

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH, COURT-III**

IA-836/2023  
In  
IB-654(PB)/2019

**IN THE MATTER OF IB-654(PB)/2019:**

**VISHAL FABRICS & ORS.**

**..... FINANCIAL CREDITORS**

**VERSUS**

**M/s AVJ DEVELOPERS (INDIA) PVT. LTD.**

**CORPORATE DEBTOR**

**AND IN THE MATTER OF IA-836/2023:**

**CANARA BANK**

*Through its Authorized Representative Mr. Prince*

*Having its Head Office at:*

*112, J.C. Road, Bangalore-560002.*

*Having Branch Office at:*

*Delhi Tamil Sangam RK Puram, Sector-5, New Delhi.*

**..... APPLICANT BANK**

**VERSUS**

**MR. VIVEK KUMAR**

*(Resolution Professional of AVJ Developers (India) Pvt. Ltd.)*

*R/o C-604, Rosewood Apartments,*

*Mayur Vihar-I, Ext., New Delhi-110091.*

**.....RESPONDENT NO.1**

**MR. VINAY JAIN**

*(Successful Resolution Applicant of AVJ Developers (India) Pvt. Ltd.)*

*R/o D-230, Vivek Vihar, Delhi-110095.*

**..... RESPONDENT NO.2**

**Order Pronounced On: 14.11.2025**

**CORAM:**

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)**

**DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)**



**PRESENT:**

For Applicant : Mr. Brijesh Kumar Tamber, Mr. Prateek Kushwaha,  
Mr. Nikhil Mehndiratta, Mr. Agastya Sen,  
Ms. Nidhisha Choksi, Advs.

For Respondent : Mr. Saurabh Kalia, Ms. Mani Gupta, Mr. Aman  
Choudhary, Advs. alongwith Mr. Vivek Kumar (RP)

**ORDER**

**PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)**

1. The present Application has been filed by Canara Bank under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016 and is seeking the following reliefs: -
  - “a) Allow the present application, declare the Applicant Bank as a 'Secured Financial Creditor' in the present case and transactions pending subject matter of the present proceeding.*
  - b) Direct the Non-Applicant i.e. Resolution Professional to admit the claim of the Applicant Bank towards as mentioned 32 accounts.*
  - c) Direct the Non-Applicant i.e. Resolution Professional to consider the Applicant Bank as a Secured Financial Creditor and to give all rights and privileges to the Applicant Bank of Secured Financial Creditor and proportionate voting rights in the Committee of Creditors.*
  - d) Pass any such further order/s as the Hon'ble Appellate Tribunal deems fit and proper in the interest of justice and equity.”*
2. The case of the Applicant Bank is that this Adjudicating Authority vide Order dated 21.10.2019 initiated Corporate Insolvency Resolution Process against the Corporate Debtor i.e. M/s. AVJ Developers (India) Private Limited and the Respondent namely, Mr. Vivek Kumar was appointed as the Resolution Professional of the Corporate Debtor vide Order dated 04.10.2022 replacing Mr. Anil Tayal, the erstwhile Resolution Professional of the Corporate Debtor.



3. It is submitted that on 25.02.2021, the Applicant Bank filed its claim in Form C, as a Financial Creditor, in respect of the Corporate Debtor, with Mr. Anil Tayal, i.e. the Erstwhile Resolution Professional, in the present matter. The said claim was with respect to 59 accounts of individuals who have taken housing loans for the purchase of residential units/flats in the Corporate Debtor's project. The total claim filed by the Applicant Bank as on 21.10.2019 i.e. Insolvency Commencement Date was for Rs. 17,46,00,000/- (Rupees Seventeen Crores and Forty Six Lakhs Only).
4. It is submitted that, on 01.09.2022, the Applicant Bank received a communication from Mr. Anil Tayal, the Resolution Professional rejecting the claim of the Applicant Bank primarily on the premise that it is the individual homebuyers who can file claim with the Resolution Professional, and the claim filed by the Applicant Bank is without any locus as the claim has been filed directly by the Applicant Bank on behalf of the Home Buyers without any authorization being granted to the Applicant Bank by the Home Buyers.
5. It is submitted that the Resolution Professional rejected the claim without giving any opportunity to the Applicant Bank to clarify the position with respect to the said loan accounts having outstanding dues towards the Applicant Bank. Further, out of said 59 accounts towards which the claim was filed, no repayment has been made by the individual borrowers i.e. homebuyers. As on date, the accounts with respect to 32 homebuyers are still irregular as per the records maintained by the Applicant Bank.
6. It is submitted that the Applicant Bank has disbursed the loan amount directly to the Corporate Debtor (Builder), on behalf of the borrower/homebuyers as per the Tripartite Agreement executed between the Applicant Bank, the Borrower, and the Corporate Debtor in respect of all the accounts. It is further submitted that as per the terms of the Tripartite Agreement, there is prior charge/lien of the Applicant Bank on the residential units/flats in the Corporate Debtor's project towards which the housing loans were advanced. As per Clause 16 of the terms of said Tripartite Agreement, in the event of default, the entire amount advanced by the bank on account of the borrowers shall be refunded by the Corporate Debtor/Builder to the bank.



