NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 461 of 2021

INDEX

GLOSSARY

CIRP	Corporate Insolvency resolution Process
CoC	Committee of Creditors
DHFL	Dewan Housing Finance Corporation limited
NCLT	National company law Appellate tribunal
Company Petition	Company Petition No. 4258 of 2019
NHB	National Housing Bank
NHB Act	National Housing Bank Act
Code	I & B Code, 2016
FSP Rules	Insolvency and Liquidation Proceeding of Financial

	Service Providers and Application to Adjudicating Authority Rules
January 30 Notification	Notification No. S.O. 464(E) dated January 30, 2020
MOA	Memorandum of Arrangement
MCA	Ministry of Corporate Affairs
FSPs	Financial Services Providers
RBI	Reserve Bank of India
MOU	Memorandum of Understanding
Arrangement	Agreement between the CoC and NHB
Piramal	Piramal Capital & Housing Finance Limited
JDoH 2010	Joint deed of Hypothecation dated July 24, 2010
Supplemental DoH 2011	First Supplemental Joint Deed of Hypothecation dated June 29, 2011
JDoH 2014	Joint Deed of Hypothecation dated 25th June 2014
HFCs	Housing Finance Institutions/Companies
EoIs	Expressions of Interest
August Order	August 3, 2020
Application	IA No. 1104 of 2020
Trust Act	Indian Trust Act, 1882
NOC Letter	NOC dated September 25, 2012
RBI Exposure Norms	Norms for Financial Institutions dated July 1, 2015.

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 461 of 2021

[Arising out of Order dated 7 June 2021 in IA No. 1104 of 2020 in Company Petition No. 4258 of 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench, Mumbai]

IN THE MATTER OF:

Union Bank of India on behalf
of the Committee of Creditors
of Dewan Housing Finance
Corporation Limited
Having its office at:
M-93, Connaught Place, New Delhi
Email: raunak.dhillon@cyrilshroff.com **Appellant**

Versus

1. **National Housing Bank**
   Through its Authorised Officer
   Having its head office at:
   Core 5A, 3rd to 5th Floors
   India Habitat Centre
   Lodhi Road, New Delhi – 110003
   Email: ho@nhb.org.in **Respondent No.1**

2. **Dewan Housing Finance**
   Corporation Limited
   Through the Administrator
   Mr R. Subramaniakumar
   Having a registered office at:
   6111 Floor, HDIL Towers, Anant Kanekar
   Marg, Station Rd, Bandra (East),
   Mumbai – 400051
   Email: dhfladministrator@dhfl.com **Respondent No.2**

Present:

For Appellant : Mr Raunak Dhillon, Ms Madhavi Khanna,
Mr Shubhankar Jain, Mr Animesh Bisht and
Ms Saloni Kapadia, Advocates

For Respondent : Mr Mohammed Himayatullah, Mr Jinella Gogri and Negandhi Shah, Advocates for R-1.

CORAM:
Hon'ble Mr Justice M. Venugopal, Member (J)
Hon'ble Mr V. P. Singh, Member (T)
Hon'ble Dr Ashok Kumar Mishra, Member (T)

J U D G M E N T
(Virtual Mode)

[Per; V. P. Singh, Member (T)]

1. Union Bank of India files the instant Appeal on behalf of the Committee of Creditors ("CoC"/"Appellant") of Dewan Housing Finance Corporation Limited ("Corporate Debtor"/"DHFL") against the order dated June 7, 2021, passed by the Adjudicating Authority/ "NCLT", Mumbai Bench in IA No. 1104 of 2020 filed in Company Petition No. 4258 of 2019 ("Company Petition"), whereby the Adjudicating Authority has inter-alia allowed the prayers, as mentioned below in the Application.

2. In the above-said Application, i.e. MA 1104 of 2020, the applicant had prayed that:

> *"(a) That this Hon'ble Tribunal be pleased to declare that under sub-section (1) of Section 16B of the National Housing Bank Act, 1987, any sums received by Dewan Housing Finance Limited in repayment or realization of loans refinanced by the Applicant and remaining outstanding shall be deemed to be received by Dewan Housing Finance Limited in trust for and on behalf of the Applicant and all the amounts so received and/or to be received by Dewan Housing Finance Limited under any*

purported documents such as assignment agreements and/or under regular repayment/pre-payments are to be held in trust by Dewan Housing Finance Limited for the benefit of the Applicant and that the same be paid to the Applicant;

(b) That this Hon'ble Tribunal be pleased to declare that under Notification dated 30th January 2020, whereat the Ministry of Corporate Affairs notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Services Providers and Application to Adjudicate Authority Rules 2019 ("FSP Rules"), the sums received and/or to be received by Dewan Housing Finance Limited in repayment or realization of loans refinanced by the Applicant to the extent of the accommodation granted by the Applicant and remaining outstanding; and the securities held by Dewan Housing Finance Limited on account of any loan refinanced by the Applicant, are held in trust in terms of section 16B of the NHB Act and thus covered under Rule 10 of the FSP Rules as assets required to be held in trust for the benefit of the Applicant and;

(c) That this Hon'ble Tribunal be pleased to declare that the Moratorium envisaged under section 14B of the Insolvency and Bankruptcy Code, 2016 as well as under Rule 5(b) of the FSP Rules shall not be applicable for the amounts that are to be held in trust by Dewan Housing Finance Limited for an on behalf of the Applicant;

(d) That any resolution plan of Dewan Housing Finance Limited that may be approved by this Hon'ble Tribunal

should incorporate the statutory right of the Applicant as provided under section 16B of the NHB Act, which provides that the sums received by Dewan Housing Finance Limited in repayment/realization of the loans refinanced by the Applicant should be held in trust by Dewan Housing Finance Limited to the extent of accommodation provided by the Applicant remaining outstanding and be paid exclusively to the Applicant; and that the securities held by Dewan Housing Finance Limited on account of any loan refinanced by the Applicant shall be held in trust for the Applicant and such sums as are identified by this Hon'ble Tribunal as per the provisions of section 16B shall be paid to the Applicant;

(verbatim copy)

3. The above application was disposed of by the Adjudicating Authority vide its order dated 03rd August 2020 with the following observations:

"Main prayers in this IA are:-

1. That this Hon'ble Tribunal be pleased to declare that under sub-section (1) of Section16B of the National Housing Bank Act, 1987, any sums received by Dewan Housing Finance Limited in repayment or realization of loans refinanced by the Applicant and remaining outstanding shall be deemed to be received by Dewan Housing Finance Limited ***in trust for and on behalf*** *of the Applicant and all the amounts so received and/or to be received by Dewan Housing Finance Limited under any purported documents such as assignment agreements and/or under regular repayment/pre-payments are to be held in trust by DHFL for the benefit of the applicant.*

2. Facts of the Matter is already discussed in the IA-449/2021, therefore for the sake of brevity, the same is not reproduced here.

3. We have Heard Ld. Solicitor General of India, Mr Tushar Mehta, Ld Sr. Counsel Mr Ravi Kadam, Ld. Sr. Counsel Mr Gaurav Joshi, Ld. Sr. Counsel Mr Mukul Rohatgi, Ld. Sr. Counsel Mr Janak Dwaraka Das and other Ld. Counsels in this matter. We have also perused the contents of the IA, Reply and written submissions of all the parties. We have carefully examined the issue involved in the present IA, and our observations/findings are as under:-

I. By following the doctrine of the Harmonious construction of both the statute e.g. National Housing Bank Act (NHB) and Insolvency and Bankruptcy Code, 2016 (I & B Code), we are of the Confirmed view that there seems to be ***No Conflict*** *between Section 16B of NHB Act 1987 and Section 14 of the I.B. Code read with Sec 238 of IB code, because the Central Government has framed and promulgated the Financial Service Provider Rules by Notification dated 30.01.2020 under the provision of the I&B Code only. The Rule 10 thereof provides and stipulates that it is the Duty of the Administrator to take custody of the third-party assets of the Financial Service Provider (herein DHFL). The conjoint readings of the Financial Service Provider Rules (under the I&B Code) with sub-section (1) of the S. 16B of NHB Act that any sum received by the FSP is repayment or in realization of Loans refinanced by the NHB and remaining outstanding shall be deemed to be received by the FSP (DHFL) in "Trust" for and on behalf of the Applicant NHB. The legislative intent of the Section 238 of the I&B Code is that in*

case of conflicting provision in both Acts, the provision of the I&B Code which is the latest shall prevail.

II. Notwithstanding the above Ministry of Corporate Affairs (MCA) has promulgated FSP Rules, 2019, better known as Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019. The same was notified on 30.01.2020 by the MCA. The Rules recognize the third-party assets of the Corporate Debtor FSP and cast a duty on the Administrator to take custody of such Assets. ***Hence such Assets cannot form part of the Assets of FSP/Corporate Debtor and such sums received, receivables if any, under the Refinance Scheme of the NHB, shall be treated as out of the purview of the C.I.R.P. and therefore provision of Section 14 of the I&B Code would not be applicable to such sums / third party assets.***

III. While declaring so, we find support from and placing reliance on the decision of the Hon'ble Supreme Court in Civil Appeal 6350 of 2019 in the matter of MCGM V/s Abhilasha Lal & Ors. and Hon'ble NCLAT decision in the matter of Directorate of Enforcement V/s Manoj Kumar Agrawal and Others in Company Appeal (AT)(INSOLVENCY)No.575/2019.

IV. Hence this IA is allowed in terms of the prayer clause. Further, the Interim Arrangement made between the NHB and the Administrator / CoC of the DHFL vide Consent Terms dated 03.12.2020 is made absolute. IA-1104 is allowed in terms of its prayer clause (Page 31 of the IA) a, b, c and d. Further, the Interim Arrangement made between the parties as per the Consent Terms dated 03.12.2020 is also made absolute as per

the prayer clause. With the aforesaid declarations/observations, the ***IA-1104/2020*** *is* ***Allowed*** *and stands* ***disposed*** *of.*

(verbatim copy with emphasis supplied)

4. **Factual Background**

4.1 The Appellant CoC of DHFL challenges the Impugned Order mainly because the NCLT had passed the order without consideration of any of the submissions made by the CoC or the Administrator and contrary to the express provisions of law. The Impugned Order proceeds on the erroneous presumption that National Housing Bank(for brevity 'NHB') is the owner of DHFL's funds or property by Section 16B of the National Housing Bank Act, 1987 ("NHB Act") despite that the CoC had made elaborate and detailed submissions before the NCLT. The Appellant challenges the finding of Adjudicating Authority/NCLT that NHB is the owner of DHFL's funds or property by Section 16B of the NHB Act. However, submissions have not even been considered in the Impugned Order. Further, the Impugned Order is contrary to the express provisions of the I & B Code, 2016, (for brevity 'Code') explicitly Section 238 of the Code.

4.2 Further, the Impugned Order erroneously places reliance on Rule 10 of the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 ("FSP Rules") and Notification No. S.O. 464 (E) dated January 30, 2020 ("January 30 Notification") when in fact, the said FSP Rules and Notification have no application whatsoever to NHB's claim before the NCLT.

4.3 NHB is a statutory body established under the National Housing Bank Act. NHB is the regulator of Housing Finance Institutions/Companies until the changes brought about by the Finance Act, 2019. From August 9, 2019, the Reserve Bank of India has been made the Regulator for Housing Finance Companies and NBFCs.

4.4 DHFL entered into a Memorandum of Arrangement ("MOA") dated February 27, 2004, with NHB for availing financial assistance from time to time from NHB under its refinance and other schemes. Under the MOA, DHFL and NHB were engaged in purely borrowing and lending transactions. DHFL applied to NHB, which agreed to provide financial assistance for housing or refinance the housing loans. NHB decided to grant financial assistance to DHFL by way of sanction letters. Under the sanction letters, there were specific repayment schedules for repayment to NHB of the loans given by NHB to DHFL. The said loans granted by NHB were secured by way of pari passu charge inter- alia over the movables, including receivables of DHFL with the other lenders, among other things, by way of several hypothecation deeds.

4.5 The Ministry of Corporate Affairs ("MCA"), vide its press release dated November 15, 2019, notified the 'FSP Rules' inter alia to provide a framework for the insolvency and liquidation proceedings of systematically important Financial Services Providers ("FSPs").

4.6 On November 20, 2019, the Reserve Bank of India ("RBI") had by way of its press release notified that the RBI had superseded the Board of Directors of

DHFL in the exercise of its powers under Section 45-IE (1) of the Reserve Bank of India Act, 1934 owing to governance concerns and defaults by DHFL in meeting various payment obligations. In this Press Release, it was also stated that the RBI also intends to initiate the resolution of DHFL and that it shall apply before the Adjudicating Authority for appointing the Administrator as the Insolvency Resolution Professional.

4.7 On November 29, 2019, the RBI filed the Company Petition under Rule 5(a)(i) of the 'FSP Rules' before the Adjudicating Authority for initiating CIRP of the Corporate Debtor under the provisions of the Code. The Adjudicating Authority vide order dated December 03, 2019, admitted the Company Petition filed by RBI.

4.8 NHB has filed Form 'C' explicitly provided for the submission of a claim by the Financial Creditor during CIRP. Hence, NHB has acknowledged that it is a Financial Creditor of DHFL. Accordingly, the Administrator had admitted the claim of Rs. 2436.67 crores submitted by NHB after verification. NHB is a member of CoC, having 2.81% of the voting share and has participated and exercised all rights as available to a Financial Creditor of DHFL[1].

4.9 On January 30, 2020, Notification No. S.O. 464 (E) was issued by the MCA. NHB[2] filed the Application IA 1104 of 2020 in the main Company Petition 4258 of 2020 along with an Additional Affidavit dated August 07, 2020.

[1] Dewan Housing Finance Limited
[2] National Housing Bank

Applicant/Respondent No. 1, relying primarily on Section 16B of the NHB Act and the 'MOA'[3] entered into between DHFL and NHB, wherein the NHB had agreed that all the loan receivables of DHFL, whether such loans have been financed or refinanced wholly or partly by NHB, ("Tagged Receivables") are held in trust and on behalf of NHB by DHFL. NHB accordingly sought declaratory reliefs to the effect that:

i) The declaration that the Tagged Receivables are deemed to be received by DHFL in trust and on behalf of NHB in terms of Section 16B of the NHB Act and all the amounts so received and to be received are to be held in trust by DHFL for the benefit of NHB and that the same be paid to NHB;

ii) The declaration that under the January 30, Notification that the 'Tagged Receivables' and securities held by DHFL on account of the loans refinanced by NHB are held in trust under terms of the NHB Act and thus covered under Rule 10 of the FSP Rules;

iii) The declaration that the 'Moratorium' under Section 14 of the I& B Code does not apply to such Tagged Receivables; and

iv) That any resolution plan for DHFL should incorporate the statutory right of NHB.

