IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

MA/67/2020 in IBA/222/2019

(Filed under Sec.12(A) of the IBC, 2016 r/w Rule 11 of the NCLT Rules, 2016)

In the matter of ***M/s. Dugar Housing Limited***

Velli Paramasivam,
Interim Resolution Professional of M/s. Dugar Housing Limited,
Priyadarshini Apartments,
10/154, N.M.K.Street,
Ayanavaram,
Chennai - 600 023

.. .. *Applicant / IRP*

-Vs-

1. M/s. Prism Johnson Limited,
305, Laxmi Niwas Apartment, Ameerpet
Hyderabad - 500 016

.. .. .. *Respondent No.1*

2. M/s. Dugar Housing Limited, Chennai
Dugar Towers, 7th Floor,
34 (123), Marshalls Road,
Egmore, Chennai - 600 008

.. .. .. *Corporate Debtor*

Present:

For IRP	:	*R. Venkatavaradan, Advocate & VelliParamasivam, in person*
For Respondent No.1	:	*Gopal Shankar Mishra, PCS*
For proposed Respondent	:	*Akhilish Jain Lunia, Counsel K.Gaurav Kumar, PCS*

WITH

MA/82/2020 in MA/67/2020 in IBA/222/2019

(Filed under Sec. 60(5) of the IBC, 2016 r/w Rule 11 of the NCLT Rules, 2016)

In the matter of ***M/s. Dugar Housing Limited***

Gurudev Foundations Pvt. Ltd,
No. 62, Audiappa Street,
Sowcarpet, Chennai - 600 079

-Vs-

1. VelliParamasivam,
Interim Resolution Professional of M/s. Dugar Housing Limited,
Priyadarshini Apartments,
10/154, N.M.K.Street,
Ayanavaram,
Chennai – 600 023

.. .. .. *Respondent No.1*

2. M/s. Prism Johnson Limited,
305, Laxmi Niwas Apartment, Ameerpet,
Hyderabad – 500 016

.. .. .. *Respondent No.2*

3. M/s. Dugar Housing Limited,
Dugar Towers, 7th Floor,
34 (123), Marshalls Road,
Egmore, Chennai – 600 008

.. .. .. *Respondent No.3*

Present:

For Applicant : *Aashish Jain Lunia, Counsel*

For IRP : *VelliParamasivam, in person*

For Respondent No.2 : *Gouri Shankar Mishra, PCS*

WITH

MA/68/2020 in IBA/222/2019

(Filed under Sec. 60(5) of the IBC, 2016 r/w Rule 11 of the NCLT Rules, 2016)

In the matter of ***M/s. Dugar Housing Limited***

Sree Sankeshwara Foundation and Investments,
No. 115, NSC Bose Road,
Chennai – 600 079, Tamil Nadu, India

-Vs-

VelliParamasivam,
Interim Resolution Professional of M/s. Dugar Housing Limited,
Priyadarshini Apartments,
10/154, N.M.K.Street,
Ayanavaram, Chennai – 600 023

.. .. .. *Respondent* ***No.1***

Present:

For Applicant : *Gaurav Kumar, PCS*
For IRP : *Velli Paramasivam, in person*

WITH

MA/09/2020 in IBA/222/2019

(Filed under Sec. 60(5) of the IBC, 2016 r/w Rule 11 of the NCLT Rules, 2016)

In the matter of ***M/s. Dugar Housing Limited***

Gurudev Foundations Pvt. Ltd,
No. 62, Audiappa Street,
Sowcarpet, Chennai – 600 079

-Vs-

Velli Paramasivam,
Interim Resolution Professional of M/s. Dugar Housing Limited,
Priyadarshini Apartments,
10/154, N.M.K.Street,
Ayanavaram, Chennai – 600 023

.. .. .. *Respondent* ***No.1***

Present:

For Applicant : *Aashish Jain Lunia, Counsel*
For IRP : *Velli Paramasivam, in person*

WITH

MA/1428/2019 in IBA/222/2019

(Filed under Rule 11 of the NCLT Rules, 2016)

In the matter of ***M/s. Dugar Housing Limited***

P. Velmurugan,
No. 2/65, 6th Street,
Jayalakshmi Nagar, Kattupakkam,
Chennai – 600 056, Tamil Nadu, India

-Vs-

1. Velli Paramasivam,
Interim Resolution Professional of M/s. Dugar Housing Limited,
Priyadarshini Apartments,
10/154, N.M.K.Street,
Ayanavaram, Chennai – 600 023
.. .. .. *Respondent No.1*

2. M/s. Dugar Housing Limited,
Dugar Towers, 7th Floor,
34 (123), Marshalls Road,
Egmore, Chennai – 600 008
.. .. .. *Respondent No.2*

3. M/s. Prism Johns Limited,
(Previously known as Prism Cement Limited),
305, Laxmi Niwas Apartment, Ameerpet,
Hyderabad – 500 016
.. .. .. *Respondent No.3*

Present:

For Applicant : *K. Gaurav Kumar, PCS*
For IRP : *Velli Paramasivam, in person*
For R3 : *Gauri Shankar Mishra, PCS*

CORAM :

R. VARADHARAJAN, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

Order Pronounced on 21st February 2020

COMMON ORDER

***Per:* R. VARADHARAJAN, MEMBER (JUDICIAL)**

1. The above noted applications are disposed of by virtue of a common order, as MA No. 67/2020 in IBA 222 of 2019 is an application filed under Section 12A of Insolvency and Bankruptcy Code (IBC), 2016 by the Interim Resolution Professional (IRP) appointed by this Tribunal at the time of admission of IBA 222 of 2019 and thereby unfolding the Corporate Insolvency Resolution Process (CIRP) in relation to the Corporate Debtor, namely M/s. Dugar Housing Limited, Chennai at the instance of an Operational Creditor, namely Prism Johnson Limited Hyderabad. The other applications are primarily filed opposing the withdrawal as sought for in MA.67 of 2020 from being allowed on the ground that Committee of Creditors (COC) Meeting in which the decision was taken, namely the 2nd COC held on 14.01.2020 was not validly constituted as the applicants, even though in the said applications were treated by the IRP initially as Financial Creditors of the Corporate Debtor and as such recognized as part of the COC

however, subsequently were never made privy to the 2nd COC meeting as their names seem to have been omitted as part of the COC and in the circumstances the decision to withdraw under Section 12A of IBC, 2016 had been taken by a COC in effect not validly constituted and held and hence the resolution passed seeking for withdrawal cannot be sustained.

2. The facts in brief as averred in the respective applications are briefly given hereunder for better appreciation of the decision arrived at in conclusion by applying the provisions of IBC, 2016 and also considering the powers of the IRP in adding or revising a claim and thereby altering the constitution of the COC in accordance with the dictates of the provisions of IBC, 2016 and the attendant regulations, namely Insolvency Resolution of Corporate Persons Regulations, 2016 (hereinafter referred to as 'IRCP Regulations' for the sake of brevity).

