IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH COURT-III

I.A. 1041/2024

In

C.P.(IB) 592/MB/C-III/2022

Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016

<u>In the matter of</u>

Radius & Deserve Land Developers Private Limited
Through its Resolution Professional, Aegis Resolution Services Private Limited

<u>Having address at</u>:

Deserve, CST Road Junction, Opposite University of Mumbai Premises, Kalina, Santacruz (East), Bandra Suburban
Mumbai – 400098

... Applicant

Vs.

1. **Radius & Deserve Builders LLP**

   Through its Resolution Professional, Jayesh Natvarlal Sanghrajka

   <u>Having its registered office</u>:

   ONE BKC, A Wing 1401, Plot No. C- 66,
   G Block, Bandra Kurla Complex
   Bandra (East), Mumbai – 400051

2. **Chandak Realtors Private Limited**

   <u>Having its registered office at</u>:

   807, B Wing, Hubtown Solaris, N S Phadke Marg, Opposite Telly Gully, Andheri (East) Mumbai – 400069

3. **Slum Rehabilitation Authority, Mumbai**

Having its office at:

Administrative Building, Anant Kanekar Marg, D Block BKC, Naupada, Bandra (E), Mumbai – 400051

… Respondents

In the matter of

Amit Infra-Logic (India) Private Limited

... Operational Creditor

Vs.

Radius & Deserve Builders LLP

Having office at: One BKC, A wing, 1401, Plot No. C-66, Gblock, Bandra Kurla Complex, Bandra East, Mumbai – 400051

LLPIN No: AAA5895

… Corporate Debtor

Order delivered on: 21.11.2025

Coram:

Ms. Lakshmi Gurung, Member *(Judicial)*

Sh. Hariharan Neelakanta Iyer, Member *(Technical)*

Appearances:

For the Applicant	:	Sr. Adv. Gaurav Joshi a/w Adv. Animesh Bisht a/w Adv. Aastha Kaushal i/b Cyril Amarchand Mangaldas.
For Respondent 1	:	Adv. Shyam Kapadia a/w Aneesa Cheema a/w Adv. Unnati Nandalaskar
For Respondent 2	:	Sr. Adv. Zal Andhyarujina, Adv. Karan Bhide a/w Swapnil Khatri, Adv. Mrinal Bhatnagar
For Respondent 3	:	Adv. Tulsi Shah

Introduction of Parties

Applicant

1. M/s Radius & Deserve Land Developers Private Limited (**Radius Company/ the Applicant**) is a company incorporated under the Companies Act, 1956, and is currently undergoing Corporate Insolvency Resolution Process (**CIRP**) under the Insolvency & Bankruptcy Code, 2016 (**Code**). This application has been filed through its Resolution Professional (**RP**) of the Radius Company namely Aegis Resolution Services Private Limited primarily seeking return of the Option Deposit of Rs. 240.85 Crores.

2. **Respondents**

2.1 **Respondent 1** is Radius & Deserve Builders LLP (**Radius LLP/ Corporate Debtor**) is also undergoing CIRP under the Code and is represented by its RP Mr. Jayesh Natvarlal Sanghrajka. It is an admitted position that the Applicant and Respondent No. 1 are related parties and controlled, *interalia,* by Mr. Sanjay Chhabria. Radius Company had entered into an Option Agreement dated 14.09.2015 with Radius LLP and had paid option deposit to Radius LLP under the said agreement which is sought to be refunded.

2.2 **Respondent 2** is Chandak Realtors Private Limited (**Chandak**) in whose favour the the Slum Rehabilitation Authority had issued revised Letter of Intent dated 12.04.2023 for development of a land parcel in Kurla which was earlier being developed by the corporate debtor under, Letter of Intent dated 24.07.2013, but was terminated by the Slum Rehabilitation Authority on 20.09.2021. The limited prayer against R-2 is, to deposit any amount payable for reimbursement of expenses to the corporate debtor, in a separate bank account.

2.3 This application was filed in February 2024 while Chandak had submitted its Resolution Plan on 05.03.2024 which was approved by the CoC with 100% voting on 20.08.2024 and Chandak is now the Successful Resolution Applicant (**Resolution Applicant**) of the corporate debtor.

2.4 **Respondent 3** is the Slum Rehabilitation Authority (**SRA**) and merely a proforma party as no prayers are sought against it.

3. **Brief background of the case**

3.1. On 14.09.2015, Radius Company and Radius LLP entered into an Option Agreement. As per the terms of the Option Agreement, Radius Company paid the Option Deposit of Rs. 240,85,00,000/- to Radius LLP. As per the Option Agreement, Radius Company had an option to purchase Floor Space Index (FSI) on the land parcel being developed by Radius LLP in Kurla (hereinafter referred to as '**Radius LLP Property**') on such terms and conditions as set out in the Option Agreement. The option period was of 60 months ending on 14.09.2020. Clause 5.1 of the Option Agreement provided that if the option was not exercised by Radius Company within the Option Period, then the Option Deposit shall be refunded by Radius LLP to Radius Company within 15 days.