[3] Memorandum of Understanding

4.10 The NCLT vide its order on the Application, dated November 17, 2020, had directed that no voting should take place about the manner of distribution of proceeds of the approved resolution plan and the approval of final resolution plans under Section 30 (4) of the Code till the next date of hearing in the NHB Application.

4.11 On November 17, 2020, the CoC discussed the November 17th Order. The CoC believed that an amicable arrangement might be reached with NHB to facilitate and expedite the insolvency resolution process for maximisation of value for all creditors and stakeholders. Accordingly, an agreement was arrived at between the CoC and NHB ("Arrangement"). Therefore, by order dated December 3, 2020, the '**Arrangement**' was taken on record by the NCLT.

4.12 On January 15, 2021, the Resolution Plan dated December 22, 2020, submitted by 'Piramal Capital & Housing Finance Limited' ("Piramal") about 'DHFL', was approved by 93.65% of the voting share of the CoC. Accordingly, the Administrator filed the IA No. 449 of 2021 in the Company Petition CP 4258 of 2020 before the Adjudicating Authority for approval of the Resolution Plan under Section 30 read with Section 31 of the I&B Code.

4.13 The Plan Approval Application was heard by the Adjudicating Authority and reserved for orders on May 13, 2021. The Plan Approval Application was allowed by the NCLT vide its order dated June 7, 2021. The Application filed by NHB was also allowed by the NCLT by way of Impugned Order dated June 7,

2021, wherein and whereby, among other things, the '**Arrangement'** made during CIRP was made absolute.

Chronology of Events

4.14 National Housing Bank ("NHB") was established as a statutory body established under the National Housing Bank Act, 1987 ("NHB Act").

4.15 DHFL entered into a memorandum of Arrangement ("MOA") dated February 27, 2004, with NHB for availing financial assistance from time to time from NHB under its refinance and other schemes. Under the MOA, DHFL and NHB were purely borrowing and lending transactions, where DHFL applied to NHB. The NHB agreed to provide financial assistance for housing or refinance the housing loans. The NHB decided to grant financial assistance to DHFL by way of sanction letters. Under the sanction letters, there were specific repayment schedules for repayment to NHB of the loans given by NHB to DHFL.

4.16 The loans above granted by NHB were secured by way of pari passu charge inter alia over the movables including receivables of DHFL with the other lenders inter alia by way of Joint Deed of Hypothecation dated July 24, 2010 ("**JDoH 2010**"), First Supplemental Joint Deed of Hypothecation dated June 29, 2011 **("Supplemental DoH 2011**"), Second Supplemental Joint Deed of Hypothecation dated June 26, 2012, Third Supplemental Joint Deed of Hypothecation dated June 20, 2013, Fourth Supplemental Joint Deed of Hypothecation dated June 25, 2014 ("**JDoH 2014**"), and the Fifth Supplemental Deed of Hypothecation dated June 18, 2015.

4.17 The NHB was the Regulator of 'Housing Finance Institutions/Companies' ("HFCs") till the changes brought about by the Finance Act, 2019 ("Finance Act"), with effect from August 9, 2019, under which Reserve Bank of India ("RBI") had been made the Regulator for HFCs[4] in addition to being the Regulator for NBFCs.

4.18 The Ministry of Corporate Affairs ("MCA") vide its press release dated November 15, 2019, notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 ("FSP Rules") inter alia to provide a framework for the insolvency and liquidation proceedings of systematically important Financial Service Providers ("FSPs").

4.19 On November 20, 2019, the RBI had by way of its press release notified that the Board of Directors of 'Dewan Hosing Finance Corporation Limited' ("DHFL / Respondent No. 2") had been superseded by the RBI in the exercise of its powers under Section 45-IE (1) of the Reserve Bank of India Act, 1934 owing to governance concerns and defaults by DHFL in meeting various payment obligations ("Press Release"). In this Press Release, it was also stated that the RBI also intends to initiate the resolution of DHFL and that it shall apply before the Adjudicating Authority for appointing the Administrator as the Insolvency Resolution Professional.

[4] Housing Finance Companies

4.20 By press release dated November 22, 2019, in exercising the powers conferred under Section 45, I.E. 5(a) of the Reserve Bank of India Act 1934, the RBI constituted a three-member Advisory Committee to assist the Administrator in discharge of his duties.

4.21 The RBI filed the Company Petition on November 29, 2019, under Rule 5(a)(i) of the FSP Rules before the Hon'ble Adjudicating Authority, Mumbai Bench, for initiating the corporate insolvency resolution process ("CIRP") of the Corporate Debtor under the provisions of the Code. The Adjudicating Authority Mumbai Bench vide order dated December 03, 2019, admitted the Company Petition filed by the RBI ("Admission Order").

Vide the same Admission Order, the Adjudicating Authority also confirmed the appointment of Mr R. Subramaniakumar as the Administrator of DHFL to perform all functions of the "Resolution Professional" under the Code and conduct and complete the CIRP of the Corporate Debtor.

4.22 NHB filed Form 'C' for submission of the claim as the Financial Creditor on December 07, 2019, with the Administrator of DHFL upon initiation of CIRP.

Accordingly, the Administrator had admitted the claim of Rs. 2,436.67 crores submitted by NHB after verification. NHB is a member of CoC, having 2.81% of the voting share and participating and exercising all rights as available to a Financial Creditor of DHFL.

4.23 By the provisions of the Code, the Administrator issued an advertisement on January 28, 2020, inviting 'Expressions of Interest ("EoIs") relating to the Corporate Debtor and 24 such EOI's were received from interested applicants.

4.24 On January 30, 2020, Notification No. S.O. 464 (E) was issued by the MCA, which inter alia provides as under:

> *"**1. Receivables for Third Parties:***
> *Where a financial service provider is contractually obliged, as on the insolvency commencement date, to act as a servicing or collection agent on behalf of third parties in respect of a transaction such as securitisation or lending arrangement, the Administrator shall-*
> *…*
> *(c) **ensure that the receivables, in respect of such transactions, collected are deposited and maintained in a separate account and are not merged with the funds or other assets of such financial service provider**;*
>
> *(d) oversee the operation of the account referred to in item (c);*
>
> *(e) transfer such receivables collected and deposited in the account referred to in item (c) in accordance with the terms and conditions of such contract:*
>
> *Explanation.- For the purpose of this item, any fee received by the financial service provider as a servicing or collection agent shall not be transferred to the account referred to in item (c), and it shall be dealt with by the Administrator as forming part of the assets of such financial service provider.*

2. Assets of Third Parties

Where the financial service provider has, as on the insolvency commencement date, in its custody or possession assets owned by its customers or counterparties or by counterparties of its customers under a contract, and is under an obligation to return or transfer such assets in accordance with the terms and conditions of such contract, the Administrator shall-

....

(b) ensure that such assets are maintained in a separate and distinct manner, capable of identifying them contract-wise, and are not merged with those of financial service provider;

(c) return or transfer such assets to the person entitled to receive it in accordance with the terms and conditions of such contract:

Provided that when such assets shall not be returned by the Administrator, due to breach of the terms of the contract, the financial service provider has become entitled to retain such assets for itself or dispose of the same to realise its dues."

4.25 The request for Resolution Plans was initially issued by the Administrator on March 03, 2020, and this was subsequently amended from time to time on March 17, 2020, August 15, 2020, and September 16, 2020 (collectively, the "RFRP").

4.26 An Application being I.A. No. 1104 of 2020 in C.P. (I.B.) No. 4258/MB/C-II/2019 was filed by NHB in the Company Petition before the Adjudicating Authority. Subsequently, on August 07, 2020, an Additional Affidavit was also filed by NHB (collectively referred to as the "Application").

4.27 By way of this Application, relying primarily on Section 16B ("Section 16B") of the NHB Act and the 'MOA' entered into between DHFL and NHB.

4.28 The NHB contends that all the loan receivables of DHFL, where such loans have been financed or refinanced wholly or partly by NHB ("Tagged Receivables"), are held in trust and on behalf of NHB by DHFL. NHB accordingly sought declaratory reliefs, as mentioned above.

4.29 By order dated August 3, 2020 ("August Order") passed in the Application, the Learned AA/ NCLT directed that formal notice be issued to all the respondents, including "members of the CoC" of DHFL. The NCLT vide the August Order had also directed, among other things, that "R.P./Administrator is expected to maintain status quo as of today so far (sic) it relates to major disbursement of amount amongst Creditors. However, it is also made clear that such status quo would not affect and prevent the R.P./Administrator from meeting urgent and necessary expenses for day to day operation of the Corporate Debtor Company as a going concern."

4.30 Replies, Rejoinders and Sur-Rejoinders were filed on behalf of Union Bank of India, Catalyst Trusteeship Limited, CoC and 'NHB' during this period about the Application. The NCLT vide its order dated November 17, 2020, had directed that no voting should take place about the manner of distribution of proceeds of the approved Resolution Plan and the approval of final Resolution Plans under Section 30(4) of the Code till the next date of hearing, on the NHB Application. In its meeting, the CoC discussed this in detail on November 17, 2020. The CoC

believed an amicable arrangement might be reached with NHB to facilitate and expedite the Insolvency Resolution Process maximisation of value all creditors and stakeholders. The Arrangement arrived at between the CoC and NHB ("Arrangement") in essence provided that as follows:

(a) Pending the hearing of the Application NHB and CoC shall get the November 17 Order passed by NCLT vacated;

(b) **Once the Resolution Plan is approved and implemented, an amount equivalent to the total amount outstanding to NHB, i.e. Rs. 2436,67,20,412/- shall be kept aside from the consideration paid by the resolution applicant for the retail loan assets of DHFL through a combination of cash (which would be kept in a separate interest-bearing no-lien account) and instruments**. **The aforesaid amount shall be kept aside until the Application is finally decided by the NCLT, NCLAT or the Hon'ble Supreme Court, in case an appeal is filed.**

(c) In the event of the NHB Application finally being decided by the NCLT or by the Hon'ble NCLAT or the Hon'ble Supreme Court, as the case may be:

(i) **If finally decided in favour of NHB**, the amount kept aside as aforesaid (i.e. Rs. 2436,67,20,412/-) shall be paid to NHB minus the pro-rata share already paid to NHB in terms of paragraph xix (c) above, as per paragraph 6(e) of the Arrangement.

(ii) **If finally decided in favour of the CoC**, the entire amount (i.e. Rs. 2436,67,20,412/-) shall be distributed amongst the creditors, including NHB, as per their pro-rata share in terms of the resolution plan as per paragraph 6(f) of the Arrangement

(d) In view of the Arrangement and upon filing the joint Application by NHB and CoC and placing the Arrangement before the NCLT, it was agreed that NHB should not demand any payment from the Administrator and DHFL till the final adjudication of the NHB Application by the NCLT (by the NCLAT or the Hon'ble Supreme Court as the case may be in case of an appeal against the order of the NCLT or the NCLAT).

(e) It was clarified that (i) the Arrangement is without prejudice to the right of recourse available to the Applicant against sureties/guarantors for recovery of a debt due to the Applicant on account of default by DHFL as per their respective guarantee agreements and (ii) since the entire amount claimed by the Applicant is agreed to be kept aside in the manner contemplated in the Arrangement pending disposal of the proceedings as set out in Arrangement, it will not be necessary to incorporate the statutory right asserted by the Applicant about the 'Tagged Accounts' under Section 16B in any resolution plan which may be submitted or approved by this Tribunal.

4.31 By way of order dated December 3, 2020, the Arrangement was taken on record by the NCLT.

4.32 The Resolution Plan dated December 22, 2020 ("Resolution Plan") submitted by Piramal Capital & Housing Finance Limited ("Piramal") in relation to DHFL, was approved by a majority of 93.65% of the CoC members by voting share. The Administrator then filed the IA No. 449 of 2021 (in the Company Petition) (the "Plan Approval Application") under Section 30 read with Section 31 of the Code with the Adjudicating Authority for approval of the Resolution Plan.

4.33 In terms of Rule 5(d)(iii) of the FSP Rules, RBI issued a letter dated February 16, 2021, giving its no objection to Piramal for change in control/management/ownership of the Corporate Debtor subject to conditions mentioned in the letter.

4.34 By way of order dated June 7, 2021, the Application filed by NHB was allowed by the NCLT and inter-alia, **the Arrangement was made absolute ("Impugned Order").** By way of a separate order, the Plan Approval Application was allowed by the Learned AA/ NCLT on the same date.

5. **Appellants Submissions**

5.1 Union Bank of India has filed the Appeal on behalf of the Committee of Creditors ("CoC)" "Appellant") of Dewan Housing Finance Corporation Limited ("Corporate Debtor"/DHFL) under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("Code") against the order dated June 7, 2021 ("Impugned Order") passed by National Company Law Tribunal, Mumbai Bench ("NCLT") in LA No. 1104 of 2020 ("Application") filed in Company Petition No. 4258 of 2019

("Company Petition") whereby the NCLT has among other things allowed the Application filed by Respondent No. 1, National Housing Bank ("NHIB").

5.2 Relying primarily on Section 16B ("Section 163") [paragraph 9(III)(K) at page 38, pdf page 46 of Vol. I of the Appeal] of the National Housing Bank Act, 1987 ("NHB Act"), National Housing Bank ("NHB") has argued that all the loan receivables of Piramal Housing Finance Corporation Limited erstwhile Dewan Housing Finance Corporation Limited ("DHFL"), where such loans have been financed or refinanced wholly or partly by NHB, ("Tagged Receivables") are held in trust and on behalf of NHB by DHFL and hence do not form part of the assets of DHFL and should be returned to NHB.