7. The Applicant Bank has also approached the Hon'ble DRT by way of filing Original Application ("OA") against the individual home buyers ("Borrowers") against the said accounts. The Ld. DRT, Delhi, while disposing the said OAs has directed that the primary liability to refund the outstanding dues of the Applicant Bank is that of the Corporate Debtor. Another OA preferred by the Applicant Bank, bearing no. 356/2019 was also disposed of in the same manner.
8. The Applicant Bank submits that out of 32 accounts of which the claim has been filed, the Applicant Bank holds decree in favour from the Ld. DRT against 18 accounts. As per Section 3(10) of the Insolvency and Bankruptcy Code, 2016, "**creditor**" means:  
*"Any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder"*
9. It is submitted that the Applicant Bank has right to maintain claim as Financial Creditor against the Corporate Debtor in the present facts and circumstances of the case. Accordingly, the rejection of the claim by the Ex-Resolution Professional is bad in law and is in total contrast and defiance to the judgments passed by the Ld. DRT, Delhi in favour of the Applicant Bank.
10. It is submitted that the reliance placed by the Resolution Professional on the judgment of **Axis Bank Limited Vs. Value Infracon India Private Limited & Anr** [Company Appeal (AT) (Insolvency) No 582 of 2020] passed by the Hon'ble National Company Law Appellate Tribunal, while rejecting the claim is not applicable in the present case in view of the orders passed by the Ld. DRT, Delhi whereby specific directions were issued in favour of bank to pursue its claim before the Liquidator or National Company Law Tribunal, as the case may be.
11. Thus, the Applicant Bank, in light of the above facts and circumstances, has prayed for appropriate directions to be passed against the Non-Applicant/Respondent herein to accept the claim filed by the Applicant as Financial Creditor against the Corporate Debtor.



## **Respondent/Resolution Professional's Case**

- 12.** The Respondent/Resolution Professional filed reply affidavit dated 28.04.2025 and submitted that the present Application is devoid of any substance and merit and is liable to be dismissed in limine.
- 13.** It is submitted that the Erstwhile Resolution Professional made a public announcement dated 22.10.2019 in Form-A as per the terms of Regulation 6(1) of the Insolvency and Bankruptcy Board of India (Corporate Insolvency Resolution Process) Regulations, 2016 ("**CIRP Regulations**"). In terms of Regulation 6(2)(c) of the CIRP Regulations, the last date for submission of proof of claim was specified as 05.11.2019. Further, the said public announcement was duly uploaded on the website of the Insolvency and Bankruptcy Board of India ("IBBI"). The Applicant filed its claim on 24.02.2021, i.e. after more than 478 days from the last date of submission of claim i.e. 05.11.2019. Further, the resolution plan of the Corporate Debtor submitted by Mr. Vinay Jain with a voting share of 72.661% was approved by the CoC in its 14<sup>th</sup> Meeting conducted on 11.10.2021, e-voting concluded on 16.10.2021. Thereafter, on 09.11.2021, the Erstwhile Resolution Professional filed an application bearing I.A. No. 5385 of 2021 under Section 30(6) of the Code seeking approval of the Resolution Plan. In light of the judgment passed by Hon'ble Supreme Court in **Greater Noida Industrial Development Authority vs. Prabhjit Singh Soni and Another**, 2024 SCC OnLine SC 122, the Resolution plan was sent back to CoC for fresh consideration. The Resolution Plan was amended and again approved with voting share of 75.963% by the CoC in its 26<sup>th</sup> CoC meeting held on 26.06.2024, e-voting concluded on 04.07.2024. Thereafter, on 12.07.2024, the Resolution Professional filed an application bearing I.A.(Plan) No. 33 of 2024 seeking approval of the resolution plan which is pending before this Adjudicating Authority. Therefore, the claim filed by the Applicant Bank with a considerable delay cannot be admitted.
- 14.** It is submitted that as per Regulation 12 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations"), a creditor is required to file its claim on or before the last date mentioned in the public announcement. The proviso to Regulation 12(1) of CIRP Regulations provides as follows:



*“Provided that a creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit his claim with proof to the interim resolution professional or the resolution professional, as the case may be, up to the date of issue of request for resolution plans under regulation 36B or ninety days from the insolvency commencement date, whichever is later:  
Provided further that the creditor shall provide reasons for delay in submitting the claim beyond the period of ninety days from the insolvency commencement.”*

The above regulation came into effect on 18.09.2023, by way of an amendment to the CIRP regulations. However, prior to the amendment, a creditor was required to submit a claim on or before the ninetieth day of the insolvency commencement date. The last date for submission of Resolution Plan in the present case was 04.03.2020 and the Applicant had filed its claim on 24.02.2021. It is contended that the said amendment is prospective in nature and cannot be applied retrospectively. Thus, the CIRP Regulation, as it stood prior to the amendment, ought to be applied in the present case. Hence, it is evident that the Applicant failed to file its claim within the stipulated timeline.

**15.** The Respondent submitted that the Applicant Bank is neither a secured nor a financial creditor of the Corporate Debtor. A bare reading of the Tripartite Agreement, clearly indicate that the Applicant had granted loan to home buyers and not to the Corporate Debtor. Therefore, contrary to the contention of the Applicant, the Tripartite Agreement, in fact, reinforces the contention of the Answering Respondent i.e. the Applicant is not a secured financial creditor of the Corporate Debtor in as much as the Applicant did not grant any loan in favour of the Corporate Debtor.

**16.** It is contended by the Resolution Professional that the Applicant herein relied upon the Tripartite Agreements executed amongst the homebuyer, the Applicant and the Corporate Debtor for establishing its status as "secured creditor" of the Corporate Debtor. However, the Applicant has conveniently ignored the following Recital:



**Recital:**

"WHEREAS the Borrower has approached the Bank to grant him loan of Rs. 11,00,000/- (Rupees Eleven Lac only) for purchase of Schedule B property and the Bank has vide its sanction letter dated . . . Agreed to sanction the loan of Rs. 11,00,000/- (Rupees Eleven Lac Only) to the Borrower (hereinafter called "loan")

**Clause 2 of the Tripartite Agreement**, which state that the borrower authorised the Applicant to disburse the loan amount directly to the Corporate Debtor and the sum advanced by the Applicant to the borrower and remitted by the Applicant directly to the Corporate Debtor shall be deemed as disbursed by the Applicant to the borrower.

**Clause 3 of the Tripartite Agreement**, it says that the Bank has and shall have the first and paramount lien over the money disbursed by the Bank as loan to the Borrower, the charge in favour of the Bank shall be first and paramount over the charge which the Builder may have over the said flat/loan amount.

**Clause 20 of the Tripartite Agreement**, which state that the term of "loan" shall include interest, penal interest and all other sums payable by the borrower to the Applicant."

From the abovementioned recitals and covenants of the Tripartite Agreement, it is clear that the loans were disbursed to the individual homebuyers and not the Corporate Debtor as per the law laid down by the Hon'ble Supreme Court in the case of **Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416**.

**17. Analysis and Findings**

- i) Heard the submissions of Ld. Counsel appearing for the Applicant and the Respondent and also perused the records.
- ii) In the instant case, the Applicant Bank has sought a direction to the Resolution Professional to admit the claim of the Applicant Bank with respect to 32 Homebuyers. It is seen from the records that out of these 32 home buyers, the 15 home buyers have filed their claims. The Resolution Professional, out of these 15 claims, admitted 13 claims and the remaining 2 claims are under verification. The remaining 17 home buyers have not filed any claims, so far.



- iii) Before proceeding to analysing the facts of the case and record the findings, it is essential to look at the background facts and some of the orders passed in this matter.
- iv) The instant application i.e. IA-836/2023, was filed by the Applicant/Bank seeking a direction to declare the Applicant/Bank as a Secured Financial Creditor and to direct the Respondent/Resolution Professional to admit the claim of the Applicant Bank etc.
- v) The said application was heard and was dismissed vide Order dated 10.02.2023 by the Hon'ble Principal Bench, NCLT, relying upon the Order dated 20.12.2021 passed in Company Appeal (AT) (Insolvency) No 582 of 2020 in the case of **"Axis Bank Limited Vs. Value Infracon India Private Limited & Anr."** by the Hon'ble NCLAT, New Delhi, wherein it was held that the Bank has not directly financed the Corporate Debtor and the real Financial Creditors are the homebuyers, the Hon'ble Principal Bench therefore, dismissed the application filed by the Canara Bank.
- vi) The operative part of the Order dated 10.02.2023 passed in IA-836/2023 by this Adjudicating Authority (Hon'ble Principal Bench) is extracted hereunder: -

