020 executed for credit facility of Rs. 35.00 crores disbursed to ELL reads as under :

*“3.1 The Borrower/s do and each of them doth hereby covenant/s to the Lender that the Borrower/s shall repay to Lender, on the Due Date or on such earlier date as demanded by Lender, the Mortgage Debt, in accordance with this Indenture or the Loan Documents,*

*3.2 The Borrower/s hereby covenant/s personally to pay to Lender, on the Due Date, the Mortgage Debt.*

*3.3 The Borrower/s/Mortgagor/s jointly and severally agree, undertake and covenant to the Lender, to comply with and perform all the terms and conditions of these presents, Loan Documents and such other documents as may be entered between the Lender acting on behalf and for the benefit of the Lender and the Borrower/s/Mortgagor/s from time to time.”*

47. In so far as ECLGS facility of Rs. 35.00 crores disbursed to ELL is concerned, it is noted that clause 3.1 and 3.2 of IoM No. 2174/2020 dt. 6.11.2020 executed in relation to this facility is differently worded and only obligates the Borrower to pay to the lender, while clause 3.1 and 3.2 of all other IoMs in relation ECLGS facility obligates Mortgagor. Had the parties intended to bind the Mortgagor (provided such was contemplated in the relevant Term Sheet and Loan Agreement which has conspicuously been referred in the IoMs), the Mortgagor could have been obligated to pay personally also in clause 3.2 of the Indenture. In our considered view, the obligation on part of Mortgagor can not be deduced from clause 3.3 which is a general clause making Mortgagor to comply with and perform all the terms and conditions of these presents, Loan Documents and such other documents. A promise to pay is a positive act and can not be inferred or deduced from the general clauses. Since, there is no promise to pay the debt and it is a case of simpliciter creation of mortgage in favor of the erstwhile lender(s)



to further securitise their debt owed by ELL, we are of considered view that said Indenture of Mortgage does not bring into existence any contract of Guarantee in relation to debt component of Rs. 35 crores disbursed to ELL, thus the said debt can not fall within clause (h) of Section 5(8). In such case, disbursal of debt to the Corporate Debtor is sine qua non to constitute the debt outstanding from ELL as financial debt qua Corporate Debtor. Accordingly, we do not find any infirmity in the decision of the Respondent RP in relation to the ECLGS credit facility of Rs. 35.00 crores not being considered as financial debt.

48. Now coming to all other IoMs, except IoM No. 2174/2020, in relation to ECLGS facilities listed above, it is noted that clause 3.1 and clause 3.2 of the IoMs executed in relation to these loan facilities, the word ‘Mortgagor’ is appearing in place of word ‘Borrower’.

- (i) A contract of Mortgage does not require a Mortgagor to pay the Mortgage Debt which is to be paid out of the proceeds of the Mortgaged property, though the Mortgagor is vested with statutory right to redeem the Mortgage after due date in terms of Section 60 of Transfer of Property Act, 1882. Accordingly, where Mortgagor has specifically assumed the liability to pay to lender in whose favour Mortgage Debt is created, that, in itself, may constitute a promise to pay the Mortgage Debt de hors its right to redeem the Mortgage, whereunder its obligation to pay arises only if Mortgagor wish to redeem the mortgage.
- (ii) If the details of securities as described in the Loan Agreement(s) are taken into consideration, the description of such securities do not contemplate personal covenant on part of the Mortgagor and it, inter-alia, contemplates exclusive charge by way of mortgage of Project owned and developed by the Borrowing entity. Accordingly, the question arises whether the personal covenant to pay enshrined in clause 3.2 of the IoM can extend the obligation of the Corporate Debtor to a Guarantor as well or such



personal covenant is to be read as arising from the right of Mortgagor to redeem the Mortgagor.

- (iii) The recital to an agreement sets out the context and Clause 1.1 (e) of IoM states that “*The Schedules, Recitals and Annexure shall form an integral part of this Indenture.*”, accordingly it may be relevant to refer the recitals to one of IoM say IoM No. 4342/2021 dt. 12.11.2021 to understand the nature of IoM :

*“A. The Mortgagor is, inter alia, seized and possessed of or otherwise well and sufficiently entitled to the property as mentioned in Schedule II hereto.*

*B. The Borrower has requested and Lender (as defined in Schedule I) has sanctioned the Loan (as defined below) to the Borrower in terms of term sheet as mentioned in Schedule I as may be modified from time to time ("Term Sheet") duly accepted by the Borrower and executed a loan agreement as mentioned in Schedule I, (the "Loan Agreement", which expression shall, unless it be repugnant to the subject or context thereof, include all amendments made thereto from time to time) details whereof are mentioned in Schedule I hereto between the Borrower and Lender. Lender has agreed to grant / extend to the Borrower and the Borrower has agreed to avail from Lender the Loan, on the terms and conditions contained in the Loan Agreement and transaction documents (hereinafter the Term Sheet, the Loan Agreement and transaction documents shall collectively be referred as the "Loan Documents")*