5.3 **ARRANGEMENT IN THE APPLICATION**

i) The NCLT vide its order dated November 17, 2020, in the Application had directed that no voting should take place in relation to the manner of distribution of proceeds of the approved resolution plan and the approval of final resolution plans under Section 30 (4) of the Code till the next date of hearing in the NHB Application ("November 17 Order") [Annexure 1-13 at pages 363 - 364, pdf pages 154 - 155 of Vol. II of the Appeal]. The November 17 Order was discussed in detail by the CoC. The CoC was of the view that an amicable arrangement may be reached to facilitate and expedite the corporate insolvency resolution process.

ii) Hence, an arrangement arrived at between the CoC and NHB ("Arrangement") (Annexure A-14 (Colly) at pages 370 - 373, pdf pages 161 - 163 of Vol. II of the Appeal). By order dated December 3, 2020, the Arrangement was taken on record by the NCLT. (Annexure 4-14 (Colly) at pages 365 - 367, pdf pages 156 - 158 of Vol. II of the Appeal). The

Arrangement is also part of the Resolution Plan and Distribution Mechanism approved by the CoC. As per terms of the Arrangement, inter alia NHB is not entitled to receive any payment other than as set out in the Arrangement, and any other payment will only be made subject to the outcome of the present Appeal or outcome of any further appeal before the Hon'ble Supreme Court.

A. The transaction with NHB is a purely commercial lending transaction, and there is a debtor-creditor relationship between DHFL and NHB.

5.4 The NCLT erred in not appreciating that DHFL and NHB are purely lending and borrowing commercial transactions.

5.5 DHFL entered into the MOA with NHB for availing financial assistance from time to time from NHB under its refinance and other schemes. Thus, DHFL takes a loan from NHB, with a specified repayment schedule (paragraph 9(I)(B)(iii) at page 35, pdf page 43, Annexure A-2 at page 71, pdf page 79 of Vol. I of the Appeal), which has to be repaid to NHB by DHFL as a borrower. Hence, DHFL and NHB is a simpliciter debtor-creditor relationship. The same is also amply clear from the following:

i. DHFL applies to NHB for financial assistance for housing or refinance the housing loans.

ii. NHB, from time to time, has conveyed its acceptance in providing refinance assistance to DHFL from 2005 until January 9, 2017, by way of sanction letters.

iii. There exists a specific repayment schedule for repayment of the loans given by NHB. The repayment obligation of DHFL to NHB is independent of any recovery that DHFL may make of the loans provided by DHFL to its customers, including the Tagged Receivables. Repayment by DHFL to NHB is from its common pool of monies/assets just as repayment to any of its other creditors. Therefore, there exists no separate collection for repayment to NHB.

iv. Facilities (fund based and non-fund based) were provided to DHFL by various banks and financial institutions (including NHB). These facilities were secured by various Hypothecation deeds executed between 2010 and 2018 in favour of the creditors, including NHB (directly or through Security Trustee) by DHFL. Under these deeds of hypothecation, pari passu security interest has been created over assets of DHFL, including receivables and Tagged Receivables.

5.6 The Learned AA/NCLT erred in not considering that the rights of NHB under Section 16B are additional security and not a transfer of ownership of any assets of DHFL to NHB. Once DHFL is admitted into insolvency, any rights of a creditor, including NHB under any other prior statute, are overridden by the Code.

5.7 DHFL remains the owner of the Tagged Receivables, and NHB does not get ownership of the same. The NCLT gravely erred in not appreciating that Rule 10 of the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of

Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 ("FSP Rules") and the Notification No. S.O.464 (E) dated January 30, 2020 ("January 30 Notification") (paragraph 7(xi) on page 25, pdf page 33 of Vol. I of the Appeal) exclude only those assets which are owned by a third party and which are in the hands of the corporate debtor under a contract, from the scope of the moratorium under Section 14 of the Code. Rule 10 of the FSP Rules contemplates a principal-agent relationship, not a trustee-beneficiary relationship. The loans given by NHB do not establish a trustee beneficiary relationship between NHB and DHFL.

B. NHB is a Financial Creditor and cannot be given any special creditor status by the NHB Act.

5.8 NHB and DHFL have a contractual relationship under which NHB has lent amounts to DHFL for time value, and if Section 16B is constructed to give a special right to NHB, it will run contrary to the Code.

5.9 NHB being a statutory body, does not give NHB a better right than any other financial creditor. NHB cannot, on the one hand, claim to be a statutory body (in which case its debts would be crown debts) and at the same time claim its entire outstanding as a creditor having special rights. Various other creditors of DHFL, including Life Insurance Corporation, State Bank of India etc., are statutory bodies and are given no priority under the Code. Hence, there is no basis to treat NHB differently.

5.10 It is now well settled that the Code is a special statute that overrides all other statutes inconsistent with the Code. The Code is a later enactment; the rights of NHB as a Financial Creditor to DHFL will be determined in terms and will prevail over the NHB Act.

C. Section 16B is only a right for repayment of any amounts due to NHB from DHFL. Thus, Section 16B runs in direct conflict with provisions of the code which specify the priority and right of payment of all creditors of a Corporate Debtor.

5.11 Section 16B only creates a right of repayment and is akin to security. It is submitted that the NCLT erred in not considering that the trust deemed to be created under Section 16B by legal fiction and is designed for and limited to the payment of the outstanding debt owed by DHFL to NHB. Any rights as may be claimed by NHB under Section 16B are therefore founded on and for repayment of loans granted by NHB

5.12 Clause 10 of the MOA, NHB relied upon which reads "shall be paid over to the Housing Bank to the extent required to repay the Financing Institutions obligations thereunder and shall pending such payment hold all such sums so realised for and on behalf of the Housing Bank.

5.13 As is clear from the language of Section 16B, the rights of NHB thereunder are only in the nature of an obligation attached to assets of DHFL (i.e. the Tagged Receivables). The obligation is to repay NHB from such assets to the extent that any amount is outstanding, and the repayment must be made. The fact that

Section 16B provides for the right to be repaid is admitted by NHB in its Rejoinder. Hence, Section 16B creates only a right of repayment. Therefore, security for repayment, in case DHFL has not been able to make payments, in the ordinary course, in favour of NHB from certain assets of DHFL.

5.14 Exercise/enforcement of such rights resulting in repayment to NHB once DHFL is admitted into CIRP is in direct conflict with the provisions and scheme of the Code, including Section 14 of the Code. This is because no creditor of DHFL can be repaid during the moratorium or in priority to any other creditor of DHFL under the scheme of the Code.

5.15 Further, all prior debts of DHFL, including those of NHB, shall be dealt with and satisfied in terms of the Resolution Plan and hence any alleged rights under Section 16B over the Tagged Receivables cannot continue.

5.16 The case of NHB is that the provisions of the NHB Act give NHB special privileges. A well-established principle of law is that when two special statutes contain non-obstante clauses, the later non-obstante clause will prevail over the earlier statute. It is further well established that in case of any inconsistency between the provisions of the Code and any other enactment, the provisions of the Code will prevail. [Innoventive Industries Ltd. v. ICICI Bank and Ors. [(2018) 1 SCC 407] (Paragraphs 13, 59-61).; Rajendra K. Bhutta v. Maharashtra Housing and Development Authority & Ors. [(2020) 13 SCC 208] (paragraphs 25, 27); Principal Commissioner of Income Tax v. Monnet Ispat and Energy Limited,

[(2018) 18 SCC 786) (paragraph 2); Pioneer Urban Land and Infrastructure Limited and Ors. vs Union of India (UOI) and Ors. [(2019) 8 SCC 416) (paragraphs 29 and 30); Duncans Industries Ltd. v. A.J. Agrochem [(2019) 9 SCC 725] (paragraphs 91 to 103); ICICI Bank Ltd. v. ABG Shipyard Ltd. [2017 SCC Online NCLT 12031] (paragraph 9 and 12); Kalparaj Dharamsheel v. Kotak Investments (Civil Appeal. 2933-44/2020) decided by the Hon'ble Supremer Court on March 10, 2021 (paragraph 7.4); Allahabad Bank v. Canara Bank and Ors. [(2000) 4 SCC 406] (paragraphs 38 to 40); Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. & Ors. [(2001) 3 SCC 71] (Paragraphs 9 & 10)]

5.17 The NCLT gravely erred in holding no conflict between the Code and the NHB. From the aforesaid, it is amply clear that there is an apparent conflict between the NHB Act and the Code. Hence, the Code, which was enacted later, will prevail, and the recovery of the amounts by NHB can only happen within the framework of the Code; this has also been upheld in the case of Directorate of Enforcement V/s Manoj Kumar Agrawal and Others (Company Appeal (AT)(Ins)No.575/2019 ("Manoj Kumar Judgment") (paragraph 9(III) (Y) at page 41, pdf page 49 of Vol. I of the Appeal] relied on by the NCLT in the Impugned Order.

D. The exception under Rule 10, read with January 30 notification, is not available to NHB, as NHB is not the owner of the tagged receivables.

5.18 NHB has claimed that NHB is the owner of the Tagged Receivables. The said submission of the NHB is entirely devoid of merit in fact or law. Even

assuming that full effect of the 'trust' is given to NHB, it can never be considered as an owner of the Tagged Receivables and therefore, the exception under Rule 10 of the FSP Rules r/w the January 30 Notification is not applicable for the following reasons:

a) A trustee and not a beneficiary is the owner of Trust Property under Section 3 of the Indian Trusts Act, 1882 ("Trust Act").

b) The author of the trust is the person who reposes or declares the confidence;

c) The Trustee is the person in whom the confidence is reposed and accepted. He is the owner of the Trust property - in this case DHFL;

d) The beneficiary is the person for whose benefit the confidence is accepted - in this case, NHB;

e) Trust property is the subject matter of the trust, i.e. the property to which certain obligations to or rights of the beneficiary are attached - in this case, the Tagged Receivables;

f) Beneficial interest or interest of the beneficiary is his right against the trustee as owner of the trust-property - in this case, the right of NHB to be repaid its dues (i.e. the loans given to DHFL) from the Tagged Receivables; (1) Instrument of trust is the instrument, if any, by which the trust is declared – in this case, there is no trust deed/any other instrument

creating the trust nor any trust account created. NHBs case is that Section 16B creates trust.

g) It is well established that under Section 3 of the Indian Trusts Act, 1882 ("Trust Act"), a trust is only an obligation annexed to the ownership of property (Kansara Abdul Rehman Sadruddin v. Trustees of the Maniar Jamat 1967 SCC OnLine Gujrat 10 (para 8)).

h) Hence, under the Trust Act, the ownership of the trust property is not with the beneficiary and always remains with the Trustee. Therefore, the beneficiary is only entitled to the obligation annexed to such property and does not become the owner of the Trust Property.

i) Under Section 5 and Section 6 of the Trusts Act, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts: (i) an intention on his part to create a trust; (ii) the purpose of the trust; (iii) the beneficiary; (d) the trust-property; and (iv) Transfers the trust-property to the trustee (unless the author is the Trustee himself). Thus, under the Trust Act, only the Trustee can be the owner of the trust property.

j) From all the above, it is clear and unmistakable that ownership of property by the trustee is a sine qua non of a valid trust, and as per the Trust Act, only the trustee can be the owner of the trust property. [(In Chandan v Longa Bai (AIR 1998 MP 1) and Himansu Kumar Roy v Moulavi

Hasan Ali Khan (AIR 1938 Cal 818 (para s)]; W. O. Holdsworth and Others v/s. The State of Uttar Pradesh (AIR 1957 SC 887) (paragraphs 18, 21, 22), Rajgopal Raghunathdas Somani v. Ramchandra Hajarimal Jhavar (1967 (69) Bom LR 472] (paragraphs 19, 25)].

Hence, the Tagged receivables could never be a property of NHB.

Creation of trust in contract with an actual transfer of actionable claim

k) The creation of a trust is in stark contrast with the transfer of an actionable claim. The Transfer of Property Act, 1882 under Section 3 and Section 130 contemplates the transfer of an actionable claim, following which all rights about such claim come to vest in the transferee. The same language is not found under Section 16B of the NHB Act.

l) Hence, in the case of NHB, there is no transfer of the claim to NHB, the Tagged Receivables never become the property of NHB, and DHFL continues to remain the owner of the Tagged Receivables. This is amply clear from the facts and documents on record, including:

a. In his letter dated March 17, 2020, the Administrator has stated that the Tagged Receivables are reflected in the balance sheet of DHFL.

b. By letter dated November 20, 2019, NHB has acknowledged that Tagged Receivables are security created by DHFL on its assets in favour of NHB.

c. Clause 7(b) read with clause 10 of the MOA specifically requires DHFL to give NHB an irrevocable power of attorney to "create a mortgage or charge in its favour on the assets held by the Financing Institution including those described In Clause 10". Hence, the assets, including the Tagged Receivables, are acknowledged by NHB to be assets of DHFL.

m) Clause 13(g) of the MOA requires DHFL to maintain separate accounts and records for the loans financed or refinanced by it and, unless otherwise agreed, the housing loans flagged against NHB's assistance. However, maintenance of such separate accounts does not constitute a transfer of Tagged Receivables to NHB and shows that they remain assets of DHFL (reflected in the balance sheet as well).

n) There is no property transfer from DHFL to NHB in Section 16B or the MOA. Thus, NHB as beneficiary cannot be the owner of the trust property and is only at best a beneficiary. Hence, Rule 10 of FSP Rules and the January 30 Notification do not apply to NHB.

o) NHB has contended that Rule 10 also includes "any funds/securities required to be held in trust for the benefit of third

parties". However, on a complete reading of both the January 30 Notification and Rule 10, it is clear that the aforesaid notification and rule will apply only in those cases where the asset is owned by a party other than the FSP.