*"This application has been filed by Canara Bank pleading that they have advanced various amount to individual home buyers and home buyers in tum have given the money in advance to the CD for the purpose of booking their units, the CD defaulted in the construction and the CD is now under CIRP proceedings. The Canara Bank/Applicant has filed a claim before the RP on the ground that they are the financial creditors as they have lent the money to the home buyers. This claim was rejected by the RP by proceedings dated 01.09.2022 (Annexure-3) (page-18) here under the RP relied upon the decision of the Hon'ble NCLAT, New Delhi the relevant portion of which is at page 19 which reads as under: -*

*Admittedly, in the present case the bank has not directly financed the Corporate Debtor.*

*The real financial creditors are the home buyers. The decision of the Hon'ble NCLAT applies to the facts of the present case hence the Resolution Professional was right in rejecting the claim.*



*We find no reason to interfere in the proceedings and the reasoning of the Resolution Professional, **IA-836/2023** stands dismissed.”*

vii) The Applicant Bank filed an Appeal before the Hon’ble NCLAT bearing Company Appeal No. 390/2023, against the order dated 10.02.2023 passed in IA-836/2023 by this Adjudicating Authority, which was dismissed vide Order dated 19.12.2023. The relevant part of the Order is reproduced hereunder: -

*“Although Counsel for the Appellant has vehemently argued that the impugned order is bad in law but he could not cite any judgment to the contrary to the decision rendered in the Case of Axis Bank (Supra), therefore, we do not find any merit in the present appeal and the same is hereby dismissed. No costs.”*

viii) The Order dated 19.12.2023 passed by the Hon’ble NCLAT in Company Appeal No. 390/2023 was challenged before the Hon’ble Supreme Court of India, in Civil Appeal No. 7311/2024 titled as **Canara Bank v. Vivek Kumar Resolution Professional of AVJ Developers (India) Private Limited**. The Hon’ble Supreme Court of India vide order dated 27.09.2024, set aside the order dated 19.12.2023 passed by the Hon’ble NCLAT in Company Appeal No. 390/2023 and remanded the matter back to the Hon’ble NCLAT for fresh consideration. The said order is extracted hereunder: -

*“With the consent of the parties, the appeal is taken up for final hearing.*

*Heard the learned counsel appearing for the parties.*

*One of the issues before the National Company Law Appellate Tribunal (for short, ‘NCLAT’) was whether as per the clauses of the relevant agreement, the developer was liable to repay the loan. Instead of considering the case of the appellant on facts, by a very cryptic order running into three paragraphs, the NCLAT has dismissed the appeal preferred by the appellant. Reliance placed by the NCLAT on its own judgment appears to be not correct, as the said case was decided on its own facts.*

*As the NCLAT has not considered the merits of the appeal preferred by the appellant, we set aside the impugned order dated 19th December, 2023 and remand Company Appeal No. 390 of 2023 for a fresh consideration by the NCLAT.*



*We direct that the restored Company Appeal shall be listed before the NCLAT on 14th October, 2024 in the morning when the parties who are represented here shall be under an obligation to appear. On that day, the appellant may apply for appropriate interim relief.*

*To enable the appellant to apply for appropriate interim relief, we direct that till 16<sup>th</sup> October, 2024, the Resolution Plan shall not be approved.*

*We, however, make it clear that the application for interim relief which will be made by the appellant shall be decided by the NCLAT without being influenced by this limited relief granted by this Court.*

*All contentions of the parties are kept open.*

*The appeal is accordingly allowed.*

*The application for intervention is disposed of.*

*However, if the intervener make an application in the remanded Company Appeal for intervention, the same shall be considered by the NCLAT in accordance with law”.*

- ix) The Hon’ble Supreme Court of India has recorded that one of the issues for consideration before the Hon’ble NCLAT was “whether as per the Clauses of the relevant agreement, the developer was liable to repay the loan”. The Hon’ble Supreme Court, recorded that the reliance placed by the NCLAT on its own judgment appears to be not correct, as the said case was decided on its own facts. Accordingly, the Hon’ble Supreme Court remanded the case back to the Hon’ble NCLAT.
- x) The Hon’ble NCLAT vide order dated 09.01.2025, remanded the matter to this Adjudicating Authority for fresh consideration. The operative paragraphs of the order dated 09.01.2025 passed by the Hon’ble NCLAT are extracted below: -