3. Brief facts brought forth in MA.No.67 of 2020 being the lead application which triggered in effect all the other applications, are taken up first:

a) That CIRP in relation to the Corporate Debtor was initiated on 13.11.2019 and the applicant was appointed as the IRP. Presently the Corporate Debtor is

maintained as a 'going concern' having three real estate projects on hand, namely GLO DUGAR PROJECT being carried at Perumbakkam, Chennai having 97 flats/apartments fully constructed with 75% of home buyers occupying the flats allotted, SKY DUGAR PROJECT situated at Ayanmbakkam, Chennai as the project site, with 237 flats/apartments with 65% of the home buyers occupying the flats allotted and LAKE DUGAR PROJECT situated at Ambattur-Puzhal Road with the approval for 408 flats/apartments with 80% of the construction completed.

b) That soon after the initiation of CIRP by this Tribunal, the Operational Creditor, namely Prism Johnson Limited, Hyderabad, before the constitution of the COC, had filed an application in Miscellaneous Application No.MA/1505 of 2019, however this Tribunal had given a direction for the COC to consider the same under Section 12A of IBC after its constitution which was duly communicated to the COC after its constitution in the first COC meeting of the Corporate Debtor which was held on 19.12.2019 which also comprised amongst others, three of whom being the land owners, namely M/s. Gurudev Foundations Pvt Ltd, M/s. Sree Sankeswara Foundations and Investments and M/s. Kanchanjanga Securities Company Pvt. Ltd, incidentally the first two out of the three of the parties amongst others presently opposing the application filed by the IRP seeking for the

withdrawal of the CIRP, hereinafter referred to as Objectors' in common depending on the context and individually as such, virtually creating a ruckus in the meeting resulting in not taking any decision or resolution being passed.

c) That under the circumstancesand further as the aforesaid three parties having been noticed to be related parties as defined under Section 5(24) of IBC, 2016 and in addition not being a Financial Creditor or an Operational Creditor, in the 2nd COC meeting held on 14th January 2020, save their participation in view of the incapacity as aforesaid, after detailed discussions of the 8 members of the COC all of whom had unanimously resolved /approved seeking the withdrawal of the application(main petition),by filing an application under Section 12A of IBC, 2016.

d) That the details of the 8 members who had attended the 2nd COC meeting held on 14.01.2020 and who had conveyed their acceptance to the Section 12A withdrawal under IBC, 2016 has been given by the IRP and being material taking into consideration the objections raised by the objectors are extracted from his application as follows: -

S. No.	Creditor's Name	Form Submitted and type of Creditor claimed in the Form	Claim Accepted	
			Total Amount	No. Of Installments
1	Nuvoco Vistas Corporation Ltd. Mumbai- 400070 Email:kamlesh.asher@nuvoco.in	Form B Operational Creditor	7,53,932	1

2	Ultracon Structural Systems Pvt. Ltd Chennai -600 020 Email: [illegible]	Form B Operational Creditor	55,026	1
3	Johnson Lifts Private Limited Chennai-600101 Email:holegal@johnsonliftsltd.com	Form B Operational Creditor	23,66,124	2
4	Rahul Cables, Chennai - 600101 Email: accounts 1@rahulcables.in	Form B Operational Creditor	2,00,000	2
5	Eco Services India Private Limited Chennai- 600032 Email: [illegible]	Form B Operational Creditor	5,04,000	2
6.	Bright Electricals, Chennai 600 101 Email: brightelectricals2014@gmail.com	Form B Operational Creditor	27,22,581	5
7.	Kailash & Company, Chennai 600 079 Email: kailashco2007@yahoo.com	Form B Operational Creditor	34,40,975	5
8.	Aasman Interiors, Chennai -600118 Email:aasmaaninteriors@gmail.com	Form B Operational Creditor	18,32,543	5
	Total Amount of Settlement		**1,18,75,979**	

e) That in relation to the 11 claims received by the IRP including the eight operational creditors listed above and three objectors already referred to in paragraph 3(b) (supra) though they have filed their claims, the three objectors stood excluded from the COC,they being the land owners and joint promoters of the projects promoted by the Corporate Debtor and in view of the said objectors being considered as `related parties' as defined under Section 5(24) of IBC, 2016 by the IRP in light of the interpretation given to the said effect by this Bench of the Tribunal in M/s.Anandram Developers Pvt.Ltd in MA/569/2019 in CP/603(CB)/2017. In relation to each of the objectors' individual reference has also been made elaborately in the instant application MA 67/2020 by the IRP as to the reason why they stood excluded from the COC even though their claims were collated, however given concisely is to the following effect: -

i) In relation to the claim of Gurudev Foundations Pvt.Ltd, it is averred that the claim of the said creditor was made in Form B as an Operational creditor, however applying the ratio of the decision of the NCLT in Anandram Developers Pvt.Ltd's case referred to in paragraph supra in relation to 'related party'as well the decision of Hon'ble NCLAT in one of the Objector's case itself, namely in the matter of Sree Sankeswara Foundations and Investments vs M/s.Dugar Housing Limited dated 25.11.2019 in Company Appeal (AT) (Insolvency)No.515 of 2019 wherein the joint development agreement as between the parties and the claim arising thereunder cannot be treated as an 'Operational Debt'and as the same principles are required to be applied and in the circumstances an issue had arisen whether it should be considered as an 'Operational Creditor' and thereby part of the COC itself.

ii) In relation to the claim of Sree Sankeswara Foundations and Investments, it is averred in the application that its claim was submitted in Form C as a Financial Creditor of the Corporate Debtor, however at the time of disposal of MA No.1505/2019 (of which reference has already been made in paragraph 3(b) supra of this Order) even though to provide the copy of the order passed by NCLT dated 10.04.2019, since

adequate documents were not provided and further the Hon'ble NCLAT in its decision dated 25.11.2019 has held that in any case the claim of the said entity as time barred debt in its own case referred in the earlier paragraph and also the books of the corporate debtor reflecting that sums are payable by the said entity to the Corporate Debtor and the dispute being referred to the Arbitrator appointed by the Hon'ble High Court of Madras,again an issue has arisen in relation to the claim of the said SreeSankeswara Foundations and Investments and thereby as to its status in the COC.

iii) In relation to Kanchanjanga Securities Company Pvt. Ltd and the claim submitted by it in Form C as a financial creditor that as per the books of the Corporate Debtor it is the said entity which owes money to the Corporate Debtor and hence it becomes the Financial Debtor and not as a Financial Creditor as claimed. Further, it is also averred that the dispute between the said entity and the Corporate Debtor has been referred to the Arbitrator appointed by the Hon'ble High Court in OP.No.305 of 2019 which was not disclosed by the claimant while submitting Form C and have also not co-operated during the CIRP process and hence an issue arises about the

status of the claimant and their status in the COC.

f) Taking into consideration the facts and circumstances as averred in the application as well as applying the decisions of the NCLT as well as Hon'ble NCLAT in relation to joint developers being considered as 'related party',the petitioner/applicant/IRP has prayed for the following reliefs: -

a) To direct and order as deemed fit under Section 12A of IBC 2016 and Section 60 (5) on the Withdrawal Application submitted with 100% voting in favour of it in the 2nd CoC Meeting held on 14th January 2020 in the matter of IBA/222/2019.

b) To direct / order as deemed fit u/s 60 (5) of IBC, 2016 to reject the Claim Form B submitted as Operational Creditor by M/s. Gurudev Foundations Pvt. Ltd. considering the orders of Hon'ble NCLT Chennai dated 10.4.2019 and Hon'ble NCLAT, New Delhi dated 25.11.2019 and also as per Section 5 (21) of the IBC, 2016.