E. Without prejudice to the above, all creditors have a pari passu charge over the 'tagged receivables'.

5.19 NHB has pleaded that the receivables of DHFL are not secured pari passu with other lenders as the NOC dated September 25, 2012 ("NOC Letter") given by NHB to GDA Trusteeship Limited (now known as Catalyst Trusteeship Limited) was subject to the covenants and restrictions in the MOA. However, the case of NHB cannot be sustained in law or fact:

a. Section 16B neither (i) contemplates exclusion of any rights that DHFL has to create security over the Tagged Receivables; nor (ii) does it take away DHFL's legal ownership over the Tagged Receivables; nor (iii) excludes or precludes NHB's ability as a beneficiary to allow the creation of security over the Tagged Receivables.

b. By way of the MOA (Clause 9), NHB has recognised the creation of charges over the Assets, including receivables of DHFL.

c. As stated above, under the MOA of NHB, required DHFL to provide a power of attorney to create a charge on, among other things, the Tagged Receivables.

d. Before issuing the NOC Letter, in 2010 and 2011, NHB itself (not through a security trustee) entered into deeds of hypothecations by which NHB acknowledged that it has pari passu charge on assets of DHFL with other lenders. No exception has been carved out for the Tagged Receivables.

e. A sample clause in the deed of hypothecation is at (paragraph E.1(vi) at page 413, pdf page 204 of Vol. II of the Appeal)

5.20 Further, the fact that NHB has itself created pari passu charge over all assets of DHFL (which include the Tagged Receivables) is clear from the following documents:

a. The sanction letters issued by NIIB (including letters dated January 21, 2009, and March 3, 2016).

b. Hypothecation deeds between 2010 and 2018 the creditors including NHB (directly or through Security Trustee) and DHFL.

c. Authority letters (including a letter dated June 20, 2018) provided by NHB to Catalyst.

d. The annual reports of DUFL for the F.Y. 2016-17, 2017-18 and 2018-19.

5.21 Where NHB has desired to exclude properties of DHFL from the pari passu charge in recognition of statutory provisions, it has expressly provided for such exclusion in the deeds of hypothecation. For example, NHB has expressly

excluded the floating charge created in favour of depositors as per the provisions of Section 29B of the NHB Act from the pari passu charge. However, no such exception has been carved out for the Tagged Receivables.

5.22 Hence, any charge of NHB on Tagged Receivables is subject to the charge of lenders and only after the satisfaction of the charge of the lenders can the same be utilised for the benefit of NHB. NHB itself, having waived its alleged benefit under the NHB Act by ceding pari passu charge in favour of all other lenders, cannot now seek to invoke the said additional privilege.

F. The AA/ NCLT has passed the impugned order without considering the submissions of the CoC or the Administrator, and hence there has been a violation of the principles of natural justice;

5.23 A bare perusal of the Impugned Order clarifies that the Learned AA/ NCLT gravely erred in passing the Impugned Order.

5.24 **Whether or not the Tagged Receivables are, in fact, third party assets and, therefore, not assets of DHFL, because of the operation of Section 16B of NHB Act has been not considered by the NCLT.**

5.25 The Learned AA/ NCLT has further failed to deal with the issue and provide any reasons as to how, despite the Tagged Receivables being an asset of DHFL as recorded in its books and recognised as such by the Administrator as well, ought now to be considered as a third party asset by operation of a statue, i.e. Section 16B when the Code provides that all assets of DHFL have to deal with

under the Code. Any other statute creating any other right to the contrary must give way to the Code.

5.26 The NCLT has not dealt with this fundamental de novo question in the first insolvency relating to financial service providers. Accordingly, the NCLT has incorrectly proceeded to presume that NHB and not DHFL own the Tagged Receivable.

G. The NCLT has passed the impugned order by incorrectly relying on the ABHILAS judgment and Manoj Kumar judgment

5.27 The NCLT erred in relying on the MCGM V/s Abhilasha Lal & Ors. [Civil Appeal 6350 of 2019] ("Abhilash Judgment") and the Manoj Kumar Judgment in order to support the decision in the Impugned Order.

5.28 The NCLT failed to appreciate that the Abhilas Judgment has no applicability to the facts in the Application inter alia for the following reasons:

a. In the Abhilas Judgment, the assets in question were assets of MCGM, and hence, the court held that Section 238 could be of importance when the properties and assets are of a debtor and not a third party. Accordingly, the Abhilas Judgment does not deal with the issue of whether the particular receivables are assets of a corporate debtor for applicability of the decision to the Application.

b. <u>The NCLT, without even deciding whose assets the Tagged Receivables are and without considering the submissions of the CoC that</u>

the Tagged Receivables are assets of DHFL, has passed the Impugned order. As set out above, DHFL, which has created security in favour of NHB and the Tagged Receivables, are assets of DHFL.

5.29 The NCLT failed to appreciate that the Manoj Kumar Judgment has no applicability to the facts in the Application inter alia for the following reasons:

a) The NCLAT was dealing with a situation where the properties of a debtor were attached. Accordingly, the NCLAT was pleased to inter alia hold that "Attachment remaining in force would affect the value of the property and prospective applicants may not respond in the manner in which they would if the property is not under active attachment or seizure.

b. In the said matter, the Court was dealing with quasi-judicial proceedings and the continuation of the same in light of Section 14 of the Code.

c) It is pertinent that in the judgment, it was also found that the Code will have an overriding effect even over a special statute (enacted prior in time) as it has the specific object, which is to consolidate and amend laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons and to promote entrepreneurship, availability of credit and balance the interest of all stakeholders including alteration in the order of priority of payment of Government dues.

d. Hence the Manoj Kumar case supports the case of the CoC that the Code will override the NHB Act. The Manoj Kumar judgment also finds that it is incumbent on the Resolution Professional to take possession/control of all assets on the debtor's balance sheet.

e. The NCLAT in this matter was not ceased of an application from a Financial Creditor seeking priority/preference in payment.

H. SECURITIZATION TRANSACTIONS

5.30 NHB, before the Learned AA/ NCLT, has sought to compare the securitisation transactions undertaken by DHFL to the relationship between NHB and DHFL. It is clarified that the securitised loans have been sold to the banks/ financial institutions on a "true sale" basis. Therefore, the loans are now a property of the said assignee banks/ financial institutions and not the property/asset of DHFL. DHFL is merely a collection and service agent and not the owner.

5.31 The FSP Rules and January 30 Notification expressly cover such assets, which are third party assets in the hands of the corporate debtor or where the corporate debtor is acting as a collection and servicing agent. Hence, such transactions are expressly permitted under the FSP Rules and January 30 Notification. Accordingly, the trade with NHB is not covered by Rule 10 of the FSP Rules and January 30 Notification.

5.32 Appellant further contends that the present Appeal is not connected with the appeals filed by the fixed deposit holders or any other appeals filed in connection with the CIRP of DHFL.

Ist Respondent's National Housing Bank's Submissions;

6. Respondent No. 1 is the original Applicant who had filed the Misc. Application MA No. 1104 of 2020 in Company Petition bearing Company Petition (IB) 4258 of 2019 filed by Reserve Bank of India under Section 227 read with clause (zk) of sub-section (2) of Section 239 of the Insolvency and Bankruptcy Code, 2016.

6.1 The Learned AA/NCLT, by its order dated 7th June 2021, was pleased to allow the said Application in terms of prayer clauses (a) (b), (c) and (d) reproduced hereinabove. The NCLT vide the said Order was also pleased to declare the Interim Arrangement dated 3rd December 2021 entered into by and between the Appellant and Respondent No. 1 as absolute. The Appellant has not assailed the said Interim Arrangement in the present Appeal.

6.2 The Appellant challenges the said Order dated 7th June 2021. The AA/NCLT had approved the Resolution Plan of Dewan Housing Finance Corporation Limited ("Corporate Debtor"). The total resolution amount of Rs. Thirty-seven thousand two hundred fifty crores have considered the admitted claim of Rs. 2436.67 crores of this Respondent No.1, NHB. The Appellant has

accepted the said Resolution in its entirety, and there is no dispute regarding the entitlement of NHB[5] to the stated amount of Rs.2436.67 crore.

6.3 The NHB is a Government of India-owned entity set up under a Special Statue viz. National Housing Bank, 1987 ("the NHB Act"). It has the mandate under NHB Act to operate as the principal agency to promote housing finance institutions and provide financial and other support to such institutions. To meet the objective of its establishment, extended refinance assistance to primary lending institutions (PLI's), including Housing Finance Companies (HFCs). Thus, this Respondent extends refinance to the housing finance institutions to ease the liquidity in the housing sector.

6.4 Between 2003-2004 and up to 2017, it had granted refinance facility to the Corporate Debtor on the terms and conditions more particularly set out in the Memorandum of Agreement dated 27th February 2004 read with the sanction letters issued from time to time, under it, the Corporate Debtor executed security documents in favour of this Respondent No.1. When managing separate security documents, this Respondent NHB also called upon the Corporate Debtor to provide a list of loans sanctioned and disbursed to its borrowers. These individual loans were clearly and distinctively identifiable.

6.5 Thus, once earmarked to NHB, against the refinance facility, they cannot be dealt with and changed without prior consent, as long as they continue to

[5] National Housing Bank

remain in the books of the Corporate Debtor. Thus, the said earmarked and tagged loans were required to stay unencumbered until the amount refinanced remained outstanding. However, between the period 2018-2019, the Corporate Debtor started committing defaults in payment of the amounts refinanced by the Respondent NHB. Given the same, this Respondent NHB called upon the Corporate Debtor under various letters to make good the defaults; however, due to failure to do so, the Respondent, NHB, finally recalled the entire outstanding amounts as due and payable by the Corporate Debtor.

6.6 Further, the provisions of the Code read along with the provisions of the NHB Act are harmonious, and there is no inconsistency in the provisions of both the statutes. The Respondent NHB states that the principle underlying Section 238 of the Code would not apply in the present facts of the case as contended by the Appellant.

6.7 The expressions used in Section 16B viz. "accommodation" and "remaining outstanding" mean the "entire refinance outstanding" against the borrowing institution. This is made explicit from the import of Section 16 B(2) of the NHB Act, which provides that '**all securities obtained by the borrowing institution under the tagged loans shall be held in trust for this Respondent'**. Such securities relate to the entire refinance outstanding. Section 16 B unequivocally impresses with trust all sums received by the borrowing institutions; all these amounts are received by such borrowing institution, i.e. the Corporate Debtor 'in trust' for this Respondent. They are bound to pay this Respondent 'NHB' as

its factual and legal owner. Section 16B is thus an unequivocal legislative intent to determine the higher priority according to the nature of the relationship between the Corporate Debtor and Respondent No.1. There is no inconsistency in applying the NHB Act vis-à-vis the Code.

6.8 Further, the FSP Rules read with S.O. 464 dated 30th January 2020, which notifies the manner of dealing with the third-party assets in custody or possession of such financial service providers covers the nature of the transaction between this Respondent and the Corporate Debtor. Further, suppose we assume that said notification does not apply to the Assets held in trust under Section 16B of the NHB Act since how these third-party assets are to be dealt with are already provided in clear terms in the NHB Act. In that case, the above notification cannot be said to derail the NHB Act, which is a special statute by itself. The NHB Act is thus a complete Code by itself to the extent it deals with the affairs of this Respondent and the housing finance companies. The provisions of the NHB Act make it explicit that there is a clear and direct public interest element involved in the statute and the role of this Respondent. It is thus impermissible to travel beyond the statutorily defined nature of the relationship.

6.9 Thus, the provisions of the Code and the NHB Act do not conflict with each other in as much as Section 16B of the NHB Act segregates a pool of assets representing amounts received in repayment or realization of loans and advances financed or refinanced by Respondent NHB to be held in trust for and paid to it

by the Corporate Debtor. The said legislative device carves out such amounts from the moratorium under Section 14 of the Code and the Insolvency Resolution Process. Therefore, the said NHB Act and Code must be read harmoniously. This is, in fact, the finding of the NCLT in its Judgment and Order dated 7th June 2021. Moreover, the FSP Rules, 2019 as well as the Notification dated 30th January 2020, framed under the Code specifically contemplate that a Financial Service Provider ("FSP") may have custody or possession of third-party funds, securities or other assets and seeks to ring-fence the same from general effects of the Moratorium under Section 14 of the Code. Thus, once Rule 10 of the FSP Rules, 2019 excludes the amounts/funds held in trust by FSP from the moratorium under Section 14 of the Code, Rule 5 of the FSP Rules, 2019, there can be no question of any "conflict" between the Code and the NHB Act. In the present case, once the trust funds are excluded under Rule 10(2) of the FSP Rules, 2019, the manner of dealing with such third-party trust funds and properties is provided in Section 16B of the NHB Act itself, i.e. "to be paid to this Respondent". Thus, in light of the above and the absence of any provision in the Code specifically rendering the operation of Section 16B of the NHB Act inapplicable to the Code, a harmonious construction of the two statutes is the only legally sustainable approach to be adopted. Therefore, Section 238 of the Code, which is intended to override inconsistencies in other laws, would not be triggered in the facts of the present case.

6.10 Section 16B (1) provisions are entirely consistent with the mandate of Rule 10 of the FSP Rules, 2019, which excludes such assets and funds held in trust

from the moratorium. The two Acts/Rules scheme is consistent and complementary, not conflicting.

6.11 Lastly, given the provisions of the NHB Act, Respondent NHB is a developmental institution, and its lending to Housing Finance Institutions and exposure are not purely on commercial lines like any other commercial bank. The Respondent NHB is an integral partner in formulating and implementing India's housing and housing finance policies by its very objects and reasons. Section 14 of the NHB Act provide for the businesses and activities that the Respondent NHB can undertake. As per Section 14(2), the Respondent NHB is entitled to make loans and advances, entering into loan agreements to record the transactions part of this Respondent's business. Where these loans involve refinancing, the provisions of Section 16B have an overriding, over-arching application. Section 19, as the provision of Section 14 of the NHB Act, also empowers the NHB to impose any conditions that it may think necessary and reasonable for protecting its interests, which can be through an agreement. Such agreements that this Respondent has entered into with the Corporate Debtor do not dilute this NHB's statutory rights under the NHB Act or make the Respondent NHB a financial creditor, ignoring the overriding trust provisions. The provisions of Sections viz. 16B, 19, 20, 21, 22 give enormous statutory powers to the NHB, distinguishing it from other Financial Creditors.

6.12 Without Prejudice, Respondent was to be treated at par with other Financial Creditors/commercial lenders; hypothetically, any CIRP against a

Housing Finance Company who had borrowed amounts totalling to this Respondent net worth would lead to a situation where the NHB may be forced into liquidation, as it could then legally result in the entire net worth of Respondent NHB being extinguished. This was never and could not ever be the legislative intent while enacting the National Housing Bank Act.