*“We have already taken into consideration that the Impugned Order rejected the claims of the Appellant mainly based on the judgment of the Hon’ble Supreme Court of India in the matter of Pioneer Urban Land (Supra) and this Appellate Tribunal in the case of Value Infracon India Private Limited (Supra). The Impugned Order passed by the Adjudicating Authority stated that the bank did not finance the Corporate Debtor and real financial creditors are the homebuyers and based on the judgment of this Appellate Tribunal Value Infracon India*



*Private Limited (Supra) the Adjudicating Authority rejected the case of the Appellant.*

*We have examined both the cases in greater details in preceding paragraphs as well as legal provisions of the Code and various clauses of the agreement specially in contrast with provisions of the Tripartite Agreement of the present case vis- a vis Value Infracon India Private Limited (Supra), as such we find that the Adjudicating Authority has erred in not considering the aspects brought out by the Appellant in the present appeal.*

*The Appellant Bank has directly disbursed the amount to the Corporate Debtor/ Builder, albeit, on behalf of the Borrowers/ Homebuyers and in terms of the Tripartite Agreements amongst the Allottees, Builder and the Bank, the Corporate Debtor/ Builder has undertaken to refund the entire amount advanced by the bank in case of event of default of repayment of loan.*

*We observe that Clause 9.5(v) of the Resolution Plan provides for submission of claims by allottee/unit holder/flat/shop owner who had failed to file the same with the Respondent or who had filed it but the same was under verification, within 45 days of the approval of the Resolution Plan. Thus, even the plan is approved by CoC, the home-buyers/Financial Creditor are entitled to file their claims and there is no extinguishment of the claims during such protected period.*

*We note that Intervener brought to our notice the clause in Resolution Plan: -*

*"In case any additional fund required for the completion of project or for the payment of any inability as per the resolution plan. the same shall be infused by the RA from his own source. "*

*In fact, the pleadings of the Intervenor and provision in the Resolution Plan support the cause of the Appellant and gives the Appellant due protection.*

*In view of above detailed discussion, the appeal succeeds. The Impugned Order is set aside and IA No. 836/2023 in C.P. (IB) No. 654(PB)/2019 is restored to its original number and the matter is remanded back to the Tribunal for reassessment of the case, in accordance with law. The Adjudicating Authority may decide without*



*being influenced by any of the observation made herein above. All contentions of the parties will also remain open*

*Parties are directed to appear before the Adjudicating Authority on 27.01.2025. No costs. IA. if any, are closed”.*

- xi) The Hon’ble NCLAT, thoroughly examined the relevant clauses of the Tripartite Agreement entered into amongst the Applicant Bank, the Homebuyers and the Corporate Debtor.
- xii) The Hon’ble NCLAT also took note of the relevant portions of the judgment in the case of **“Axis Bank Limited vs Value Infracon India Pvt Ltd. & Anr.”** which was relied upon by the Respondents therein and recorded that in the case of **Value Infracon India Pvt. Ltd. (Supra)**, the loans were given by the Banks to the independent homebuyers and it was the responsibility of the home buyers alone to repay the loan to the bankers/Financial Creditors and there was no responsibility of the Corporate Debtor/ Borrower for any payment to banker in case of any default by borrower or Corporate Debtor.
- xiii) Thus, the Hon’ble Appellate Tribunal referring to the Clauses in the Tripartite Agreement in the case of **Value Infracon India Pvt. Ltd. (Supra)** observed that the said clause clearly indicates that in case borrower/homebuyers failed to honour its commitment, the bank had THE right to pay the balance sale consideration and get it registered either in bank's name or its nominee's name.
- xiv) The Hon’ble NCLAT also referred to Clause 16 of the Tripartite Agreement in the present case and observed that this clause is quite different from the typical clauses of the Tripartite agreement and different from the equivalent clause of the **Value Infracon India Private Limited (Supra)**.
- xv) The Hon’ble NCLAT has also recorded that this Adjudicating Authority has not considered the distinction carved out in the relevant clauses of the Tripartite Agreement in the present case and therefore remanded the matter for fresh consideration/reassessment of the case.
- xvi) From the above discussion, it is imperative to examine the Clause 16 of the Tripartite Agreement in the present case and the relevant Clause of the Tripartite Agreement in case of **Value Infracon India Private Limited (Supra)** and to decide as to whether the Applicant/Bank can be considered to be a Financial Creditor in terms of Section 5(7) of the Code.



vii) The relevant Clause of the Tripartite Agreement in the case of Value Infracon India Pvt. Ltd. (Supra) has been taken note by the Hon'ble NCLAT in its judgment and is quoted hereunder: -