3.2. It is undisputed position that Radius Company did not exercise its option to purchase FSI, within the option period, and that Radius LLP did not refund the option deposit to Radius Company. It is also admitted that Radius Company, under the management of the suspended director, never demanded refund of the Option Deposit from Radius LLP.

3.3. Subsequently, Radius Company was admitted into CIRP vide order dated 03.05.2023 in CP(IB)/892/2022 (**Radius Company Petition**). The IRP of Radius Company addressed letters dated 01.06.2023 and 17.07.2023 calling upon the management of Radius LLP to return the Option Deposit. Since no reply came forth, the IRP of Radius

Company filed IA/3741/2023 seeking directions for return of the Option Deposit.

3.4. While the said IA was pending, Radius LLP was also admitted into CIRP vide order dated 27.09.2023 in the captioned Petition CP(IB)/592/2022 (**Radius LLP Petition**). Consequently, the IA/3741/2023 was disposed of vide order dated 03.10.2023 with liberty to the IRP of Radius Company to approach the IRP of Radius LLP.

3.5. On 21.11.2023, the IRP of Radius Company addressed a letter to the IRP of Radius LLP demanding payment of the Option Deposit within 15 days. However, the delivery of the letter remained unsuccessful.

3.6. Subsequently, the IRP of Radius LLP was replaced by Mr. Jayesh Natvarlal Sanghrajka who was appointed as the RP vide order dated 24.11.2023. Thereafter, on 26.12.2023, the RP of Radius Company sent email to the RP of Radius LLP demanding repayment of the option deposit within 15 days.

3.7. The RP of Radius LLP replied on 27.12.2023 seeking additional documents which were provided by the RP of Radius Company on 28.12.2023. On 17.01.2024, the RP of Radius LLP rejected the demand on the ground of applicability of moratorium under section 14 of the Code.

3.8. Against this backdrop, the present application has been filed by the RP of Radius Company, seeking following reliefs:

a. *Direct Radius & Deserve Builders LLP (acting through its Resolution Professional, Mr. Jayesh Natvarlal Sanghrajka) i.e., the Respondent No. 1 to forthwith or within such time as may be directed by this Tribunal pay Rs. 240,85,00,000 to Radius & Deserve Land Developers Private Limited i.e. the Applicant towards return of the Option Deposit;*

b. *In the alternative to prayer clause (a):*

    1. *Declare that the Option FSI as defined under the Option Agreement dated September 14, 2015 is an asset of Radius &*

Deserve Land Developers Private Limited i.e., the Applicant and Radius & Deserve Land Developers Private Limited i.e. the Applicant is the owner of the Option FSI as defined under the Option Agreement dated September 14, 2015; and

2. *an order of injunction against Radius & Deserve Builders LLP, i.e. the Respondent No. 1 injuncting them, acting by themselves or through their servants, agents, representatives, and/or all other persons claiming by, through or under them, from selling, transferring, alienating, relinquishing or creating any third party rights or interests including charges in respect of the Option FSI as defined under the Option Agreement dated September 14, 2015 till payment of the entire Option Deposit Amount to Radius & Deserve Land Developers Private Limited i.e. the Applicant;*

c. *Pending hearing and final disposal of this Application, this Tribunal be pleased to restrain the Respondent No. 1 from distributing any amount held by the Respondent No. 1 to any other creditors without first apportioning an amount of Rs. 240.85,00,000 due and payable to Radius & Deserve Land Developers Private Limited i.e., the Applicant;*

d. *In the alternative to prayer (c) above, pending hearing and final disposal of this Application, this Tribunal be pleased direct Radius & Deserve Builders LLP, i.e., the Respondent No. 1 to deposit Rs. 240,85,00,000 with this Tribunal and/or in any designated bank/escrow account to be intimated by the Applicant or furnish a bank guarantee to the Applicant for Rs. 240,85,00,000, to secure payment of the Option Deposit or;*

e. *Direct that any amounts deposited by Radius & Deserve Builders LLP, i.e., the Respondent No. 1 in any designated bank/escrow account to be intimated by the Applicant as per prayer (d) above, shall be held for the benefit of the Applicant and shall not be set off/adjusted against the dues owed by Radius & Deserve Builders LLP, i.e., the Respondent No. 1 to any bank/financial institution or any other person/party subject to final orders passed in this Application;*

f. *Pending hearing and final disposal of this Application, this Tribunal be pleased to direct the Respondent No. 2, i.e. M/s. Chandak Realtors Pvt. Ltd. to deposit any amount payable for reimbursement of expenses to Radius & Deserve Builders LLP, the Respondent No. 1 with this Tribunal and/or in any designated bank/escrow account to be intimated by the Applicant;*