6.13 Without Prejudice, if the NHB is treated as financial creditors, the same could be contrary to the provisions of (i) NHB Act; (ii) Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019; and (iii) Notification bearing S.O. 464 (E) - 30th January 2019 issued by Ministry of Corporate Affairs. Furthermore, Respondent NHB is serving as a development finance institution for the growth of the housing sector in the country. Therefore, considering the larger objective behind setting up Respondent NHB, it cannot be equated with other Financial Creditors. Hence, Respondent NHB is a *sui generis* financial creditor with vested statutory rights.

6.14 The above said statute mandate ought to be respected. When Section 16B provides certain rights to this Respondent in clear, unambiguous terms, then assuming/suggesting to the contrary would be a fallacious proposition. There is no conflict, as has been explained already. There is no inconsistency since Rule 10 of the FSP Rules, 2019 carves out an exception that applies to sums/assets held in trust under Section 16B of the NHB Act for the benefit of Respondent

NHB, excluding such funds from the moratorium of Section 14 of the Code and Rule 5 of the FSP Rules, 2019.

6.15 The Appellant has approved the Scheme in its commercial wisdom, which recognizes the claim of this respondent, NHB, in its entirety. The present Appeal is therefore not maintainable. The Resolution Plan has been accepted in its entirety by the Corporate Debtor. Thus, the same being implemented and the issues raised in the Appeal do not survive. Once the commercial wisdom of the creditors is applied to the Resolution Plan and approved by the Adjudicating Authority, the same shall stand binding on the Corporate Debtor, employees, members, other creditors, guarantors and stakeholders, any deviation from the Resolution Plan that has frozen the claim of the creditors ought not to be allowed by this Tribunal. Further, the legislature has consciously not provided any ground to challenge the "commercial wisdom" of the individual Financial Creditors or their collective decision.

6.16 The principal object of the Code is to ensure that the Corporate Debtor is revived and to make it a going concern. While keeping this in mind, the resolution plans submitted by various resolution Applicants' undergo deep scrutiny by not only the Resolution Professional but also by the Committee of Creditors; during such negotiations, various modifications may be done to ensure that the Financial Creditors, as well as the other creditors, are paid, and the Corporate Debtor is revived and is made an on-going concern. Thus, it's only the majority decision of the Committee of Creditors that approves the Resolution Plan and

places the same before the Adjudicating Authority, i.e. the NCLT, the NCLT thus is only required to arrive at subjective satisfaction that the plan conforms to the requirements as are provided in Section 30 of the Code. The legislative intent is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims.

Rejoinder Submissions by Appellant in response to Ist Respondents Reply

7. In brief, NHB, in its Reply, has raised inter alia the following contentions:

(i) NHB has granted refinance to the Corporate Debtor / DHFL against clear, identifiable and earmarked individual housing loan portfolios;

(ii) The relationship between DHFL and NHB is not a simple debtor-creditor relationship and is governed by a special statute, i.e., National Housing Bank Act, 1987 ("NHB Act") under which the NHB has special rights and thus, NHB cannot be equated with other Financial Creditors;

(iii) The NHB Act and the Insolvency and Bankruptcy Code, 2016 (" IBC / Code") can and should be read harmoniously, and as such, there is no conflict between the provisions of the two statutes;

(iv) The Form C filled by NHB to file its claim as well as the agreements entered into between DHFL and NHB contain a stipulation that the same are in addition to Section 16B of the NHB Act;

(v) Rule 10 of the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to

Adjudicating Authority) Rules, 2019 ("FSP Rules") applies to funds held in trust under Section 16Bof the NHB Act and therefore, such funds must be returned to NHB as Tagged Receivables are assets held in trust by DHFL;

(vi) Section 51 of the Trust Act, 1882 provides that property held in trust by the trustee cannot be used for its benefit;

(vi) Any securitisation of the tagged loans with the banks would be in breach of the statutory trust and therefore void;

(vii) In addition to Section 16B of the NHB Act, NHB has a charge over all the receivables of DHFL by way of hypothecation, which is permissible under Section 19 of the NHB Act.

8. **NHB cannot claim any special status amongst the Financial Creditors of DHFL.**

8.1 It is submitted that the reliance placed by NHB on the NHB Act, expressly Section 16B, to state that NHB's position is distinguishable from other Financial Creditors and should therefore receive priority in terms of repayment is incorrect and has no bearing in law. NHB and DHFL share a purely contractual relationship under which NHB has lent certain sums to DHFL for the time value of money. If Section 16B is construed to give a special right to NHB, the same will be contrary to the provisions of the Code.

8.2 It is stated that between 2005 to January 2017, NHB has time and again provided refinancing assistance to DHFL by way of sanction letters which laid

out specific repayment schedules. The repayment obligation of DHFL to NHB is independent of any recovery that may be made by DHFL concerning the loans advanced by DHFL to its customers, including the Tagged Receivables (such loans which have been refinanced or financed wholly or partly by NHB). Thus, it is submitted that even if DHFL does not receive any repayment of the loans advanced by DHFL to its customers, which have been financed/refinanced by NHB, DHFL would still have to repay NHB as per the repayment schedule of such loan. Such repayment is made to NHB by DHFL from its common pool of monies/assets, just as repayment to any other creditor of DHFL. There is no separate pool of assets for repayment to NHB.

8.3 That merely because NHB is a statutory body or merely because of the object for which NHB was set up does not entitle NHB to a better right and title than any other Financial Creditors, especially since the relationship between NHB and DHFL is a purely commercial lending relationship like other creditors. It is further submitted that various creditors of DHFL are statutory bodies, including Life Insurance Corporation, State Bank of India etc. However, under the Code, no special treatment is given to any creditor because it is a statutory body or otherwise.

8.4 The Code and the law laid down thereunder clearly stipulates only four kinds of creditors: financial, operational, secured, and unsecured. Neither the Code nor any rule laid down thereunder in any manner stipulates any priority being given to any creditor.

8.5 Hence, it is clear that the Code and the law for the time being in force do not provide for any priority of NHB, and the said special status that NHB is seeking cannot be provided under the express terms of the Code.

9. **The relationship between DHFL and NHB is that of a lender and borrower**

9.1 The contention raised by NHB in the Reply is that the exposure norms of the Reserve Bank of India ("RBI") applicable to a commercial bank is not applicable to a refinance portfolio of a refinancing institution like NHB. Hence, finance and refinance actions by NHB to DHFL is not purely commercial transaction. The said contention raised by NHB is untenable in law.

9.2 The RBI Master Circular on Exposure Norms for Financial Institutions dated July 1, 2015 ("RBI Exposure Norms") provides that exposure norms are also applicable to refinancing institutions like NHB and other institutions, however, given refinance operation being the core function of such institutions, their refinance portfolio is not subject to the exposure norms. However, the RBI Exposure Norms also clarify that refinancing institutions like NHB are well-advised to evolve their credit exposure limits, even regarding their refinancing portfolio. Thus, even the RBI Exposure Norms caution the refinancing institutions to evaluate their credit exposure limit and conduct a risk assessment before financing any loans, like any ordinary commercial transaction. Hence, the RBI Exposure Norms in no manner support the case of NHB.

9.3 Without prejudice to the aforesaid, it is stated that the applicability or otherwise of the RBI Exposure Norms does not change the commercial nature of the transaction entered into between NHB and DHFL.

9.4 NHB in the Reply has also argued that if it is treated at par with other Financial Creditors, any Corporate Insolvency Resolution Process against a Housing Finance Company who had borrowed 100% of NHB's net worth will lead to force liquidation of NHB. However, NHB has, among other things, relied on Section 54 of the NHB Act for the said purpose. Therefore, the said argument raised by NHB is elusive, hypothetical and untenable.

9.5 It is submitted that Section 54 of the NHB Act, which speaks about the non-applicability of winding up or liquidation proceedings to NHB, has no relevance to the present case.

9.6 The said provision only comes into effect when considering a winding up/ liquidation of NHB. In the present case, the resolution of the insolvency of DHFL and not NHB is under question, and hence the said Section 54 of the NHB Act does not further the case of NHB.

9.7 Further, suppose NHB's contention of repayment in priority to all creditors in terms of Section 16B of the NHB Act is accepted; in that case, it will lead to preferential treatment of NHB (a Financial Creditor), which is impermissible under the Code. Resultantly other Financial Creditors of DHFL will receive lesser amounts, despite being Financial Creditors having the same pari passu charge.

Such preferential treatment will lead to creating a class within a class that de hors the Code's provisions.

10. **NHB is not the owner of Tagged Receivables, and Rule 10 of the FSP Rules would not be applicable in the present case**

10.1 The rights of NHB under Section 16B of the NHB Act is a security interest created over the Tagged Receivables. However, it does not result in the transfer of ownership of any of the assets of DHFL to NHB. It is stated that DHFL remains the owner of the Tagged Receivables. The Deeds of Hypothecation entered into to secure the loans granted by NHB unequivocally state that the hypothecated assets, which would include the 'Tagged Receivables', are to continue to be the absolute property of the borrower.

10.2 Further, once DHFL was admitted into insolvency, any rights of a creditor, including NHB under any other prior statute, were overridden by the provisions of the Code. Therefore, the Tagged Receivables are assets of DHFL and must be dealt with in the same manner as any other asset of DHFL by the FSP Rules and Notification No. S.O. 464 (E) dated January 30, 2020 ("Notification") read with the provisions of the Code.

10.3 Rule 10 of the FSP Rules only exclude assets owned by a third party in the hands of the corporate debtor under a contract. However, in the case of NHB, the 'Tagged Receivables' have always remained the assets of DHFL, and at no point in time, the ownership was transferred to NHB. In the absence of NHB

being the owner of the Tagged Receivables, Rule 10 of the FSP Rules does not apply, and the 'Tagged Receivables' are not outside the purview of the CIRP. Further, NHB has in no manner proved by documents or otherwise that the Tagged Receivables are assets of NHB. Hence, from the documents annexed to the Appeal and the contentions in the Reply, it is amply clear that the Tagged Receivables have always been the assets of DHFL.

10.4 Trust is an obligation annexed to the ownership of property as defined in Section 3 of the Indian Trusts Act, 1882 ("Trusts Act"). As per Section 5 and Section 6 of the Trusts Act, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts: (a) an intention on his part to create a trust; (b) the purpose of the trust; (c) the beneficiary; (d) the trust-property and; (e) transfers the trust property to the trustee (unless the author is the trustee himself). Thus, under the Trust Act, only the trustee can be the owner of the trust property. Therefore, the trustee's property ownership is a sine qua non of a valid trust. This is in addition to the contention that Section 16B of the NHB Act only states 'deemed to be received in trust' and does not divest DHFL of legal ownership.

10.5 Without prejudice to those above, even assuming that a proper trust exists in favour of NHB, it can never be considered an owner of the Tagged Receivables. Therefore, the exception under Rule 10 of the FSP Rules read with the Notification is inapplicable in the present factual matrix. It is submitted because the memorandum of arrangement dated February 27, 2004 ("MOA") requires

DHFL to maintain separate accounts and records for the loans financed or refinanced by it. Therefore, unless otherwise agreed, the housing loans flagged against NHB's assistance, the maintenance of such separate accounts does not constitute a transfer of 'Tagged Receivables' to NHB and shows that they remain assets of DHFL.

10.6 It is submitted that Rule 10 of the FSP Rules and the Notification only exclude assets owned by a third party in the hands of the corporate debtor under a contract from the moratorium under Section 14 of the Code and Rule 5(b) of the FSP Rules. Rule 10 of the FSP Rules, the Notification and the Code provisions complement one another and aid each other. Hence, the Tagged Receivables are not covered under the exception under Rule 10 of the FSP Rules.

11. **NHB has itself filed a claim as Financial Creditor in DHFL's insolvency by submitting Form C and has stated therein that Section 16B of the NHB Act is additional security held by NHB.**

11.1 The contention of NHB that 'Form C' filed by NHB contains a stipulation that it is "in addition to the rights of the NHB under Section 16B" is incorrect and misconceived. The purpose of filing 'Form C' before the Administrator of DHFL is to be admitted and recognized as a Financial Creditor of DHFL.

11.2 It is stated that NHB has claimed its alleged rights under Section 16B in Clause 8 of the Form-C, i.e. under the column "Details of security held, the value of the security, and the date it was given". Hence, as clearly set out in 'Form C', NHB has itself identified the alleged rights under Section 16B as a 'security'.

Accordingly, having taken the correct position in the Claim above Form C that its rights under Section 16B of the NHB Act amount to a security interest over the monies received from the tagged accounts, NHB is precluded by estoppels from subsequently taking the position that the monies received from the tagged accounts constitute a third-party asset, i.e. an asset belonging to NHB of which mere custody or possession is with DHFL.

11.3 On the one hand, NHB's case in the claim Form dated December 17, 2019, and revised claim form dated May 05, 2020, is that the monies belong to DHFL and that there is a security interest created in NHB's favour under Section 16B of the NHB Act. In contrast, on the other hand, it has contended that the said monies are "third party assets," i.e. assets belonging to NHB, in effect claiming outright ownership over the said 'Tagged Receivables'. Therefore, NHB cannot at the same time (i) contend with being a statutory body claiming priority in payments, (ii) contend that it is the owner of the third-party assets being 'Tagged Receivables' and (iii) also claim its entire outstanding as a financial creditor having advanced loans for the time value of money.

11.4 It is submitted that NHB is now raising false and frivolous arguments clearly as an afterthought seeking the benefit of the security under the financing agreements (wherein it has ceded pari passu charge in favour of the other banks) and sought to stand outside the agreements and also seek the benefit of Section 16B of the NHB Act.

11.5 From the aforesaid, it is clear that the NHB has taken contradictory pleas which are mutually destructive and impermissible in law.

12. **NHB has consistently recognised the pari passu charge of other lenders of DHFL**

12.1 NHB has at all times acknowledged and recognized the pari passu charge of the other lenders on the loans in terms of the security documents. This has been acknowledged inter alia in the sanction letters dated January 21, 2009, and March 03, 2016, and Joint Deeds of Hypothecations from 2010 to 2015. Further, a letter dated March 17, 2020, issued by the Administrator of DHFL and the Balance Sheets of DHFL, provides a pari passu charge on the security and loan amounts of DHFL in favour of NHB and other lenders.