c) To direct / order as deemed fit u/s 60 (5) of IBC, 2016 to reject the Claim Form C submitted by M/s. SreeSankeswra Foundations and Investments which was misconceived and awarded as time barred debts already by the orders of Hon'ble NCLT Chennai dated 10.4.2019 and Hon'ble NCLAT New Delhi dated 25.11.2019 and also humbly request to order on the amount outstanding between them which is yet to be arrived in Arbitration as per High Court Order No. OP No.168 of 2019 dated 4/7/2019.

d) To direct / order as deemed fit u/s 60 (5) of IBC 2016 on the amounts outstanding between M/s. Kanchanjanga Securities Company Pvt. Ltd and M/s. Dugar Housing Limited which is yet to be arrived in Arbitration as per High Court Order No:OP No.305 of 2019 dated 21/11/2019.

e) To direct / order as deemed fit u/s 60 (5) of IBC, 2016 that the 3 land owners who entered Joint Development Agreement with M/s. Dugar Housing Ltd.

i. M/s. Gurudev Foundations Pvt. Ltd. - Land owner, Joint Promoter and also Partner

ii. M/s. SreeSankeswara Foundations and Investments - Land owner, Joint Promoter and also Partner

iii M/s. Kanchanjanga Securities Company Pvt. Ltd. - Land owner, Joint Promoter and also Partnerare neither Operational Creditor nor Financial Creditor under the purview of IBC, 2016.

4. Now moving on to **MA/68/2020**, it being an application filed by Sree Sankeswara Foundations and Investments, a partnership firm aggrieved by the action of the COC in seeking for the withdrawal under Section 12A of IBC, 2016 without its consent, its being a part of the COC as a financial creditor and further having been allowed to also attend in the said capacity in the 1st COC held on 19.12.2019, however subsequently the respondent in the application, namely the IRP without any locus, *suo motu* has removed the name of the applicant, namely Sree Sankeswara Foundations and Investments from the Committee of Creditors and the said unilateral action is not in accordance with the provisions of IBC, 2016 and in the circumstances requires serious investigation on the part of the conduct of the IRP and in the circumstances,

inter-alia has sought for the removal of the respondent from the position of the IRP and in his stead appoint a new resolution professional, refer to IBBI in relation to the conduct of the IRP for appropriate disciplinary action to be taken and also to conduct a forensic audit or special audit in relation to the books of accounts of the corporate debtor. From the averments contained in the application it is seen that pursuant to the initiation of CIRP in relation to the Corporate Debtor by this Tribunal on 13.11.2019 and the IRP being appointed, the IRP seemed to have made the public announcement in Form A calling for the claims on 16.11.2019 in Malai Chudar (Tamil) Newspaper and on 18.11.2019 in Business Standard (English) Newspaper to be submitted by workmen/creditors on or before 29.11.2019 and that the applicant, M/s.Sree Sankeswara Foundations and Investments, pursuant to the public announcement lodged its claim with the IRP in Form – C for a sum of Rs.5,07,25,979.88 along with dues as mentioned in the said claim form filed. Pursuant to the lodging of the claim, the IRP it is averred to have acknowledged it and included the applicant in the COC of the corporate debtor. The first meeting of the COC was held on 19.12.2019 in which the applicant also participated, but however in the said COC meeting the IRP placed the agenda for the consideration of withdrawal of the CIRP firstly, which was

opposed by the applicant and the applicant had sought for production of the financials of the corporate debtor which were not complied as the respondent IRP was not in a position to produce it. Despite subsequent communications with the IRP he has not been able to produce the same even after two months. Further in the said period of two months the compliance as required of the IRP under Section 18 of IBC, 2016 has also not been complied with. However, the IRP had chosen to send an e-mail dated 05.01.2020 for removing the already admitted member of the COC, namely the applicant, thereby exceeding the powers given under Section 18 of IBC, 2016. In addition, it is averred by the applicant that the IRP had alleged that the applicant has outstanding dues to be paid to the corporate debtor as per the books of the corporate debtor thereby causing a great doubt about the integrity of the IRP who had initially chosen to admit the claim of the applicant as a Financial Creditor and allowed it to participate in the COC, however subsequently had sought to remove the name of the applicant from the COC itself which makes the applicant believe about the falsification of accounts of the Corporate debtor with the connivance of the IRP and the IRP seems to be guided by the promoters of the corporate debtor instead of acting as an officer of this Tribunal and thereby not acting in an independent manner and

in the circumstances the above application in MA-68/2020 opposing the premature withdrawal as well to take cognizance of the acts of the IRP and suitably deal with the same.

5. **MA 82 of 2020** in MA No.67 of 2020 is an application filed by M/s. Gurudev Foundations Pvt. Ltd, again, aggrieved by the actions of the IRP almost based on similar set of facts as that of the applicant in MA-68 of 2020 as noted above and thereby seeking to get itself impleaded in the application seeking for withdrawal as filed by IRP under Section 12A of IBC, 2016. It is averred in the impleading application that the applicant is having an arbitration award given in its favour, even prior to the initiation of the CIRP. The applicant it is averred that pursuant to calling for the claims by the IRP, the applicant had file the claim in Form – B as operational creditor on 23.11.2019and after verifying the documents, the claim came to be admitted by the IRP as an operational creditor which was also duly communicated vide e-mail dated 29.11.2019. However, subsequently vide e-mail communications dated 03.12.2019 and 10.12.2019 the IRP without rejecting the claim, had sought from the applicant for the claim to be submitted by the applicant as a Financial Creditor in Form C. The applicant had also attended the first COC held on 19.12.2019. Despite all the above,

vide e-mail dated 05.01.2020, the claim of the applicant had been rejected on the ground that they are 'Joint Promoters' and 'Partners' and thereby attracting Section 5(24) of IBC, 2016 with a view to oust the applicant from the COC;thereby demonstrating the inefficiencies of the IRP by himself. This act of the removal of the applicant from the COC by the IRP is assailed as nothing but an attempt to remove those creditors who are objecting to the resolution of withdrawal of application of CIRP being passed. It is further averred that the e-mail dated 05.01.2020 was replied to by the applicant on 06.01.2020 and also requested the IRP to desist from conducting further COC meetings. However, the IRP sent a reply to the said e-mail seeking for proof that it is nota 'related party' and the non-applicability of the Arbitration award in view of the moratorium in place. Since an application has already been filed in MA/09/2020 before this Tribunal seeking for the proper constitution of the COC even prior to the filing of MA.67 of 2020, the act of the 1st respondent in constituting the COC and recording the satisfaction of all the creditors in a surreptitious manner, without all the eligible creditors like the applicant having been made as a part of the COC, is illegal and deserves serious observations of this Tribunal. Reliance is also taken to Regulation 30A of the IBBI(Insolvency Resolution Process for Corporate

Persons) Regulations, 2016 in this regard as the applicant constitutes not less than 10% of the total debt and in the circumstances for its impleadment as a necessary party to MA.67 of 2020.

6. **MA/9/2020** in IB/222/2019 is an application filed again by Gurudev Foundations Pvt. Ltd. as mentioned in MA 82 of 2020 being prior in time to the filing of the said application and as mentioned therein based on identical set of facts and aggrieved by the actions of the IRP in effect excluding the applicant from the COC and in the circumstances seeking for constituting the COC including all the financial creditors of the Corporate Debtor as reflected in the latest financial records and also direct the respondent IRP to clarify on the status of the claim filed by the applicant in Form B dated 23.11.2019.