*"14. The relevant clause of the tri-partite Agreement entered into between the Home Buyers, the developer and the Appellant/M/s. Axis Bank is reproduced as hereunder: - "It is agreed by and between the parties to this Agreement that in case if the Borrower fails to honour the commitment. the Developer/Builder shall inform the BANK and the BANK shall have the right to pay the Sale consideration and get it registered either in BANK's name or its nominee. Likewise in the event the Borrower defaults in payment of instalments then, in such an event also, the Bank shall have the right to inform about such default on the part of the Borrower to the Builder and shall accordingly have the right to write to the Builder cancellation of Agreement executed between the Builder and the Borrower, where after the Bank shall have the right to pay the Sale consideration and get the subject property registered either in the Bank's name or in the name of the Bank's nominee."*

xviii) The above clause indicates that in case the borrower/homebuyers fail to honour the commitment, the Bank shall have the right to pay the balance sale consideration and get it registered either in bank's name or its nominee's name.

xix) Clause 16 of the Tripartite Agreement of the present case is as under: -

*"16. In the event of default of repayment of the loan and/or the Borrower (s) committing any other default which make the Borrower liable for the re payment of the entire amount outstanding in the said loan as per the terms of the loan agreement executed between the Borrower's and the Bank, or (the Borrower withdraws from his agreement or Builder cancels the booking of the Borrower, or in the event of failure of the Builder to complete the project, or in the event of death of the Borrower. or in any event where the title to the schedule flat/dwelling unit is not/not being passed on to the Borrower or in any other eventualities of the nature by which the loan advanced by the Bank is not utilized for the purpose for which it was so advanced or breach of any of the terms and conditions contained in this*



*agreement, the entire amount advanced by the Bank on account of the Borrower shall be refunded by the Builder to the Bank. If the entire amount refunded by the Builder is insufficient to close the loan account, Borrower shall make immediate arrangements for payment of such deficit amount as may be required to close the loan account. If the Builder fails to repay the amount as stated under this clause, the Borrower shall repay the entire loan amount with interest, expenses, penal interest, etc. in terms of the loan agreement executed by the Borrowers”*

- xx) Perused the relevant clauses of the Tripartite Agreement in the case of “**Axis Bank Limited Vs. Value Infracon India Private Limited & Anr.**” as well as in the present case and noted the distinction in the present case. As per Clause 16 in the present case, the Builder takes the liability/responsibility to repay the debt amount to the Bank in case of default. The language used in this clause (Clause 16) is quite different from the clauses of the Tripartite Agreement in the case of **Value Infracon India Pvt. Ltd. (Supra)**. This clause (Clause 16) stipulated that in case of default of payment of loan or borrower committing any default or any event of failure of builder or in event where the title of dwelling unit is not passed on to the borrower/ homebuyers or due to breach of any terms and conditions contained in the Tripartite Agreement “the entire advance by the bank on account of borrower shall be refunded by the builder to the bank”. The Clause 16 also provides that in case the builder fails to pay the amount as stated in this clause, the borrower shall pay the entire loan amount with interest, including penal interest etc., in terms of loan agreement.
- xxi) It can be thus, seen that in case of the Tripartite Agreement of **Value Infracon India Pvt. Ltd. (Supra)**, there is no responsibility of the Corporate Debtor/ Builder/Developer, to repay any money of the bankers and the entire responsibility was that of the homebuyers, whereas in terms of clause 16 of the Tripartite Agreement of the present appeal, the primary responsibility of repayment of loan is that of the Builder/Corporate Debtor, in case of any of the eventuality laid down in Tripartite Agreement.
- xxii) The Applicant has therefore contended that Clause 16 of the Tripartite Agreement in the present case casts an obligation upon the Builder/ Corporate Debtor to repay the debt to the Bank. Thus, the entire amount



advanced by the Bank on the account of the borrower shall be refunded by the Builder/Corporate Debtor to the Applicant/Bank and therefore, the same would become a financial debt in terms of Section 5(8) read with Section 3(33) of the Code, the same may become a financial debt advanced by the Appellant bank to the Corporate Debtor.

xxiii) At this juncture, it is essential to note that an amendment was made in Section 5(8)(f) of the Code to enable the Homebuyers/allottees to act as Financial Creditor and to participate in the CoC. The Applicant Bank's case is that Clause 16 of the Tripartite Agreement in the present case agrees for payment in favour of the Applicant in terms of Section 3(6) of the Code and since, the Applicant gets a right to payment, it has to be classified as Financial Creditor to the extent of its money due to be paid by the Corporate Debtor in terms of Clause 16 of the Tripartite Agreement.

xxiv) The amendment brought under Section 5(8)(f) of the Code which classified the homebuyers/allottees as Financial Creditors was challenged before the Hon'ble Supreme Court and the constitutional validity of Section 5(8)(f) of the Code was upheld by the Hon'ble Supreme Court in the case of **Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors.**, reported in (2019) 8 SCC.

xxv) At this stage, it is pertinent to peruse Clause 2 of the Tripartite Agreement. The Clause 2 is reproduced hereunder for ready reference.