12.2 It is stated that NHB cannot cherry-pick the contents of the no-objection letter dated September 25, 2012, provided by NHB for appointment of Catalyst Trusteeship Limited, mainly when the letter itself gives that the refinance outstanding of the NHB is 'secured by the first charge on all the book debts, movables (other than housing loans and investments) and immovable properties of the company ranking pari passu with other lenders.'

12.3 In fact, among other things, under clause 9 of the MOA, NHB has itself recognized the creation of charge over the assets, including receivables of DHFL. Further, post-issuance of the NOC Letter, between 2012 and 2018, the creditors, including NHB (directly or through the Security Trustee), created a pari passu charge over all the assets of DHFL. Therefore, it is stated that NHB itself, having

waived its alleged benefit under the NHB Act by ceding pari passu charge in favour of all other lenders, cannot now seek to invoke the said alleged additional privilege.

12.4 Appellant submits that NHB has desired to exclude properties of DHFL from the pari passu charge in recognition of statutory provisions by specifically excluding Section 29A of the NHB Act under the Joint Deeds of Hypothecation. The contention raised by NHB in the Reply that the exclusion made to Section 29A was only made so that the liquid assets remain unencumbered is misconceived and raised as an afterthought. Without prejudice to the above, if specific exclusion to Section 29A could have been provided, the same ought to have been for Section 16B of the NHB Act had the parties intended to exclude the Tagged Receivables. In this regard, even Section 16B of the NHB Act neither contemplates excluding any rights that DHFL has to create security over the 'Tagged Receivables' nor does it take away DHFL's legal ownership over the 'Tagged Receivables'.

12.5 Accordingly, the loan portfolios being held by DHFL are subject to the valid charge of all lenders. Therefore, NHB cannot claim any special priority on the amounts charged to other lenders.

13. **As so for as NHB Act provides for any priority in repayment to NHB, is inconsistent with the provisions of the Code, and shall be overridden by Section 238 of the Code.**

13.1 It is also well settled that the Code will override any prior law inconsistent with the Code's provisions to the extent of the inconsistency.

13.2 Further, the well-established principle of law is that when two special statutes contain non-obstante clauses, the later statute will prevail over the earlier statute. Additionally, the Code is a statute enacted later and shall prevail over the NHB Act in case of any consistency. Thus, the contention of the NHB that the NHB Act, 1987 is a unique statute, whereas Section 238 of the Code is a 'general non-obstante clause' is untenable and baseless.

13.3 NHB, like all Financial Creditors, is subject to the rigours of the Code. Any statutory right that prioritises repayment not envisaged by the Code is in direct conflict with the Code and is therefore overridden by the Code. As stated, the Code is a special statute that overrides all other statutes inconsistent with the Code, including any special law enacted prior to the Code. Hence, special rights, if any, under Section 16B of the NHB Act, by virtue of which NHB claims that it was required to be repaid its dues from DHFL during the corporate insolvency resolution process of DHFL and in priority to other creditors, will be invalid being contrary to the provisions of the Code.

14. The 'Arrangement' is subject to the orders passed by this NCLT, NCLAT or the Hon'ble Supreme Court (where such appeal is preferred) and does not in any manner establish or recognise the right of NHB under the Section 16 B of the NHB Act.

14.1 NHB has contended that the Plan Approval Order records the total resolution amount of Rs. 37,250 Crores includes the claim of NHB, and the same is arrived at after considering the additional recovery to the creditors by the NCLT relying on the 'Arrangement' and taking into consideration the statutory rights of NHB. Therefore, the said contention raised by NHB is incorrect.

14.2 The Appellant is well aware on account of the November 17 Order, the CoC in its meeting on November 17, 2020, was of the view that an amicable arrangement may be reached with NHB to facilitate and expedite the process of insolvency resolution for maximisation of value for all creditors and stakeholders. However, NHB is now seeking to misinterpret the Arrangement and mislead this Tribunal.

14.3 The Arrangement itself contemplates that NHB shall not demand any payment from the Administrator and DHFL till the final adjudication of the NHB Application by the NCLT (by the NCLAT or the Hon'ble Supreme Court as the case may be in case of any appeal against the order of the NCLT or the NCLAT). In the Arrangement, it was also clarified that (i) the Arrangement is without prejudice to the right of recourse available against sureties/guarantors for recovery of debt on account of default by DHFL; and (ii) since the entire amount claimed by NHB is agreed to be kept aside in the manner contemplated in the Arrangement pending disposal of the proceedings as set out in Arrangement, it would not be necessary to incorporate the statutory right asserted by the

Applicant about the 'Tagged Accounts' under Section 16 B of the NHB Act, in any resolution plan which may be submitted for approved by the NCLT.

14.4 A plain reading of the Arrangement shows that it was an interim arrangement between the parties, and in no manner can it be relied upon by NHB to further its cause.

14.5 The Plan Approval Order merely records the portion of the compliance certificate (Form H) filed by the Administrator, which states that the amount under the Resolution Plan "includes NHB's admitted claim of INR 2436.67 crores and is arrived at after considering the additional recovery to the creditors as set out in the interim arrangement as per Appendix A". Appendix A provides for the Arrangement submitted and recorded by the Hon'ble NCLT vide order dated December 3, 2020.

14.6 Hence, the said portion of the Plan Approval Order is part of the Compliance Certificate and is subject to the Arrangement, which records that the distribution will be contingent on the outcome of the NHB Application by the NCLT, NCLAT or the Hon'ble Supreme Court as the case may be, in case appeal is filed against the order of the NCLT or the NCLAT.

14.7 It is submitted that the Arrangement and its portion sought to be relied upon by NHB merely is about the distribution of funds and in no manner can be construed by NHB to further its cause. Therefore, such an attempt by NHB is malafide and against the spirit of the Arrangement. Moreover, it is known to NHB

that at the time of passing of the Plan Approval Order, the Arrangement entered into by NHB on its own volition and was subsisting till the matter was pending outcome by the NCLT, NCLAT or Hon'ble Supreme Court (where such appeal is preferred) as the case may be. Hence, the submissions made by NHB about the Arrangement are entire without merit and ought not to be considered.

15. **The adverse balance certificates submitted by DHFL do not further the case of NHB.**

15.1 NHB has contended that the adverse balance certificate issued by DHFL states that the Tagged Receivables are "unencumbered/ free from any charge". However, it is pertinent to note that NHB has not produced any document in support of its said contention.

15.2 It is further submitted that the requirement from DHFL to provide an adverse balance certificate is provided in clause 4(d)(ii) of the MOA, which is reproduced below:

> *"4(d)(ii) ADVERSE BALANCE*
>
> *The Financing Institution availing the NHB Loan Assistance from the Housing Bank shall furnish a certificate as at September 30 and March31 every year, duly countersigned by their Statutory Auditor, confirming that the NHB Loan Assistance outstanding does not exceed the total outstanding housing loans, in respect of which the NHB Loan Assistance has been disbursed. The said certificate should be accompanied by a complete list of the housing loans (i.e. book debt statement) in respect of which the NHB Loan Assistance*

has been availed. In case of such Balance is adverse, the Housing Bank will advise the Financing Institution regarding the needful as per its policy. The Housing Bank's policy in this regard will be intimated to the Financing Institution from time to time."

15.3 It is submitted that a bare reading of the clause itself shows that there is no requirement for the certificate to state whether the 'Tagged Receivables' are unencumbered/free of charge.

15.4 Without prejudice to the aforesaid, the documents produced in the Appeal clearly and unequivocally establish that all the lenders, including NHB, have a pari passu charge on the assets of DHFL (which include the Tagged Receivables). Hence, any charge of NHB on Tagged Receivables is subject to the charge of lenders and only after the satisfaction of the charge of the lenders can the same be utilised for the benefit of NHB.

15.5 Hence, the said argument of NHB is entirely unsupported by facts or the documents on record and merits no consideration being contrary to its submissions by this Tribunal.

16. **Section 16B only creates a right of repayment and is therefore akin to a security**

16.1 NHB, in the reply, has argued that the stand of the Appellant that Section 16B only creates a right of repayment and is therefore akin to security and hence

runs in direct conflict with the Code is incorrect and devoid of merits. It is submitted that the said contention of NHB is belied by its submissions.

16.2 NHB, in the Reply, among other things, has stated that the purpose of the alleged trust is "only for repayment to Respondent No. 1". Hence, it is clear that NHB merely has a right to be repaid from the 'Tagged Receivables'. Hence, the trust is deemed to be created under Section 16 B by legal fiction and is created for and limited to the payment of the outstanding debt owed by DHFL to NHB. Any rights claimed by NHB under Section 16B are therefore founded on and for repayment of loans granted by NHB.

16.3 As stated above, NHB filed its claim in 'Form-C' with the Administrator as a Financial Creditor of DHFL and was part of the CoC, and NHB has exercised all rights as a Financial Creditor in the CRIP of DHFL. It is reiterated that a bare perusal of the Form-C would show that NHB has claimed its alleged rights under Section 16B in clause 8 of the 'Form-C', i.e. under the column "Details of security held, the value of the security, and the date it was given". Hence, as clearly set out by NHB in 'Form C', NHB has itself identified the alleged rights under Section 16 B as a 'security'.

16.4 NHB has not produced any shred of evidence in any of the proceedings to show that the 'Tagged Receivables' are assets of NHB, including the balance sheets of NHB. On the one hand, NHB's case in the claim form dated December 17, 2019, and revised claim form dated May 5, 2020, is that the monies belong

to DHFL and that there is a security interest created in NHB's favour under Section 16 B ,and on the other hand, contended that the said monies are "third party assets" by NHB has effectively claimed outright ownership over the said 'Tagged Receivables'. The pleas taken by NHB are hence mutually destructive.

16.5 It is clear from the language of Section 16 B that the rights of NHB thereunder are only in the nature of an obligation attached to assets of DHFL (i.e. the Tagged Receivables) to repay NHB from such assets to the extent any amount is outstanding and the repayment is required to be made. The fact that Section 16 B provides for the right to be repaid is admitted by NHB in the NHB UBI Rejoinder. Hence, Section 16B creates only a right of repayment (therefore, security for repayment in case DHFL has not been able to make payments in the ordinary course in favour of NHB from certain assets of DHFL. Therefore, any effect given to Section 16 B requiring repayment of dues to NHB from the 'Tagged Receivables' during the moratorium or in priority to other Financial Creditors would conflict with the provisions of the Code.

16.6 In light of those above, it is amply clear that rights under Section 16B of the NHB Act is only for repayment and hence akin to security and do not create any ownership over the Tagged Receivables, which at all times remain the assets of DHFL.

16.7 It is submitted that enforcing rights under Section 16B by NHB to get repaid in priority or preference from the assets of DHFL is in ex facie conflict with the provisions of the Code. It is settled law that the IBC prohibits repayment

of one class of creditors in preference to other creditors in CIRP. It is also well established that all Financial Creditors have to be dealt with the same yardstick provided under the Code.

16.8 NHB has incorrectly and without any basis stated that NHB has double security over the assets of DHFL, i.e. first by way of claiming the entire 'Tagged Receivables' and second over the other assets of DHFL, i.e. pari passu charge with other lenders under the various financing documents. It is submitted that the "Tagged Receivables are also assets of DHFL while ceding charge over the assets of DHFL, NHB has also ceded charge over the 'Tagged Receivables'. It is submitted that while Section 19 of the NHB Act permits NHB to impose conditions while lending amounts, it does not in any manner restrict NHB from ceding charges. A plain reading of the documents entered into between NHB and the lenders establishes that NHB has ceded charge over all assets of DHFL, which include the Tagged Receivables. It is further reiterated that where NHB wanted to carve out an exception to the terms of the agreements or the assets of DHFL, it has expressly done so in the agreements itself.

16.9 It is submitted that since NHB has ceded charge over the Tagged Receivables, which are assets of DHFL, the same must be dealt with as per the Code and Resolution Plan provisions.

16.10 NHB has also submitted that the Administrator is the "real aggrieved party" so far as the Impugned Order is concerned, and the Administrator has

not challenged the Impugned Order. Therefore, it is submitted that the said contention of NHB is entirely incorrect. Moreover, NHB is well aware that the subject matter of the NHB Application and now the present appeal is an inter se dispute amongst creditors. Hence, the other creditors are affected by the Impugned Order and not the Administrator. Further, and without prejudice to the aforesaid, the claim of NHB in the NHB Application was contested by the Administrator.

16.11 Appellants contend that the Impugned Order is not well-reasoned and has even failed to deal with the principal issue, i.e., whether or not the Tagged Receivables are third party assets. Consequently, while passing Impugned Order, the Adjudicating Authority has overlooked the central question of law that arose in the present case. Thus, the Impugned Order is not reasoned and is against the principles of natural justice.

17. **STATUTORY PROVISIONS**

National Housing Bank Act, 1987

[Act 53 of 1987 as amended up to Act 23 of 2019]

[*23rd December, 1987*]

An Act to establish a bank to be known as the National Housing Bank to operate as a principal agency to promote housing finance institutions both at local and regional levels and to provide financial and other support to such institutions and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Thirty-eighth Year of the Republic of India as follows:—

Prefatory Note—Statement of Objects and Reasons.—*Housing is a basic need and serves to fulfil the fundamental objective of providing shelter. The existing institutional framework for providing housing finance is yet to develop fully. It is, therefore, necessary to create a housing finance structure, through establishment of appropriate institutions at various levels which would mobilise resources and promote housing activity.*

2. A high-level group which looked into the problem, recommended that a National Housing Bank be established as an apex housing financial institution to function as the principal agency for the promotion of housing finance institutions at various levels, to co-ordinate the activities of these institutions, to promote mobilisation of resources for housing and to extend financial support to the housing finance institutions.

3. The Bill seeks to provide for the establishment of a National Housing Bank with a view to giving effect to the aforementioned recommendations of the high-level group. In addition, the National Housing Bank will also play a role in the formulation of policies designed to promote housing in the country and provide guidelines for the working of all the agencies connected with housing.