*C. One of the conditions of the Loan Documents is that the Loan together with all interest, further interest, default interest, prepayment premium, commission, costs, charges, expenses and all other present or future obligations and liabilities, whatsoever stipulated in or payable by the Borrower under the Loan*



*Documents, including all costs, charges and expenses including but not limited to the costs, legal expenses and costs of preserving the securities and/or enforcement thereof, incurred by Lender under the Loan Documents shall be secured, inter alia, by a second charge over the Mortgaged Properties as mentioned in Schedule II by the Borrower (hereinafter collectively referred to as the "Mortgaged Properties").*

*D. To secure the repayment of the Mortgage Debt (as defined below), the Mortgagor has agreed to create a simple mortgage on the Mortgaged Properties in favour of the Security Trustee acting on behalf and for the benefit of the Lender in the manner hereinafter appearing.”*

- (iv) The Applicant has neither placed on record the Loan Agreement nor Term Sheet to find whether such documents contemplate guarantee of the Corporate Debtor to securitise the loan advanced to one of the group companies. The loan agreement(s), except in case of ECLGS facility disbursed to XWL, were taken note of by this Tribunal while hearing IA 1302 of 2025, which was heard together. Perusal of those loan agreements reveal that those Loan Agreement(s) do not contemplate any guarantee on part of the Corporate Debtor and only contemplate(s) mortgage as created by respective IoMs. The recital D to IoM clearly indicates the intent of the parties to the Agreement to create a simple mortgage on the Mortgaged Properties in favour of the Security Trustee acting on behalf and for the benefit of the Lender in the manner appearing in the later part of the IoM.
- (v) The later part of the IoM contains clause 3.2 requiring the Corporate Debtor to personally pay to Lender, on the Due Date, the Mortgage Debt. In our considered view, if clause 3.2 of the IoM is read as bringing into existence a Guarantee obligation, it would extend beyond the scope of the



loan agreement as well as term sheet forming part of said IoM, and such expansive construction of IoM in light of clause 3.2 shall also be contrary to the intention of the parties to create a simpliciter mortgage as expressed in the recital. Clause 3.2 of IoM has to be read harmoniously in conjunction with the Loan agreement as well as Schedule appended to the IoM which lays down conditions of loan facility. Hence, in the absence of specific stipulation in the term sheet to this effect, the clause 3.2 of the IoM can not be read to enhance the obligations of the Mortgagor(s) so as to extend their obligation to the personal guarantee.

- (vi) The Applicant has also relied upon clause 5.1(b) and 5.1(d) of the IoMs, which reads as under :

*“(b) If default shall be made by the Mortgagor in repayment of the Mortgage Debt on the Due Date.*

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*(d) The Borrower failing to pay the Mortgage Debt to Lender, despite demand having being made on the Borrower, in that behalf.”*

- (vii) These clause(s) only list out circumstances in which ‘Events of Default’ can be declared and Security Trustee can declare the entire Mortgage Debt payable forthwith to become the security created enforceable. These clauses do not create any obligation to pay beyond the value of mortgage property. It is pertinent to note that, in case of China Development Bank (Supra), there was a specific clause in the Deed of Hypothecation whereby the hypothecating entities had undertaken to pay the remainder amount of debt after appropriation of proceeds of hypothecated property also, which led the Hon’ble Supreme Court to construe the Deed of Hypothecation in that case as a contract of guarantee. It is relevant to note that the Hon’ble Supreme Court distinguished the Three Judge decision



in case of Ketulbhai Patel (Supra) on this proposition only and noted that in case of Ketulbhai Patel, there was no such obligation.

- (viii) In our considered view, the promise to pay i.e. personal covenant herein is to be read as arising from the right of Mortgagor to redeem the Mortgagor and it can not be read to constitute a contract of guarantee. Instead, it is a case of simpliciter creation of mortgage in favor of the erstwhile lender(s) to further securitise their debt owed by XDL, XAR, XWL and ELL. Accordingly, we are of considered view that IoMs in relation to ECLGS facility do not bring into existence any contract of Guarantee in relation to debts arising from ECLGS facilities availed by XDL, XAR, XWL and ELL, thus the said debts can not fall within clause (h) of Section 5(8). In such case, disbursal of debt to the Corporate Debtor is sine qua non to constitute the debt outstanding from XDL, XAR, XWL and ELL as financial debt qua Corporate Debtor. Accordingly, we do not find any infirmity in the decision of the Respondent RP in relation to these facilities also.
- (ix) The Applicant has taken the plea of cross-collateralization clause contained in the IoMs, however, in our considered view, the said clause only extends the scope of mortgage over mortgaged properties and do not create any guarantee obligation in relation to the debts.

**(IV) Debt arising from Supplemental Loan Agreement dated 30.11.2022 for Rs. 15 Crores in addition to Principal Loan Facility dated 29.06.2018 for Rs. 370 Crores**

49. This Supplemental Loan Agreement was entered on 30.11.2022 (Annexure L of IA 1302 of 2025) between the erstwhile Lenders (L&T) and (a) Xrbia Developer Limited (XDL), (b) Xrbia Warai Developers Private Limited, and (c) Xrbia Ambience Realty LLP (XAR) for extending additional loan of Rs. 15 Crs. Loan disbursed to XDL for its Khopoli Woods Project.