7. Coming to **MA/1428/2019** in IBA/222/2019 it is an application filed by one of the home buyers of the Corporate Debtor, namely an individual by the name of Mr P. Velmurugan on the basis that the Corporate Debtor being primarily engaged in real estate development and alleging that the claim arises out of debt to be paid by the corporate debtor incurred due to non-completion

of the project in time in "SKY DUGAR"", based on the strength of documents annexed along with the claim filed in Form C with the respondent IRP for a sum of Rs.1,01,31,511/- and also seeking for declaration that the applicant is eligible to join the COC taking into consideration the provisions of Section 21 of IBC, 2016. The claim,it is averred was filed with the IRP on 05.12.2019 and in the circumstances to take cognizance of the claim filed and to restrain the respondent IRP from premature withdrawal of the application under Section 12A of IBC, 2016.

8. In opposition to the applications filed against MA/67/2020 seeking for withdrawal by the IRP, while in relation to the applications filed by two of the objectors, namely M/s. Sree Sankeswara Foundations and Investments and M/s. Gurudev Foundations Pvt. Ltd, the stand taken by the IRP for not including them in the COC after initially including them in the COC and allowing them to participate in the 1st COC and not thereafter based on the reasons given in MA.67 of 2020 and the kernel of reaching such decisionby IRP having been already given in paragraph 3(e)(i) and 3(e)(ii) of this order and for sake of brevity the same not being repeated, in relation to MA/1428/2019 from the submission of reply by the IRP the following reasons have been given bringing

out discrepancies in the submission of claim form by the applicant therein in Form C which are as follows:-

a. In the S.No.7 of the Claim Form C **"DETAILS OF ANY MUTUAL CREDIT, MUTUAL DEBTS, OR OTHER MUTUAL DEALINGS BETWEEN THE CORPORATE DEBTOR AND THE CREDITOR WHICH MAY BE SET OFF AGAINST THE CLAIM"** is **left blank intentionally and wilfully hiding the facts of correspondences made by the Corporate Debtor vide letters dated 30.1.2019 to pay the outstanding amount of Rs.55,96,771/- , 31.3.2019 to pay** the outstanding amount of Rs.57,00,375/- letter dated 16.5.2019 to pay the outstanding amount of Rs.57,48,142/- letter dated 1.8.2019 to pay the outstanding amount of Rs.58,54,048/- and all the three were sent by Registered Post. This clearly indicates that there is a malicious intention in hiding the facts in the submitted Form C.

b. In the S.No.6 of the Claim Form C **" DETAILS OF HOW AND WHEN DEBT INCURRED"** the Applicant mentioned "Debt to be paid by the Corporate Debtor incurred due to non completion of the Project on time", Mr. P. Velmurugan the Applicant hide the "Ready to Occupy letter" received by him and also the amount demanded by the company for final settlement. There is no correspondence from Mr. P Velmurugan to M/s. Dugar Housing Limited for the amount of Rs.1,01,31,511/- claimed and also not mentioned any letter reference in this regards in the Claim Form C submitted. This clearly indicates that there is a malicious intention in hiding the facts in the Form C, submitted by Mr. P. Velmurugan.

c. In the S.No.10 of the Claim Form C " LIST OF DOCUMENTS ATTACHED TO THIS CLAIM IN ORDER TO APPROVE THE

EXISTENCE AND NON PAYMENT OF CLAIM DUE TO THE FINANICAL CREDITOR" there is no reference of letter/correspondence for the Claim amount of Rs.1,01,31,511/- made by him officially to M/s. Dugar Housing Limited which awaits justification from the Applicant Mr. P Velmurugan failing which his claim Form C submitted on 01.12.2019 is a false claim and not tenable as mentioned in the above paragraphs as per Sections 5(8) and 5(7) of IBC 2016.

Thus, in view of the completion of flat which became ready for occupation but not taken up, it is the contention of the IRP that the application filed in MA No.1428 of 2019 is liable to be dismissed as the claim filed in Form C is not tenable and being against the provisions of Section 5(8) and 5(7) of IBC, 2016.

9. From the applications filed by the IRP, as well as other applicants, it is quite evident that while the IRP is seeking for withdrawal of the CIRP initiated against the Corporate Debtor taking into consideration the provisions of Section 12A of IBC 2016 based on the resolution passed by the COC in its meeting held on 14.01.2020 comprising of 8 operational creditors as listed in paragraph 3 supra, in the absence of any financial creditors according to the IRP, the resolution for withdrawal as passed by the COC under Section 12A of IBC, 2016 on 14.01.2020 is being vehemently opposed by the objectors/other applicants, save the

IRP that the constitution of the 2nd COC in effect is illegal in view of the omission of the said applicants from the 2nd COC, even though 2 of them, namely M/s. Sree Sankeswara Foundations and Investments and M/s. Gurudev Foundations Pvt.Ltd were made a part of the 1st COC meeting held after filing of the report of constitution of COC by the IRP before this Tribunal, however subsequently *suo motu* omitting their names from the COC itself and the meeting held on 14.01.2020, wherein the resolution seeking for withdrawal under Section 12A of IBC, 2016 has been passed by a COC not validly constituted and in relation to the applicant in MA.1428 of 2019 though a financial creditor not being included.

10. Thus, the issue in short which is required to be decided by this Tribunal is that when the resolution seeking for withdrawal under Section 12A of IBC 2016 was passed by the COC on 14.01.2020, whether it stood validly constituted by the IRP and the members who were required to be part of the COC were allowed to participate and vote as required under the provisions of IBC, 2016 as it is evident from a reading of Section 12A of IBC, 2016, that the Adjudicating Authority may allow the withdrawal of an application admitted under section 7 or section 9 or section 10, if

such an application is made by the applicant ***with the approval of ninety per cent of voting share of the committee of creditors***, in such manner as may be specified. (highlight and italics supplied). Thus, it becomes incumbent that a COC validly constituted by the IRP with a 90% voting share is required to approve the withdrawal of an application earlier admitted resulting in the initiation of CIRP of the Corporate Debtor by this Tribunal sitting as an Adjudicating Authority as named under IBC, 2016. The approval of 90% of voting share has been held to be mandatory as heldby the Hon'ble Supreme Court as decided in the matter of Swiss Ribbons (P) Ltd and another v. Union of India and others vide paragraph 53 of the judgement rendered on 25.01.2019 which threshold limit has not been in any way disturbed, even after the amendment made to IBC, 2016 by way of Insolvency and Bankruptcy Code (Amendment) Act, 2019 in relation to dealing with exercise of voting rights by the financial creditors through their Authorized Representatives and more particularly by insertion of sub section 3A and proviso thereunder to Section 25A, to overcome the impasse, in view of the peculiar situation which arose in Jaypee Infratech Ltd matter and those matters similarly placed due to large scale absentations in voting on the part of Home Buyers or to give voting instructions to their Authorized Representative, all of

which had already been dealt with in detail by one of us (namely R. Varadharajan) while sitting in the Reference Bench in the matter of IDBI Bank Ltd vs. Jaypee Infratech Ltd in CA No.223/ALD/2018 dated 24.05.2019 which went up to the highest court of the land and not disturbed. Be that as it may, the decision of the Hon'ble Supreme Court laid down in Swiss Ribbon's case and followed in Jaypee Infratech Limited's case by a reference Bench of this Tribunal namely NCLT, and subsequently followed up with the Amendment Act of 2019 passed thereafter has not in any way watered down in any manner the high threshold limit of voting share of 90% of the CoC fixed under Section 12A of IBC, 2016 to be obtained, i.e. requiring almost all financial creditors, in the instant case the Operational Creditors according to the IRPin the absence of any financial creditors, to have to put their heads together to allow such withdrawal ipso factobecomes a *sine quo non*.