*"The Borrower has already paid a sum of Rs.15,85,000/- (Rupees Fifteen Lac Eighty-Five Thousand Only) to the builder on..... as advance money for the purchase of Schedule B property. The Borrower hereby authorizes the Bank to disburse the above said loan amount directly to the Builder in terms of the above said Agreement for Sale or as requested by the Borrower. The sum of Rs.11,00,000/- (Rupees Eleven Lac Only) advanced by the Bank to the Borrower and remitted by the Bank directly to the builder shall be deemed as disbursed by the Bank directly to the Borrower."*

xxvi) The Recital to the Clause 2 of the Tripartite Agreement provides that it is the Borrower/Homebuyer and not the Builder/Corporate Debtor who has approached the Bank seeking loan for purchasing the flat. It is the Borrower/Homebuyer who has authorized the Bank to disburse the above said loan amount directly to the Builder/Corporate Debtor. This shows that



the Bank has acted on the instruction of the Homebuyer and not otherwise. Therefore, The submissions made on behalf of the Applicant Bank that the Applicant assumes the character of Financial Creditor defined under Section 5(7) of the Code just because the Builder takes the liability/responsibility to repay the debt amount to the Bank in case of default cannot be accepted.

xxvii) It will also be pertinent to refer to Section 5(8) of the Code at this stage, which defines the word “Financial Debt” as well as Clause (a) and (f) of Section 5(8) of the Code, which read as under: -

*“financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*

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

*....*

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

*[Explanation. - For the purposes of this sub-clause-*

*(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*

From the plain reading of the above definition of ‘Financial Debt’ under Section 5(8) of the Code, 2016, it is evident that the first and foremost ingredient/requirement for classifying a debt as a ‘financial debt’ is that the money must be disbursed against the consideration for the time value of money, involving borrowing with an obligation to pay interest. In the present case, the amount is raised by the Corporate Debtor from the Homebuyer and therefore, the real Financial Creditors in terms of Section 5(8)(f) of the Code are the Homebuyers as the loan was availed by the Homebuyers from the Bank which has not directly advanced the money to the Corporate Debtor and only acted on instructions of the Homebuyers in disbursing the loan amount to the Builder. The Clause 16 of the Tripartite Agreement stipulating that the Builder would be liable to repay the loan to the Bank in event of default, entitles the Bank to recover the same. In such a case, the said clause can only be termed as an indemnity clause under the Tripartite Agreement. The mere existence of a clause in the Tripartite Agreement stipulating that



the Builder would be liable to repay the loan to the Bank in event of default, does not alter the intrinsic nature of the transaction between the Bank and the Homebuyer. It is a settled principal of law that that terms of a contract/agreement cannot override or supersede statutory provisions. The provisions in a contract/agreement that conflicts with statutory mandate are generally considered invalid and unenforceable.

xxviii) In the instant case, the debt in question has been disbursed by the Bank to the Corporate Debtor on the instructions of the homebuyer so as to enable the homebuyer to purchase the flat. Such an arrangement made by the Bank and the Homebuyer will not change the character of the financial debt and place the bank in the category of a Financial Creditor, as can be seen in the clauses 2,3,16 and 20 in the Tripartite Agreement. These clauses in the Tripartite Agreement have been incorporated for the sake of convenience of the Bank. Under the Tripartite Agreement, it is the homebuyer who is availing the finance from the Bank and creating the charge in favour of the Bank by giving an undertaking to keep the bank indemnified against any loss. Therefore, the Bank cannot be termed as the Financial Creditor of the Corporate Debtor in terms of Section 5(7) of the Code. Thus, a clause in the Agreement cannot be contrary to the provisions of the Code or give a status to the party which is not contemplated by the Code. Accordingly, the claim of the Bank cannot be accepted as the Financial Creditor as no loan amount has been disbursed to the Corporate Debtor.