50. The Corporate Debtor is neither a party to the Agreement dated 30.11.2022 nor this Agreement contains a covenant to bind Corporate Debtor to the terms under the Agreement dated 29.06.2018. The Applicant has contended that clause 3.1, 3.2 and 3.3 of the IoMs dated 14.11.2022, to which the Corporate Debtor is a party as Mortgagor (Annexure S), constitutes a contract of guarantee. The said clause(s) reads as under :

*“3.1 The Mortgagor do and each of them doth hereby covenant/s to the Lender/Security Trustee (as the case may be) that the Mortgagor shall repay to Lender, on the Due Date or on such earlier date as demanded by Lender, the Mortgage Debt, in accordance with this Indenture or the Loan Documents.*

*3.2 The Mortgagor hereby covenant/s personally to pay to Lender, on the Due Date, the Mortgage Debt.*

*3.3. The Mortgagor agree, undertake and covenant to the Lender/Security Trustee (as the case may be) (acting for the benefit of the Lender), to comply with and perform all the terms and conditions of these presents, Loan Documents and such other documents as may be entered between Lender and the Mortgagor from time to time.”*

51. A contract of Mortgage does not require a Mortgagor to pay the Mortgage Debt which is to be paid out of the proceeds of the Mortgaged property, though the Mortgagor is vested with statutory right to redeem the Mortgage after due date in terms of Section 60 of Transfer of Property Act, 1882. Accordingly, where Mortgagor has specifically assumed the liability to pay to lender in whose favour Mortgage Debt is created, that, in itself, may constitute a promise to pay the Mortgage Debt de hors its right to redeem the Mortgage, whereunder its obligation to pay arises only if Mortgagor wish to redeem the mortgage. However, if the details of securities as described in the Loan Agreement dated 30.11.2022 are taken into consideration, the description of such securities do not contemplate personal covenant on part of the Mortgagor and it only contemplates



charge by way of registered mortgage on Project owned/developed by the Corporate Debtor.

52. Accordingly, the question arises whether the personal covenant to pay enshrined in clause 3.2 of the IoM can extend the obligation of the Corporate Debtor to a Guarantor as well or such personal covenant is to be read as arising from the right of Mortgagor to redeem the Mortgagor. In our considered view, if clause 3.2 of the IoM is read as bringing into existence a Guarantee obligation, it would extend beyond the scope of the principal loan agreement as well as term sheet forming part of said IoM as expressed in the recital, accordingly, clause 3.2 of IoM has to be read harmoniously in conjunction with the Principal loan agreement as well as Schedule appended to the IoM which lays down conditions of loan facility prescribing the details of security, wherein the Corporate Debtor has been obligated to be Mortgagor. Hence, in the absence of specific stipulation in the principal loan agreement to this effect, the clause 3.2 of the IoM can not be read to enhance the obligations of the Mortgagor(s) so as to extend their obligation to the personal guarantee.
53. Since, there is no express provision to pay the remainder of debt after appropriation of the proceeds of mortgaged properties, it is a case of simpliciter creation of mortgage in favor of the erstwhile lender(s) to further securitise their debt owed by XDL, we are of considered view that Indenture of Mortgage dated 14.11.2022 does not bring into existence any contract of Guarantee in relation to debt component of Rs. 15 crores, thus the said debt can not fall within clause (h) of Section 5(8). In such case, disbursal of debt to the Corporate Debtor is sine qua non to constitute the debt outstanding from XDL as financial debt qua Corporate Debtor. Accordingly, we do not find any infirmity in the decision of the Respondent RP in relation to this Loan Agreement.



## Decision

54. In view of the foregoing discussion, we hold that the claim of the Applicant does not fall within the definition of Section 5(8), and hence does not qualify as financial debt. However, in view of security interest over property of Corporate Debtor held by the Applicant in relation to these debts, such debts shall fall under the category of other secured debt and shall be classified accordingly.

## Other Prayers

55. The Applicant has sought removal and replacement of the present Resolution Professional, Mr. Sanjay Vijay Jeswani. The discomfort of the applicant is arising from rejection of its claim for amounts which were not directly disbursed to the Corporate Debtor. On perusal of submissions, we note that IRP had rejected the claims giving reasoned communication to the Applicant and had even sought legal opinion in relation to claim of the Applicant. Thus, we do not find any merit in this prayer, as no mala-fide on part of IRP could be demonstrated by the Applicant. Further, we have given directions in relation to each component of loan, accordingly, we do not see any reason for appointment of an external auditor to assist the Resolution Professional for verifying claims of Creditors. Also, the details of claims of other creditors can not be provided to a stakeholder, including the creditor, hence prayer for direction for provision of detailed bifurcation of the claims of the homebuyers in the present CIRP is also rejected.

56. In view of the foregoing, IA 1864 of 2025 is dismissed and disposed of accordingly.

**-Sd/-**

**Prabhat Kumar**  
**Member (Technical)**

**-Sd/-**

**Sushil Mahadeorao Kochey**  
**Member (Judicial)**