11. This precisely is the challenge mounted by M/s. Sree Sankeswara Foundations and Investments and Mr. P. Velmurugan, claiming to be financial creditors who were not allowed to participate and vote as required under the provisions of IBC, 2016 with former's claim being admitted and allowed to participate in the

1st COC held on 19.12.2019, however the latter's claim still not admitted at all. In relation to M/s. Gurudev Foundations Pvt. Ltd, though initially the claim being admitted as an operational creditors claim, however at the insistence of IRP being changed to that of a financial creditors claim but however, not allowed to participate in the 2nd COC where the decision to withdraw was taken by the operational creditors. Even if the premise of the IRP is accepted in view of the claim being admitted, it is the contention of M/s. Gurudev Foundations Ltd that if it is treated as an Operational Creditor since it is having in excess of 10% of the aggregate of the dues owed by the Corporate Debtornotice of the meetings was required to be given to it in terms of Section 24(3)(c) of IBC, 2016 in case the COC comprised of only Financial Creditors, even though it may not have the right to vote; at the least to attend. However, even according to the IRP the 2nd COC consisting only of operational creditors, it is the contention of M/s.Gurudev Foundations Ltd that it is entitled to participate and vote in the meetings.

12. Referring to the provisions in relation to the constitution of the COC under IBC, 2016, Section 21(1) of the Code provides upon determination of the financial position after collation of all claims

received against the Corporate Debtor the IRP shall constitute the COC and in terms of Section 21(2) it shall comprise of all the financial creditors of the corporate debtor. As per the proviso to Section 21(2), in case the financial creditor happened to be a related party of the corporate debtor it shall not have any right of representation, participation or voting in a meeting of COC. In the absence of any financial creditor(s) in relation to a corporate debtor,proviso to Section 24(8) of the Code contemplates the COC to be constituted in such manner as may be specified. IBBI, being the Regulator has framed regulations to meet such an eventuality in terms of Regulation 16 of Insolvency and Bankruptcy Board of India(Insolvency Resolution Process of Corporate Persons) Regulations, 2016 for brevity hereinafter called as IRCP Regulations which reads as follows:

> **16. Committee with only operational creditors.**
>
> (1) Where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with this Regulation.
>
> (2) The committee formed under this Regulation shall consist of members as under –
>
> (a) eighteen largest operational creditors by value:
>
> Provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors;

(b) one representative elected by all workmen other than those workmen included under sub-clause (a); and

(c) one representative elected by all employees other than those employees included under sub-clause (a).

(3) A member of the committee formed under this Regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt.

Explanation – For the purposes of this sub-regulation, 'total debt' is the sum of-

(a) the amount of debt due to the creditors listed in sub-regulation 2(a);

(b) the amount of the aggregate debt due to workmen under sub-regulation 2(b); and

(c) the amount of the aggregate debt due to employees under sub-regulation 2(c).

(4) A committee formed under this Regulation and its members shall have the same rights, powers, duties and obligations as a committee comprising financial creditors and its members, as the case may be.

13. Going further, in relation to the constitution of the COC and its meetings, Regulation 17(1) and 17(2) of IRCP Regulations requires the IRP to file a report of the constitution of the COC within the time prescribed therein after verification of claims and to hold the 1st COC meeting within 7 days of filing the report. In terms of Regulation 19(1) of IRCP Regulations, notice of the meetings of the COC is required to be given to every **participant** as prescribed thereunder (emphasis supplied) which includes all the meetings of the COC. Regulation 30A of IRCP Regulations lays down the procedure as to the mode and manner in which the withdrawal

application is to be made in terms of Section 12A of the Code to this Tribunal, being the adjudicating authority.

> **[30 A. Withdrawal of application.**
> (1) An application for withdrawal under section 12A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under regulation 36A.
>
> (2) The application in sub-regulation (1) shall be accompanied by a bank guarantee towards estimated cost incurred for purposes of clauses (c) and (d) of regulation 31 till the date of application.
>
> (3) The committee shall consider the application made under sub-regulation (1) within seven days of its constitution or seven days of receipt of the application, whichever is later.
>
> (4) Where the application is approved by the committee with ninety percent voting share, the resolution professional shall submit the application under sub-regulation (1) to the Adjudicating Authority on behalf of the applicant, within three days of such approval.
>
> (5) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (4).]

14. Now looking into the pleadings and averments made by the respective parties it is evident that in relation to the constitution of the COC and the report filed by the IRP before this Tribunal with a view to ascertain the compliance by the IRP with respect to the CIRP process after initiation of the CIRP on 13.11.2019 as provided under IBC, 2016 read with IRCP Regulations, 2016.

S No.	Creditor's Name	Form Submitted and type of Creditor claimed in the Form	Claim Form Received				Date of receipt of claim	Remarks
			Total Claim amount (Rs.)	Principle/ Invoice (Rs.)	Interest	Others		
1	Gurudev Foundations Pvt. Ltd. Chennai – 600 079	Form – B Operational Creditor	71595989	71595989	0	0	23.11.2019	Actually Financial Creditor – Land Owner Joint Promoter – Arbitration award dated 27.9.2018 enclosed
2	Nuvoco Vistas Corporation Ltd. Mumbai – 400070	Form – B Operational Creditor	1468874	753932	714942	0	27.11.2019	Ready Mix Concrete Suppliers
3	Ultracon Structural Systems Pvt. Ltd., Chennai – 600020	Form – B Operational Creditor	197413	105020	92393	0	27.11.2019	Supply and Installation of Post-tensioning work – No Interest Clause in Contract
4	Kanchanjunga Securities Company Pvt. Ltd. Chennai 600 079	Form-F other than FC & DC Creditors	4925480	3178152	1747328	0	28.11.2019	Actually Financial Creditor – Land Owner Joint Promoter
5	SreeSankeshwara Foundation and Investments, Chennai 600 079	Form – C Financial Creditor	50725980	32260161	12171760	6294059	29.11.2019	Land Owners – Joint Promoters
6	Johnson Lifts Private Limited, Chennai – 600 101	Form – B Operational Creditor	3043276	2366124	677152	0	02.12.2019	Lift Suppliers
			131957014	110259378	15403577	6294059		

Total amount of Claim Forms received as on 2.12.19 is Rs.13,19,57,014/- (Rupees Thirteen Crore Nineteen Lakhs Fifty Seven Thousand Fourteen only)