4. The Notes on clauses appended to the Bill explain the provisions of the Bill.

1. Short title, extent and commencement.—*(1) This Act may be called the National Housing Bank Act, 1987.*

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and any reference in any provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

***14. <u>Business of the National Housing Bank</u>**.—Subject to the provisions of this Act, the National Housing Bank may transact all or any of the following kinds of business, namely:—*

(a) promoting, establishing, supporting or aiding in the promotion, establishment and support of housing finance institutions;

[(b) making of loans and advances or rendering any other form of financial assistance whatsoever for housing activities to housing finance institutions, scheduled banks, State cooperative agricultural and rural development banks or any other institution or class of institutions as may be notified by the Central Government;

(ba) making of loans and advances for housing or residential township-cum-housing development or slum clearance projects;]

(c) subscribing to or purchasing stocks, shares, bonds, debentures and securities of every other description;

(d) guaranteeing the financial obligations of housing finance institutions and underwriting the issue of stocks, shares, bonds, debentures and securities of every other description of housing finance institutions;

(e) drawing, accepting, discounting or rediscounting, buying or selling and dealing in bills of exchange, promissory notes, bonds, debentures, hundies, coupons and other instruments by whatever name called;

[(ea) buying, selling or otherwise dealing in any loans or advances secured by mortgage or charge of the immovable property relating to scheduled banks or housing finance institutions;

(eb) creating one or more trusts and transferring loans or advances together with or without securities therefor to such trusts for consideration;

(ec) setting aside loans or advances held by the National Housing Bank and issuing and selling securities based upon such loans or advances so set aside in the form of debt obligations, trust certificates of beneficial interest or other instruments, by whatever name called, and to act as trustee for the holders of such securities;

(ed) setting up of one or more mutual funds for undertaking housing finance activities;

(ee) undertaking or participating in housing mortgage insurance;]

[

(f) promoting, forming, conducting or associating in the promotion, formation or conduct of companies, mortgage banks, subsidiaries, societies, trusts or such other association of persons as it may deem fit for carrying out all or any of its functions under this Act;]

(g) undertaking research and surveys on construction techniques and other studies relating to or connected with shelter, housing and human settlement;

(h) formulating one or more schemes, for the purpose of mobilisation of resources and extension of credit for housing;
[(hh) formulating a scheme for the purpose of accepting deposits referred to in clause (a) of Section 2 of the Voluntary Deposits (Immunities and Exemptions) Act, 1991 and crediting forty per cent of the amount of such deposits to a special fund created under Section 37;]

(i) formulating one or more schemes, for the economically weaker sections of society which may be subsidised by the Central Government or any State Government or any other source;

(j) organising training programmes, seminars and symposia on matters relating to housing;

(k) providing guidelines to the housing finance institutions to ensure their growth on sound lines;

(l) providing technical and administrative assistance to housing finance institutions;

(m) co-ordinating with the Life Insurance Corporation of India, the Unit Trust of India, the General Insurance Corporation of India and other financial institutions, in the discharge of its overall functions;

(n) exercising all powers and functions in the performance of duties entrusted to the National Housing Bank under this Act or under any other law for the time being in force;

(o) acting as agent of the Central Government, the State Government or the Reserve Bank or of any authority as may be authorised by the Reserve Bank;

(p) any other kind of business which the Central Government may, on the recommendation of the Reserve Bank, authorise;

(q) generally, doing of all such matters and things as may be incidental to or consequential upon the exercise of its powers or the discharge of its duties under this Act.

*[**16-A. Assistance to borrower when to operate or a charge in the property offered as security**.—(1) Where any person or institution seeks any financial assistance from the National Housing Bank on the security of any immovable property belonging to him or to that institution or on the security of the property of some other person whose property is offered as a collateral security for such assistance, such person or institution or, as the case may be, such other person may execute a written declaration in the form set out in the Third Schedule to this Act stating therein the particulars of the immovable property which is proposed to be offered as security or, as the case may be, collateral security, for such assistance and agreeing that the dues relating to the assistance, if granted, shall be a charge on such immovable property and, if on receipt of such declaration, the National Housing Bank grants any financial assistance to the person or institution aforesaid, the dues relating to such assistance shall, without*

prejudice to the rights of any other creditor holding any prior charge or mortgage in respect of the immovable property so specified, be, by virtue of the provisions of this section, a charge on the property specified in the declaration aforesaid.

(2) Where any further immovable property is offered by a person or an institution as security for the financial assistance referred to in sub-section (1), such person or institution may execute a fresh declaration, as far as may be in the form set out in the Third Schedule to this Act, whereupon the dues relating to such assistance shall, by virtue of the provisions of this section, also be a charge on the property specified in such fresh declaration.

(3) A declaration made under sub-section (1) or sub-section (2) may be varied or revoked at any time by the person or institution as aforesaid, with the prior approval of the National Housing Bank.

(4) Every declaration made under sub-section (1) or sub-section (2) shall be deemed to be a document registrable as an agreement under the provisions of the Registration Act, 1908 and no such declaration shall have effect unless it is so registered.

***16-B. Amount and security to be held in trust**. —(1) Any sums received by a borrowing institution in repayment or realisation of loans and advances financed or refinanced either wholly or partly by the National Housing Bank shall, to the extent of the accommodation granted by the National Housing Bank and remaining outstanding, be deemed to have been received by the borrowing institution in trust for the National*

Housing Bank, and shall accordingly be paid by such institution to the National Housing Bank.

(2) Where any accommodation has been granted by the National Housing Bank to a borrowing institution, all securities held, or which may be held, by such borrowing institution on account of any transaction in respect of which such accommodation has been granted, shall be held by such institution in trust for the National Housing Bank.]

***17. Power to transfer rights**.—The rights and interests of the National Housing Bank (including any other rights incidental thereto) in relation to any loan or advance made, or any amount recoverable, by it, may be transferred by the National Housing Bank, either in whole or in part, by the execution or issue of any instrument or by the transfer of any instrument by endorsement, or in any other manner in which the rights and interests in relation to such loan or advance may be lawfully transferred, and the National Housing Bank may, notwithstanding such transfer, act as the trustee within the meaning of Section 3 of the Indian Trusts Act, 1882 (2 of 1882), for the transferee.*

***29. Chapter not to apply in certain cases**.—(1) The provisions of this Chapter shall not apply to deposits accepted by a housing finance institution which is a firm or an unincorporated association of individuals.*

(2) For the removal of doubts, it is hereby declared that the firms and unincorporated associations of individuals referred to in sub-section (1) shall continue to be governed by the provisions of Chapter III-C of the Reserve Bank of India Act, 1934 (2 of 1934).

*[**30-A. Power of Reserve Bank to determine policy and issue directions**.—(1) If the Reserve Bank is satisfied that, in the public interest or to regulate the housing finance system of the country to its advantage or to prevent the affairs of any housing finance institution which is a company being conducted in a manner detrimental to the interest of the depositors or in a manner prejudicial to the interest of such housing finance institutions, it is necessary or expedient so to do, it may determine the policy and give directions to all or any of the housing finance institution which is a company relating to income recognition, accounting standards, making of proper provision for bad and doubtful debts, capital adequacy based on risk weights for assets and credit conversion factors for off balance-sheet items and also relating to deployment of funds by a housing finance institution which is a company or a group of such housing finance institutions or housing finance institutions which are companies generally, as the case may be, and such housing finance institutions shall be bound to follow the policy so determined and the direction so issued.*

(2) Without prejudice to the generality of the powers vested under sub-section (1), the Reserve Bank may give directions to housing finance institutions which are companies generally or to a group of such housing finance institutions or to any housing finance institution which is a company in particular as to—

(a) the purpose for which advances or other fund-based or non-fund-based accommodation may not be made; and

(b) the maximum amount of advances or other financial accommodation or investment in shares and

other securities which, having regard to the paid-up capital, reserves and deposits of the housing finance institution and other relevant considerations, may be made by that housing finance institution to any person or a company or to a group of companies.

(3) The Reserve Bank may, if it considers necessary in the public interest so to do, issue directions to housing finance institutions which are companies accepting deposits referred to in Section 31, either generally or to any group of such housing finance institutions accepting deposits, and in particular, in respect of any matters relating to, or connected with, the receipt of deposits, including credit rating of the housing finance institution which is a company accepting deposits, the rates of interest payable on such deposits, and the periods for which deposits may be received.

(4) If any housing finance institution which is a company accepting deposits fails to comply with any direction issued under sub-section (3), the Reserve Bank may, by order, prohibit the acceptance of deposits by that housing finance institution.]

*[**35-B. Power of Reserve Bank to exempt housing finance institution**.—(1) The Reserve Bank, on being satisfied that it is necessary so to do, may declare by notification that all or any of the provisions of this Chapter shall not apply to a housing finance institution which is a company or a group of such housing finance institutions either generally or for such period as may be specified, subject to such conditions, limitations or restrictions as it may think fit to impose.*

(2) Every notification made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.]

36. Chapter V to override other laws.—The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

18. **Analysis**

18.1 We have heard the argument of the learned counsel for the parties and perused the record.

18.2 The appellant emphasises that the transaction with NHB is a purely commercial lending transaction, and there is a debtor-creditor relationship between the DHFL and NHB.

18.3 Per contra, the National Housing Bank, Respondent No. 1, is emphasising that all the loan receivables of 'Piramal Housing Finance Corporation limited' (erstwhile DHFL), where such loans have been financed or refinanced wholly or partly **("tagged receivables"), are held in trust on behalf of the NHB by DHFL does not form part of the Assets DHFL**. Thus it should be returned to NHB.

18.4 It is undisputed that during CIRP, NCLT vide its order dated 17 November 2020 had restrained the voting about the distribution of proceeds as per the approved resolution plan till the next date of hearing. Therefore an arrangement

was made between the COC and NHB. The said arrangement is also part of the resolution plan & distribution mechanism, which CoC approves. Therefore, given the terms of the arrangement, NHB is not entitled to receive any payment other than as set out in the arrangement. Any other payment will only be made subject to the appeal's decision.

18.5 The appellant contends that NHB and DHFL's lending transaction is purely commercial, and there is a creditor-debtor relationship between them. The DHFL entered into an 'MoA' with the NHB to provide financial assistance. The DHFL had taken loans from NHB with different repayment schedules was to be repaid to NHB. Thus the relationship between the DHFL and NHB is a simpliciter creditor-debtor.

18.6 Based on the pleadings of the parties following points arise for the determination of this appeal;

a). Whether the Adjudicating Authority erred in holding that NHB is entitled to any rights under section 16 B of the NHB Act after commencement of CIRP against the DHFL when such rights are in direct conflict with the express provisions of the Code?

b) Is the relationship between DHFL and NHB that of a debtor and creditor, and no special rights can be afforded to NHB other than as a financial creditor?

c) Whether the Adjudicating Authority erred in holding that the Tagged Receivables are 3rd party assets?

18.7 In response to the issues raised in the Appeal, the Respondent NHB emphasized the relevant provisions necessary for considering the present dispute between the parties:

A. National Housing Bank Act, 1987

Section 16B - Amount and Security to be held in trust:

(1) ***Any sums received by a borrowing institution in repayment or realization of loans and advances financed or refinanced either wholly or partly by the National Housing Bank*** *shall, to the extent of the accommodation granted by the National Housing Bank and remaining outstanding****, be deemed to have been received by the borrowing institution in trust for the National Housing Bank and shall accordingly be paid by such institution to the National Housing Bank****.*

(2) ***Where any accommodation has been granted by the National Housing Bank to a borrowing institution****, all securities held, or which may be held, by such borrowing institution on account of any transaction in respect of which such accommodation has been granted, shall be held by such institution in trust for the National Housing Bank.*

B. Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019

Rule 10 - Assets of third parties, etc.

*(1) For Removal of doubts**, it is clarified that the provisions of clause (b) of Rule 5 and section 14 shall not apply to any third-party assets or properties in custody or possession of the financial service provider**, including any funds, securities and other assets required to be held in trust for the benefit of third parties.*

(2) The Administrator shall take control and custody of third-party assets or properties in custody or possession of the financial service provider, including any funds, securities and other assets required to be held in trust for the benefit of third parties only for the purpose of dealing with them in the manner, as may be notified by the Central Government under Section 227.

C. Notification, S.O. 464 (E), Dt 30th January 2019 issued by Ministry of Corporate Affairs.

In exercise of the powers conferred by Section 227 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) and in pursuance of rule 10 of the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019. The Central Government, in consultation with the Reserve Bank of India, hereby notifies the manner of dealing with the third party assets in custody or possession of such financial service providers, as referred to in the notification vide No. S.O. 4139 (E), dated 18th November 2019 by the Administrator appointed under clause (a) of Rule 5 of the said rules, as under:

1. ***Receivables for Third Parties****: Where a financial service provider is contractually obliged, as on the insolvency commencement date, to act as a servicing or collection agent on behalf of third parties in respect of a transaction such as securitization or lending arrangement, the Administrator shall-*

(a) *……*

(b) ***continue to discharge the obligation of the financial service provider as a servicing or collection agent****;*

2. ***Assets of Third Parties - Where the Financial Service Provider has, as on the insolvency commencement date, in its custody or possession owned by its customers or counterparties or by counterparties of its customers under a contract, and is under an obligation to return or transfer such assets in accordance with the terms and conditions of such contract, the Administrator shall-***

(a) *….*

(b) ***ensure that such assets are maintained in a separate and distinct manner, capable of identifying them contract wise, and are not merged with those of the financial service provider***

……"

18.8 From a perusal of the above provisions, it is clear that the provisions of Section 16B of the NHB Act unequivocally provide that any sums received by the borrowing institution would be received by such borrowing institution in trust

for RespondentNo.1, NHB, and would be accordingly, required to be paid to the Respondent, NHB.

18.9 What is pertinent is that the funds with the Corporate Debtor to the extent they relate to the earmarked/flagged loans refinanced by this Respondent NHB are impressed with a trust and are held "in trust" for the benefit of Respondent NHB, hence a beneficial owner of the trust created under the statue. The amount (that stands admitted under the resolution plan) is thus required to be paid to this Respondent NHB. Moreover, these are third-party assets, i.e. they belong to this Respondent NHB; the Corporate Debtor was collecting the same from its owners in trust for this Respondent.

18.10 In the present case, both the factors stated in Section 16B are satisfied viz. the amounts held in trust by the Corporate Debtor (i) are to the extent of the accommodation granted by this Respondent; and (ii) are remaining outstanding. Accordingly, these are bound to be paid to this Respondent NHB in the plain and unambiguous terms of Section 16B of the National Housing Bank Act.