xxix) Upon perusal of the records, it is seen that the Applicant Bank has placed on record a copy of an E-mail dated 19.10.2024 sent by the Mr. Vinay Jain/Successful Resolution Applicant to Ld. Counsel appearing for Canara Bank after the matter was heard by the Hon'ble NCLAT, New Delhi on 16.10.2024 in the case of Canara Bank vs. Vivek Kumar, Resolution Professional of AVJ Developers (India) Pvt. Ltd. in Comp. App. (AT)(Ins) No. 390/2024. In the said E-mail, the Successful Resolution Applicant has categorically stated that out of the 32 claims filed by the Applicant Bank, 13 claims have been admitted by the Resolution Professional and further 19 claims are under consideration. The Successful Resolution Applicant made the following proposal to the Bank: -

*"1. The claim of homebuyers has been admitted as unsecured financial creditors, similarly, with respect to the 19 claims by the*




*Bank, the undersigned hereby proposes to accept these claims as unsecured financial creditors.*

*2. Pursuant to Clause 16 of the Tripartite Agreement, the undersigned proposes to accept the claim for the principal amount advanced by the Bank on behalf of the borrower to the Corporate Debtor (AVJ Developers (India) Pvt. Ltd.). The claim, however, shall exclude any interest, expenses, penal interest, or other ancillary charges.*

*3. The undersigned further proposes that the acceptance of the aforementioned claim shall be subject to the receipt of claims from the home allottees/borrowers of the said loan amount. In the event that, at any subsequent stage within 45 days from the date of approval of the resolution plan, as provided in the Resolution Plan, any home allottee/borrower files a claim in respect of any of the 19 units, the Bank's claim corresponding to such units shall stand extinguished.”*

xxx) The Successful Resolution Applicant vide E-mail dated 23.10.2024 shared a copy of the Amended Resolution Plan to the Applicant Bank. The Ld. Counsel on behalf of the Applicant Bank replied to E-mail dated 19.10.2024 rejected the proposal. In order to ascertain the treatment given to the Homebuyers who have either submitted belated claims or have not submitted any claims as well as that of the bank who is claiming to be given the status of the financial creditor in place of such Homebuyers, I have perused the Resolution Plan which is already on record and has been filed alongwith the IA (R.Plan)-33/(PB)/2024 filed by the Resolution Professional seeking approval of the Resolution Plan and pending before this Adjudicating Authority. Although a copy of the Resolution Plan has not been placed on record in the instant application, it was shared by the Successful Resolution Applicant with the Ld. Counsel for the Applicant-Bank vide E-mail dated 23.10.2024. In order to determine the issue involved, it is appropriate to refer to the relevant clauses of the Resolution Plan which is part of the IA (R. Plan)-33/(PB)/2024.

xxxii) **The relevant paragraph of the Resolution Plan is Para 9.7 of Chapter 9:-**



*“Settlement of Outstanding Liability of the Resolution Plan, deals with the claims of the Banks against Homeloans and Tripartite agreement with Homebuyers.”*

Sub-clause (a) of Paragraph 9.7 of the Resolution Plan reads as under:

*“(a) The separate details in this regard has not been given in the IM, but the claim lodged or to be lodged by the bank on the strength of Tripartite Agreement shall be treated as unsecured creditor and shall be settled by Resolution Applicant which will be paid in 2 quarterly equal instalments after 365 days from the date of approval of the Resolution Plan by the Hon'ble NCLT.”*

Sub-clause (b) of Paragraph 9.7 of the resolution plan reads as under:

*“(b) For the banks who have been subrogated in the position of flat owners by virtue of right exercised under Tripartite Agreement are unsecured financial creditors and for the satisfaction of the debt, the same shall be pay off as unsecured creditors as mentioned in Chapter-6.”*

- xxxii) A perusal of the sub clause (a) of Para 9.7 of the Resolution Plan shows that the claim, if any be lodged by the Bank on the strength of Tripartite Agreement shall be treated as unsecured creditor. The clause (b) of Para 9.7 of the Resolution Plan stipulates that banks who have been subrogated in the position of flat owners by virtue of right exercise under the tripartite agreement are unsecured financial creditors and for the satisfaction of the debt, the same shall be paid off as unsecured creditors as mentioned in Chapter VI of the Resolution Plan.
- xxxiii) At this stage, it may be clarified that no view or opinion is being expressed with respect to the Resolution Plan, even though certain paragraphs of the Resolution Plan have been referred to.
- xxxiv) In view of the foregoing discussion, the prayers of the Applicant-Bank in the present case cannot be allowed. Therefore, the present application is **dismissed**.

No order as to costs.

- Sd/-

**(BACHU VENKAT BALARAM DAS)**  
**MEMBER (JUDICIAL)**