15. With the above composition of members, the 1st COC seems to have been held as reflected from the minutes of the COC meeting held on 19.12.2019 which ultimately came to an end because of disturbance by the members based on the insistence of the IRP that the Section 12A withdrawal is to be considered as the Main Agenda which according to him is to get precedence in view of the order of this Tribunal passed on 11.12.2019 in aMiscellaneous Application filed in MA No.1505 of 2019 even before the constitution of the COC cannotbe made at the instance of the operational creditor who initiated the proceedings in the first place . We fully understand that the IRP is required to act under immense time pressure as the 1st COC is required to be completed within a period of 30 days and within which he has to perform the duties as provided of him under IBC, 2016 including those prescribed under Section 18 of the Code, for all of which co-operation of the Corporate Debtor and its personnel as well as the claimants who have lodged their claims are required,all of which are taken for granted being an ideal situation contemplated under the law, however experiences with the implementation of the law suggests that the conditions are not so idealistic as invariably the IRP is not even being handed over with the books of accounts and records of a corporate debtor by its management and personnel, leave alone

taking possession of the assets, which leads the IRP to classify the claims in accordance with documents filed in support of the claim by the creditors and of his best estimate. A combined reading of Regulation 7 to Regulation 14 falling under Chapter IV of IRCP Regulations, 2016 dealing with proof of claims makes this position clear, particularly in relation to the role of IRPs and the claimants Regulation 10, 12 and Regulation 14 of the IRCP Regulations, 2016 which for ready reference are extracted below:-

> **10. Substantiation of claims.** The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.
>
> ****
>
> **12. Submission of proof of claims.**
> (1) Subject to sub-regulation (2), a creditor shall submit [claim with proof] on or before the last date mentioned in the public announcement.
>
> [(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.]
>
> (3) Where the creditor in sub-regulation (2) is [a financial creditor under regulation 8], it shall be included in the committee from the date of admission of such claim:
>
> Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.
>
> *******

14. Determination of amount of claim.
(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.

(2) The interim resolution professional or the resolution professional, as the case may be, *shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1),* as soon as may be practicable, when he comes across additional information warranting such revision.

16. A combined reading of the above regulations clearly brings forth to light that in relation to the constitution of the COC, the constitution is liable to be modified where under Regulation 12 of IRCP Regulations, 2016if at the time of submission of a claim is not substantiated by documents as required to be made by the IRP, but however the same is provided to the satisfaction of the IRP in relation to the claim within a period of 90 days and thereby being classified as a creditor who can form part of the COC on and from the said date. This act of the IRP necessarily results in the change in the constitution of the COC. It is also required to be seen that under Regulation 14(1) as extracted above, again there is a scope for change in the constitution of the COC, if the IRP according to his best estimate comes to a decision that a particular claimant can be admitted to the COC, but subsequently upon obtaining additional

information, which may come from any source, shall revise the amounts of claim admitted including the estimates of claim as soon as practicable. The power of revision provided to the IRP/RP it must be noted is not only confined when the claim came to be admitted on best estimate as provided under Regulation 14(1), but is also available to claims admitted even other wise as well, as the term which has been used in Regulation 14(2) is to the effect that "**shall revise the amounts, including the estimates of claim made under sub-regulation(1)**" . Thus from the above regulations it is seen that the IRP is having a power to re-constitute the COC based on his decisions, including by way of addition of claims as well as by revision of claims admitted previously based on additional information thereby connoting that he has the power to revise the claimant from one class to another class for e.g.) from a financial creditor as originally admitted to an Operational creditor or vice versa or even based on bonafide additional information thereby resulting in complete exclusion of a claim previously admitted and the claim forming part of the COC, be it as a financial creditor or as an operational creditor.

17. Thus from the combined reading of the Regulations contained in Part IV of IRCP Regulations, 2016 as well as the forms prescribed

thereunder, it is seen that while the onus is placed upon the claimants, irrespective of the category under which their claim may fall, a full and complete disclosure of the claim is required to be made and in its absence, the IRP may await for the claimant to satisfy with sufficient documents and proof in relation to the claim so made or to admit the claim according to his best estimate and upon additional information made available, revise the claim so admitted, which can also include the negation of the claim. However, in case of exclusion or revision of the claim to the detriment of the claimant such revision cannot be made without due notice to the claimant who is prejudiced taking into consideration the well established principles of natural justice applicable to all authorities, including the IRPs/RPs who are to be considered as an officer of this Tribunal and the exercise of such power by the IRP/RP is to be based on reasonable and credible information and not based on surmises and mere hearsays.

18. Having considered the provisions of IBC, 2016 as well IRCP Regulations, 2016 as well as testing the actions of the IRP in relation to the claimants who stood excluded from the COC, namely the 2nd COC, we return the following findings:-

i) **M/s. Sree Sankeswara Foundations and Investments: -**

In relation to the above claimant it is to be noted that the IRP based on the claim made in Form C as a financial creditor has chosen to admit it as a financial creditor and has also allowed it to participate in the 1st COC meeting held on 19.12.2019 as such. However upon the decisions made available when it transpired during the course of submissions made before this Tribunal in MA.NO.1505/2019, it has come to the knowledge of the IRP that the claim made by the above said entity as an 'operational creditor' stood rejected by Bench II of Chennai Bench of this Tribunal vide order dated 01.04.2019 in its own matter against the corporate debtor herein in IBA/236/2019 and the material portion of the said order reads as follows after discussion of facts:-

****

> 4. On reading the averments and hearing the submissions of either side, we are given to understand that it is an agreement entered into between the parties for development of a property way back in the year 2012, not falling under any of the kinds of debt defined u/s clause 21 of section 5 of the Code, therefore it cannot be treated as **"creditor-debtor"** relationship between the parties and this Joint Development Agreement no way indicates that the applicant is entitled to a claim against the developer falling within the purview of **"operational credit"**, hence forth we are of the considered view that no debt payable to the applicant is in existence.

5. Another supplementary point is, this Joint Development Agreement was executed in the year 2012, ever since no acknowledgement from the developer side disclosing that the developer is under obligation to pay to the applicant until before 04.05.2016, since there is no acknowledgement within three years from the date of agreement, this claim is otherwise also barred by limitation whereby this Company Application is hereby **dismissed as misconceived**.

****

Aggrieved by the above said findings by this Tribunal, an appeal it is seen as had been preferred by the said entity in Company Appeal (AT) (Insolvency) No.515 of 2019 which also came to be dismissed by the Hon'ble NCLAT and while rejecting the appeal with the following findings, i.e.,

****

6. Having gone through the records and stand taken by the Appellant, we hold that the Appellant along with Respondent ('Corporate Debtor') had executed Joint Development Agreement in the year 2012 for construction of structure and allotment to allottees. Both of them being parties to a joint venture project, we hold that the Appellant cannot claim to be 'Operational Creditor' as it does not relate to supply of goods nor service rendered by the Appellant. If joint venture under any service to the allottees and for that to pay service tax it does not mean that the parties of the joint venture will render service to each other.

7. Therefore, we hold that the Appellant is not an 'Operational Creditor'. The application under Section 9 at the instance of the Appellant was not maintainable and the same has been rightly rejected by the Adjudicating Authority.