18.11 Under Section 16B of the NHB Act, the Corporate Debtor is statutorily deemed to hold these funds as a 'Trustee' for this Respondent NHB. Although it is elementary and a matter of the first principle that a Trustee never has the Trust property for its use or purpose, such funds can be used solely for the Trust, i.e. only to be paid to this Respondent.

18.12 In the instant case, being a refinance transaction, the Corporate Debtor availed refinance against a pool of tagged loans. Towards these tagged loans, Respondent 'NHB' had already passed on the consideration in the form of refinancing to the Corporate Debtor. Under a clear mandate of Section 16 B(1) of the NHB Act, any realization from the said loans shall be deemed to be held by the Corporate Debtor in trust for the benefit of the refinancing institution, i.e. the Respondent NHB.

18.13 Therefore, the Corporate Debtor cannot use these tagged loans or recoveries for its purposes or uses or treat them as its property, disregarding the statutory Provision under Section 16B of the NHB Act. Thus, the realisations under the tagged loans and securities held thereunder are held by the Corporate Debtor only as an intermediary/custodian in trust for the benefit of the Respondent NHB, as it has refinanced these tagged loans.

18.14 These amounts are required to be paid to this Respondent NHB. The Corporate Debtor cannot use these realisations for its benefits as if it is the owner of the same when it has availed refinance against these very tagged loans. Ultimately repayments under the loans belong to this Respondent NHB and not the Corporate Debtor. The Corporate Debtor is bound to act as per the mandate of the NHB Act. The actions of the Administrator, who was vested with the management of the Corporate Debtor, cannot be in contravention of the mandate given under clause (e), sub- section (2) of Section 17 of the Code, which envisages that the Administrator will be responsible for complying with the requirements

under any law for the time being in force on behalf of the Corporate Debtor and thereby jeopardize the right and entitlement of Respondent NHB or act contrary to the provisions of Section 16 B of the NHB Act.

18.15 Undisputedly the corporate debtor DHFL was accepting fixed deposits and public deposits with interest on contractual terms. In connected appeals, we have already decided that transactions of the corporate debtor with the fixed deposit holders or public deposit holders were commercial transactions. Therefore, we have decided that since the Corporate Debtor is undergoing an Insolvency Resolution Process, the creditors of the corporate debtor, i.e. fixed deposit holders and public deposit holders, are entitled to the amount as per the approved Resolution Plan.

18.16 While dealing with the issue of fixed deposit holders and public deposit holders, we have decided that Insolvency and Bankruptcy Code, 2016 overrides the provisions of the National Housing Bank Act, National Housing Bank directions and the RBI Act. No full payment right exists under the NHB, the RBI Act, or subordinate legislation. Even if it exists, any such right would be wholly repugnant to the provisions of the Code, which provides for a specific manner in priority of payment and sets out the right. The minimum amount a creditor is mandatorily required to be paid in the resolution plan, i.e. the liquidation value.

18.17 It is also held that section 238 of the IB code overrides the RBI and NHB Act. Therefore the approved resolution plan that stipulates extinguishment of

the claims to the FD's without discharging their payments in full is valid and legal under the Code.

18.18 However, the appellant has argued that the present appeal is not connected with the appeal filed by the fixed deposit holders or any other appeal filed in connection with the CIRP of the DHFL. Therefore, there is no commonality between the present appeal and the appeal filed by the fixed deposit holders. Therefore, the present appeal should not be tagged and decided with any other appeals.

18.19 The appellant emphasized that NHB is a financial creditor and cannot be given any special creditor status by the National Housing Bank Act. The National Housing Bank and DHFL have a contractual relationship under which NHB has lent amounts to DHFL for time value, and if section 16 B is constructed to give a special right to NHB, it will run contrary to the Code. The appellant argues that the Insolvency and Bankruptcy Code is a special statute that overrides all other statutes inconsistent with the Code. The Code is a later enactment; the rights of NHB as a Financial Creditor to the DHFL will be determined in terms and will prevail over the NHB Act.

18.20 Section 14 of the NHB Act provides for the businesses and activities undertaken by NHB. As per section 14(2), NHB is entitled to make loans and advances. Entering into loan agreements to record the transactions is a part of NHB's business. These loans involve refinancing; Section 16B will have an overriding, over-arching application. Section 19 of the NHB Act also empowers

NHB to impose any conditions that it may think necessary and expedient for protecting its interests, which can be through an agreement. Such agreements that NHB has entered into with DHFL do not dilute NHB's statutory rights under the NHB Act or make NHB a financial creditor, ignoring the overriding trust provisions. On the contrary, the provisions of sections like S.16 B, 19, 20, 21, 22 give enormous statutory powers to NHB, distinguishing it from other financial creditors.

18.21 NHB is a development financial institution. It is lending to housing finance institutions. Exposure is not on purely commercial lines like any other commercial bank. NHB is an integral partner in formulating and implementing India's Government's housing and housing finance policies. For example, the exposure norms of RBI applicable to a commercial bank are not relevant to refinance a portfolio of a refinancing institution like NHB.

18.22 It is clear from the relevant RBI Circular on Exposure Norms inter alia that given refinance operations being the core function of a refinancing institution like NHB, the general exposure norms do not apply to its refinance portfolio. The Board of Directors of a refinancing institution is empowered to evolve its exposure norms. Under RBI exposure norms, a commercial Bank may extend finance up to 15-25% of its net worth, whereas NHB is entitled to and has been extending refinance up to 150-200% of its net worth.

18.23 If NHB were to be treated at par with any other financial creditors/commercial lenders, hypothetically, any CIRP against a Housing

Finance Companies who had borrowed amounts totalling to NHB's net-worth would lead to a situation where NHB may be forced into liquidation, as it could then legally result in the entire net-worth of NHB being extinguished. This is not and could never have been the legislative intent.

18.24 It is pertinent to note that Section 54 of the NHB Act makes special provision for its liquidation: "Liquidation of National Housing Bank - *No provisions of law relating to the winding-up of companies shall apply to the National Housing Bank, and the National Housing Bank shall not be placed in liquidation save by order of the Central Government and in such manner as it may direct.*"

18.25 In these circumstances, the provision of another legislation like the IBC cannot be interpreted in such a manner as to result in a situation that would force liquidation of NHB in a manner otherwise than as provided in the NHB Act. This is also consistent by excluding NHB's trust funds held by DHFL from the moratorium, as provided in Rule 10 of the FSP Rules.

18.26 Equating NHB with other financial creditors when the statute places it in a special category of institutions would be a misplaced conclusion and must be avoided. NHB is serving as a development finance institution for the growth of the housing sector in the country. In view of the larger objective behind setting up NHB, it cannot be equated with other Financial Creditors. Hence, NHB is a *sui generis* financial creditor with vested statutory rights.

18.27 It was argued that even the State Bank of India had been constituted under a specific statute. This fact is not disputed. However, the constitution of an entity under a special statute that engages in commercial transactions under contractual arrangements and becomes a financial creditor does not put such a financial creditor at par with NHB. This is precisely why the statute under which NHB is set up vests rights in NHB under Section 16B, and other provisions of NHB Act (as discussed above), showing the unmistakable intent of the legislature to treat NHB differently from other "creditors" in the matter of the conduct of its refinancing transactions.

18.28 This unique mandate of the statute must be respected. Section 16B of the NHB Act provides certain rights to NHB in clear, unambiguous terms, then assuming/suggesting the contrary is a fallacious proposition. There is no conflict, as has been explained already. There is absolutely no inconsistency since the Rule 10 exception applies to sums/assets held in trust under Sec. 16B of the NHB Act for the benefit of NHB, excluding such funds from the moratorium provisions of S. 14 of the Act and Rule 5 of the FSP Rules.

18.29 Appellants without prejudice contention that all assets, including receivables of DHFL, are secured pari passu among the creditors is incorrect. Besides the provisions of section 16 B, NHB also stipulated other securities for extending refinance to DHFL. As Sec. 19 of the NHB Act empowers NHB to do so. NHB's rights under Sec. 16 B flow from the statute; any contractual arrangements are only in furtherance of and complimenting these statutory

rights and not contrary to these rights. The other conditions governing the refinance transaction, which are stipulated under the sanction letters, are stipulated in writing in the form of various financing and security documents.

18.30 Executing such separate agreements as rightly done under Section 19 of the NHB Act does not dilute or extinguish or vary the rights vested in NHB under Section 16 B. The Act does not say so. Section 16 B and Section 19 coexist in the statute, giving NHB the full right and liberty to exercise its rights.

18.31 The submission that Section 16 B does not exclude or preclude NHB's ability as a beneficiary to create security over the 'Tagged Receivables'. Accepting this position as correct, it is clear that by doing so, NHB did not, and has not, carved out exclusions to its rights under Sec. 16 B. In this regard, there is no answer to the Memorandum of Agreement (MOA), each Sanction Letter issued by NHB; the NOC dated 25th September 2012 (for appointment of GDA Trustee). Moreover, every Joint Deed of Hypothecation (which is relied upon by the CoC for claiming pari passu rights) stipulates in express terms that they are subject to the terms of the respective Loan Agreements; the Loan Agreements expressly stipulate that NHB's rights under S.16 B shall not be affected; thus, NHB's right under section 16 B as provided under the Loan Agreements is not affected, and all creditors recognize the same.

18.32 The reference to section 29 B of the NHB Act is untenable. It is urged that there was no exclusion provided in the pari-passu ceding letters/agreements, unlike the express exclusion of the assets under Section 29B of the NHB Act.

The contention is based on a misapprehension of the correct position. Thus, under Sec. 29B, the HFC has to create a floating charge over the unencumbered approved securities to the extent provided therein. NHB, being the Regulator for the sector, had to provide a specific exclusion to ensure that such liquid assets remained unencumbered.

18.33 Whereas exclusion for section 16B funds and assets has already been provided, starting from the sanction letters to the charge creating documents under which the banks and other lenders are claiming rights. In these circumstances, the argument that the rights of NHB under Section 16B are subject to the charge of other lenders is misconceived.

18.34 On the contrary, the correct position that emerges on an analysis of the relevant statutory provisions and the terms of the documents is that the rights of NHB extend over other securities (excluding Sec. 16 B) on a pari-passu basis. Even the latest Adverse Balance Certificates submitted by DHFL under the very regime of the Administrator appointed by NCLT confirms that the pool of tagged loans against which the company has availed refinance is unencumbered/free from charge. The same position has also been certified by the Statutory Auditor on every half-yearly basis.

18.35 The appellant contends that NHB itself filed its claim in 'Form C' with the administrator as a financial creditor of DHFL, and is part of the committee of creditors of DHFL. Thus NHB has exercised all rights as a financial creditor in the CIRP of the DHFL. Furthermore, "Form C would show that NHB has claimed

its alleged rights under section 16 B, in clause 8 of Form C, i.e. under the column "details of security and, the value of the security, and the date it was given". Hence, as clearly set out by NHB in Form C, NHB has identified the alleged rights under Section 16 B as security.

18.36 In reply to the above, the learned senior counsel for NHB submits that the Claim 'Form C' submitted by this Respondent contains a clear stipulation that "in addition to the statutory rights of NHB under Section 16B", the NHB has a first charge over all book debts, all movable properties etc. This is provided in clause 8 of the Claim Form. This is not a relinquishment of any rights by Respondent NHB, as contended by the Appellant, but a reiteration of its statutory rights under Section 16 B of the NHB Act. Similarly, in the Agreements executed by NHB, it is made clear that nothing contained in the Agreement or sanction letters shall prejudice or in any way affect the rights vested in NHB under the NHB Act. These same conditions and clauses have been accepted. Accordingly, the claim of Respondent NHB in the Claim 'Form C' submitted by Respondent NHB has been admitted in its entirety in the Resolution Plan that has been approved, accepted and implemented.

18.37 Further, it is important to mention that the learned NCLT has passed the impugned order based on the judgement of the Hon'ble Supreme Court in the case of Municipal Corporation of Greater Mumbai versus Abhilash Lal reported in **(**2020) 13 SCC 234**.** In this case, Hon'ble Supreme Court has clearly held that Section 238 of the Code could be of importance when the *properties and assets are of a debtor* and not when a third party like MCGM is involved. Hon'ble

Supreme Court's observation in paragraph 47 of the above-mentioned case is as under;

> ***"47.*** *In the opinion of this Court, Section 238 cannot be read as overriding MCGM's right—indeed its public duty—to control and regulate how its properties are to be dealt with. That exists in Sections 92 and 92-A of the MMC Act.* ***This Court is of the opinion that Section 238 could be of importance when the properties and assets are of a debtor and not when a third party like MCGM is involved****. Therefore, in the absence of approval in terms of Sections 92 and 92-A of the MMC Act, the adjudicating authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands. No doubt, the resolution plans talk of seeking MCGM's approval; they also acknowledge the liabilities of the corporate debtor; equally, however, there are proposals which envision the creation of charge or securities in respect of MCGM's properties. Nevertheless, the authorities under the Code could not have precluded the control that MCGM undoubtedly has, under law, to deal with its properties and the land in question, which undeniably are public properties. The resolution plan, therefore, would be a serious impediment to MCGM's independent plans to ensure that public health amenities are developed in the manner it chooses, and for which fresh approval under the MMC Act may be forthcoming for a separate scheme formulated by that corporation (MCGM)."*

18.38 It is pertinent to mention that in the instant case, funds with the corporate debtor to the extent they relate to the flag loans refinanced by the NHB are clearly impressed with the trust and are held in trust for the benefit of NHB.

The DHFL is not the owner of the property, but the property is held in trust. Therefore, Section 238 of the Code is not applicable for the 3rd party assets.

18.39 Based on the above discussion, it is clear that the relationship between the DHFL and NHB is not only that of a debtor and creditor. But the NHB has special rights under Section 16 B of the NHB Act, and these rights are not in conflict with the express provisions of the Code. Therefore Adjudicating Authority has not erred in giving the said findings. Accordingly, we do not find any reason for interference in the impugned order. Hence the appeal is liable to be dismissed.

Order

Company Appeal CA (AT) (Ins) No. 461 of 2021 is dismissed. No order as to costs.

[Justice M. Venugopal]
Member (Judicial)

[Mr. V. P. Singh]
Member (Technical)

[Dr. Ashok Kumar Mishra]
Member (Technical)

NEW DELHI
7th February 2022

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