****

Even though during the course of the arguments a feeble attempt was made by the Learned Counsel for the applicant in MA.No.68 of 2020 that the appellate tribunal in its order in appeal has not dealt with the aspect of limitation being one of the grounds on which this Tribunal sought to dismiss the claim, however it must be noted that while dealing with an appeal it is not required to deal with each and every aspect of the order before it in appeal and once it has confirmed the findings of this Tribunal the order of this Tribunal becomes final, however subject to appeal as provided in IBC, 2016 before the Hon'ble Supreme Court. No material has been placed on record to demonstrate that an appeal is pending before the order of the Hon'ble NCLAT and in the circumstances the aspect of limitation dealt with by this Tribunal as a ground for rejection stands as such undisturbed. If that were so, once a finding has been returned by this Tribunal on the ground that the 'debt' is barred by limitation then irrespective of the nature of debt, whether it be 'financial debt' or 'operational debt', the finding holds its position and in the circumstances the exclusion of M/s. SreeSankeswara Foundations and Investments from the 2nd COC by the IRP, even though admitted and allowed to

participate in the 1st COC cannot be questioned in light of Regulation 14 of IRCP Regulations, 2016.

ii) **Gurudev Foundations Limited:-**

In relation to the above entity it is seen that the claim originally had been filed in Form B as an 'Operational Creditor' with the IRP. Even though the claim is seen to have been admitted as such, from the report of the constitution of the COC as extracted in paragraph 14 supra filed by the IRP before this Tribunal, the IRP had made an observation as reflected in the 'remarks' column of the said report had remarked that Gurudev Foundations Limited is required to be considered as a 'Financial Creditor'. Following it up with it is the averment of the said entity that the IRP directed it to file as a 'financial creditor' which was also complied with. Be that as it may, in view of the decision rendered by the Hon'ble NCLAT that transactions in relation to joint venture development agreement cannot be considered as an 'operational debt', and hence the claim as preferred by Gurudev Foundations Ltd will not form part of the COC exclusively constituted with the operational creditors when the resolution was passed in the 2nd COC held on 14.01.2020.

iii) **Kanchanjanga Securities Company Pvt.Ltd :-**

In relation to the above said entity the claim seems to have been filed only in Form F before the IRP. However the IRP while filing the report about the constitution of the COC has chosen to remark the above said entity as a financial creditor. The name of Kanchanjanga Securities Company Pvt.Ltd, even though does not figure in the 2nd COC meeting held on 14.01.2020, even though having been allowed to participate by the IRP in the 1st COC held on 19.12.2019 has chosen to raise grievance belatedly about not being allowed to participate in the 2nd COC only by way a memo and not by way of any formal application and in the circumstances this Tribunal is not required to dwell in relation to the said entity.

In any case further in relation to all the above three entities, namely **M/s. Sree Sankeswara Foundations and Investments, Gurudev FoundationsLimited and** Kanchanjanga Securities Company Pvt. Ltd, the IRP had chosen not to allow them to participate in the 2nd COC meeting based on the above grounds and additionally having come to the conclusion that each of them is a `related party' taking into consideration the joint development agreement entered

into by each of them with the Corporate Debtor in relation to the landed properties. In order to come to above conclusion the IRP seeks to rely on the order passed by this Tribunal in Anandram's case in the decision rendered by this Bench in MA.569/2019 in CP/603/(CB)/2017 in the matter of **M/s. Asset Reconstruction Company (India) Limited VersusMr. Gopal Krishna Raju and Ors. on 05.03.2019** wherein, under similar circumstances while considering a joint development agreement as between the Corporate Debtor and one of the claimants therein which was opposed by the applicant in the abovesaid MA569/2019 , this Bench I of Chennai Bench had come to a conclusion that they are to be treated as 'partners' and thereby a related party falling within the confines of definition of a related party under Section 5(24) of IBC, 2016 and we are equally persuaded by the decision and if all the above three parties, namely **M/s. Sree Sankeswara Foundations and Investments, Gurudev FoundationsLimited and** Kanchanjanga Securities Company Pvt.Ltd are to be treated as a 'related party' cannot be allowed either to be represented, participate or vote in a meeting of COC, be it a COC consisting of financial creditors or operational creditors as the case may be taking into

consideration the 1st proviso to Section 21 of IBC, 2016 read with Regulation 16(4) of IRCP Regulations, 2016.

This Tribunal is now confronted to deal with only the opposition as raised by a Home Buyer opposing the application seeking for withdrawal, namely one Mr P. Velmurugan. In his case it is the submission of the Ld. IRP that the claim is yet to be admitted inter alia as additional documents have been sought for and lack of disclosures in the claim form submitted and in the circumstances cannot be treated as a part of the COC. From the facts disclosed in the application filed by Mr. P. Velmurugan in MA No.1428 of 2019along with the response of the IRP, in totality it is seen that there has been a squabbling going on between him and the corporate debtor and it is the contention of the corporate debtor that despite possession being offered the same is not being taken up. Further counter claims are also being raised against the said applicant. In view of summary jurisdiction we are not in a position to deal with the claim based on limited disclosure. In any case the claim is pending admission by the IRP, the applicant-home buyer cannot seek to thwart the withdrawal of an application filed under Section 12A of IBC, 2016. The applicant is always at

liberty to approach this Tribunal with his claim independently if required or to seek recourse elsewhere. In any case by virtue of a claim in relation to a particular project of the Corporate Debtor, the applicant cannot seek to bring the Corporate Debtor to insolvency, being the effort made by the applicant by insisting that based on his claim, in any case yet to be admitted in view of non compliance with the requirements of IRP to establish the claim, the CIRP should not allowed to be withdrawn. In this connection reference to the recent decision passed by the Hon'ble NCLAT and also referring to the judgement of Hon'ble Supreme Court in its sweep is material, namely **Flat Buyers Association Winter Hills – 77, Gurgaon –Vs- Umang Realtech Pvt. Ltd through IRP &Ors.** to the following effect:-

> *21. In Corporate Insolvency Resolution Process against a real estate, if allottees (Financial Creditors) or Financial Institutions/Banks (Other Financial Creditors) or Operational Creditors of one project initiated Corporate Insolvency Resolution Process against the Corporate Debtor (real estate company), it is confined to the particular project, it cannot affect any other project(s) of the same real estate company (Corporate Debtor) in other places where separate plan(s) are approved by different authorities, land and its owner may be different and mainly the allottees (financial creditors), financial institutions (financial creditors, operational creditors are different for such separate project. Therefore, all the asset of the company (Corporate Debtor) are not to be maximized. The asset of the company (Corporate Debtor – real estate) of that particular project is to be*

maximized for balancing the creditors such as allottees, financial institutions and operational creditors of that particular project. Corporate Insolvency Resolution Process should be project basis, as per approved plan by the Competent Authority. Any other allottees (financial creditors) or financial institutions/ banks (other financial creditors) or operational creditors of other project cannot file a claim before the Interim Resolution Professional of other project and such claim cannot be entertained.

So, we hold that Corporate Insolvency Resolution Process against a real estate company (Corporate Debtor) is limited to a project as per approved plan by the Competent Authority and not other projects which are separate at other places for which separate plans approved. For example - in this case the Winter Hill - 77 Gurgaon Project of the 'Corporate Debtor' has been place of Corporate Insolvency Resolution Process. If the same real estate company (Corporate Debtor herein) has any other project in another town such as Delhi or Kerala or Mumbai, they cannot be clubbed together nor the asset of the Corporate Debtor (Company) for such other projects can be maximised.

22. Further, a 'Secured Creditor' such as 'financial institutions/ banks', cannot be provided with the asset (flat/apartment) by preference over the allottees (Unsecured Financial Creditors) for whom the project has been approved. Their claims are to be satisfied by providing the flat/apartment. While satisfying the allottees, one or other allottee may agree to opt for another flat/apartment or one tower or other tower if not allotted to any other. In such case their agreements can be modified by the Interim Resolution Professional/ Resolution Professional with the counter signature of the Promoter and the allottees, so that the allottees (financial creditors), who are on rent or paying interest to banks may like to get earlier possession and are relieved from paying rent or interest to banks.

23. There may be some allottees who may ask for refund. But that prayer cannot be allowed by the Adjudicating Authority (National Company Law Tribunal) or by this Appellate Tribunal in view of the decision of the Hon'ble Supreme court in ***"Pioneer Urban Land and Infrastructure Limited &Anr. v. Union of India***

&Ors.– (2019) SCC OnLine SC 1005", wherein the Hon'ble Supreme Court observed as follows:-

"57. It can thus be seen that just as information utilities provide the kind of information as to default that banks and financial institutions are provided under Sections 214 to 216 of the Code read with Regulations 25 and 27 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, allottees of real estate projects can come armed with the same kind of information, this time provided by the promoter or real estate developer itself, on the basis of which, prima facie at least, a "default" relating to amounts due and payable to the allottee is made out in an application under Section 7 of the Code. We may mention here that once this prima facie case is made out, the burden shifts on the promoter/real estate developer to point out in their reply and in the hearing before the NCLT, that the allottee is himself a defaulter and would, therefore, on a reading of the agreement and the applicable RERA Rules and Regulations, not be entitled to any relief including payment of compensation and/or refund, entailing a dismissal of the said application. At this stage also, it is important to point out, in answer to the arguments made by the Petitioners, that under Section 65 of the Code, the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out, for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. They can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it. Given the above, it is clear that it is very difficult to accede to the Petitioners' contention that a wholly one-sided and futile hearing will take place before the NCLT by trigger-happy allottees who would be able to ignite the process of removal of the management of the real estate project and/or lead the corporate debtor to its death."

Thus, in relation to an yet to be admitted and as yet not being part of the COC, the applicant-claimant cannot seek to oppose the resolution of withdrawal as passed by the COC unanimously seeking for withdrawal under Section 12A of IBC, 2016.

19. Ignoring all of the above objections as raised by the objectors, it is required to be noted that even before the constitution of the COC an application in MA.1505 of 2019 had been filed before this Tribunal at the instance of a compromise arrived at between the operational creditor who in the first instance initiated the main C.P and based on which the CIRP was initiated in relation to the Corporate Debtor. However, at the said stage of the withdrawal it was not permitted in view of the reasons stated in the order passed by this Tribunal on 11.12.2019 based on the order of this Tribunal rendered on the even date in MA/1325/2019 in IBA/229 of 2019. In hind sight as the said order dated 11.12.2019 had been overruled by the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.6 of 2020 dated 29.01.2020 and also gaining wisdom from the subsequent decisions rendered by the Hon'ble NCALT in relation to exercise of inherent powers under Rule 11 of NCT Rules, 2016/ Section 12A of IBC, 2016 as the case may be it is seen that the Hon'ble NCLAT had adopted a liberal approach which is

demonstrated in the judgements rendered by it in ***Dhiraj Prabhu Vs. Rajeev Shetty & Anr. Company Appeal (AT) (Insolvency) 1501 of 2019 which as follows:-***

> *5. In the meantime, in view of the vacation of the interim order, the 'Committee of Creditors' was formally constituted on 4th February, 2020 and was informed on 5th February, 2020 to the Adjudicating Authority and by the aforesaid period, the parties have reached settlement.*
>
> *6. In the light of the decision of the Hon'ble Supreme Court in "Swiss Ribbons Pvt. Ltd. &Anr. vs. Union of India &Ors.– 2019 SCC OnLine SC 73", this Appellate Tribunal can exercise inherent powers under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 accepting the settlement and thereby to allow the Respondent to withdraw the application under Section 9 as prayed for, but technically constitution of the 'Committee of Creditors' was intimated on the same date i.e. 5th February, 2020, the day the parties reached the settlement.*
>
> *7. As we find that the parties have been negotiating and almost reached a final settlement and on merit the Appellant has also raised certain issues, taking into consideration that the 'Corporate Debtor' is an Infrastructure Housing Company on which a large number of allottees are dependent and if the 'Corporate Debtor' goes on 'Corporate Insolvency Resolution Process', then it may delay the completion, we in exercise of powers conferred under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 accept the settlement reached between the parties and allow Mr. Rajeev Shetty to withdraw the application under Section 9.*

20. However in the instant case it is to be seen that the Corporate Debtor who is also engaged in the real estate sector and as compared to the facts in ***Company Appeal (AT) (Insolvency) 1501 of 2019*** is better placed herein as even before the

constitution of the COC, an application seeking for withdrawal had been filed in MA.No.1505 of 2019. In the circumstances in the fitness of things and also taking into consideration the decision of the COC in its 2nd meeting held on 14.01.2020 wherein the resolution was passed unanimously by the reconstituted members of the COC and after the IRP had rightly excluded exercising his power of revision as contained in Chapter IV of IRCP Regulations, 2016 after due intimation to the parties concerned about his objections in they being included in the COC, application in *MA/67/2020* had been moved and in view of the detailed reasoning given above in the earlier paragraphs, the *MA/67/2020* stands **allowed**, while all the other applications, namely *MA/82/2020, MA/68/2020, MA/09/2020 and MA/1428/2019* are **dismissed** however without costs.

21. From the facts as disclosed in the application, it can be discerned that the IRP being not sure about the classification as required to be done under the provisions of IBC, 2016 read with attendant regulations, had been vacillating without understanding the provisions of IBC, 2016 with regard to classification of creditors as disclosed in the constitution of Committee of Creditors filed by the IRP itself allowing different types of creditors to be part of the

CoC, as evident from the 1st CoC held on 19.12.2018 and the initial classification and subsequent change, which lead to the other applicants filing these applications before this Tribunal, challenging the action of the IRP and the decision made in the 2nd CoC held on 14.01.2020. In connection with the inefficient function of the IRP/RP/Liquidator, it is worthwhile to recollect the Report of the Bankruptcy Law Reforms Committee Volume I, Rational and Design, 2015 , more particularly Chapter 4.4;

> The role of the IPs is thus vital to the efficient operation of the insolvency and bankruptcy resolution process. A well functioning system of resolution driven by the IPs enables the adjudicator to delegate more and more powers and duties to the professionals. This creates the positive externality of better utilization of judicial time. The worse the performance of IPs, the more the adjudicator may need to personally supervise the process, which in turn may cause inordinate delays. Consumers in a well functioning market for IPs are likely to have greater trust in the overall insolvency resolution system. On the other hand, poor quality, services and recurring instances of malpractice and fraud, erode consumer trust.

It is needless to say that the IRP is not only required to act in accordance with law but also seen to have acted in accordance in law.

22. Since Form FA has also been filed vide filing dated 28th January 2020 having Diary No.624 of 2020 and as the fees and costs of the IRP has been fully provided for to his satisfaction, no

specific order is necessary in this regard. In the circumstances the CIRP initiated by this Tribunal vide order dated 13.11.2019 stands withdrawn, the powers of the Board of Directors which stood suspended is restored and the management and affairs of the Corporate Debtor is directed to be handed over to them by the IRP including the possession and control of books and assets of the Corporate Debtor, if any taken during the CIRP period. This order disposes of all the applications as above and any interim orders passed during the CIRP by this Tribunal also stands vacated in view of the withdrawal of the CIRP.

-SD-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-SD-
(R.VARADHARAJAN)
MEMBER (JUDICIAL)

3/3/2020

ASSISTANT REGISTRAR
NATIONAL COMPANY LAW TRIBUNAL
CHENNAI BENCH
CORPORATE BHAVAN, 3rd FLOOR