g. *Pending hearing and final disposal of this Application, this Tribunal to direct the Respondent No. 1, Radius and Deserve Builders LLP to give disclosure of all its assets with the respective valuation on oath to the Applicant and/or file an Affidavit of disclosure of all assets before this Tribunal;*

h. *Pending hearing and final disposal of this Application, this Tribunal be pleased to by an order of temporary injunction against Radius & Deserve Builders LLP, i.e. the Respondent No. 1 injuncting them, acting by themselves or through their servants, agents, representatives, and/or all other persons claiming by, through or under them, from selling, transferring, alienating, relinquishing or creating any third party rights or interests including charges in respect of the Option FSI as defined under the Option Agreement dated September 14, 2015;*

i. *Any other order/direction, as deemed fit and necessary, in the facts and circumstances of the case and in the interest of justice and equity.*

Submissions of the Parties

4. **<u>Submission of the Applicant</u>**

4.1. Radius Company, Radius LLP (CD), Radius Developers LLP and M/s Aaditri Construction Private Limited (**Aaditri**) are all controlled, *inter alia,* by Mr. Sanjay Chhabria.

4.2. It is submitted that as per Clause 3.2 the Option Agreement, the Option Deposit was entrusted with Radius LLP, and Radius LLP was not permitted to use the option deposit for any purpose other than the purchase of the FSI on Radius LLP Property in case Radius Company exercised the Option. Further, Clause 5.1 provides that if the option was not exercised by Radius Company within a period of 60 months, then the Option Deposit shall be refunded by Radius LLP to Radius Company within 15 days. It is submitted that since the option deposit is entrusted for a specific purpose i.e. purchase of FSI, Radius LLP was required to keep the option deposit ***in trust*** till the purchase of the FSI. Thus, the said deposit would not constitute asset of Radius LLP when the FSI was not purchased but is an asset of Radius Company.

4.3. The Financial Statements of Radius Company, under 'Transactions with related parties', there is an entry for 'Option Deposit Given' of Rs. 240,85,00,000/-. The Financial Statement of Radius LLP for the Financial Year 2018-19 also reflect that an 'option deposit' of Rs. 240,85,00,000 payable by Radius LLP to Radius Company.

4.4. It is submitted that the Option Deposit is an asset of Radius Company which was placed in trust with Radius LLP. Reference is made to the Explanation to section 18 of the Code according to which, the assets held in trust cannot form part of the 'assets' of the corporate debtor. Therefore, the moratorium *qua* Radius LLP does not extend to the Option deposit.

4.5. It is further submitted that in the event the option deposit is not returned, the Option FSI as defined under the Option Agreement should be protected.

4.6. Furthermore, the Applicant submits as per the Revised LoI dated 12.04.2023 issued by the Slum Rehabilitation Authority in favour of R-2 to re-develop the Radius LLP property, the R-2 is directed to reimburse the amount for expenses incurred by the old developer i.e. Radius LLP, as per the Valuation Report prepared by the Valuer appointed in this regard. The Applicant also understands from an article published in the Hindustan Times that the valuer appointed by the Slum Rehabilitation Authority has assessed the expenses incurred by Radius LLP to be at Rs. 56,00,00,000/- excluding transit rents, MCGM premiums, etc. Thus, an amount of at least Rs. 56,00,00,000/- is receivable by Radius LLP from R-2.

4.7. In this regard, it is submitted that if the trust property is intermingled with the other assets of Radius LLP, then an equal amount must be extracted and paid to the trustor. Thus, any amount for reimbursement of expenses receivable from the R-2 to Radius LLP, should be deposited in any designated bank/escrow account. Furthermore, the Applicant is unaware of the assets of Radius LLP other than the option deposit amount and therefore, seeks direction to disclose of details of all the assets of Radius LLP available as on date.

4.8. It is submitted that sections 18(f) and 25(2)(a) of the Code requires the IRP/RP to take control and custody of the assets of a Corporate Debtor. Thus, the RP of Radius Company is duty-bound to take control and custody of the option deposit which is the asset of Radius Company. However, by rejecting the demand of return of option deposit, the RP of Radius LLP is preventing the RP of Radius Company from carrying out his duties under the Code.

4.9. It is submitted that the Option Deposit represents a valuable asset of Radius Company. It is believed that these deposits were made pursuant to the borrowings raised by Radius Company from its own lenders, in respect of which Radius Company is also undergoing CIRP. It is submitted that the Option Deposit so recovered could be applied towards discharging the dues to Radius Company's lenders and/or for the CIRP costs.

5. **Reply of Radius LLP (Respondent 1)**

5.1. It is submitted that the Applicant has not filed a claim with the RP of Radius LLP and has directly approached this Tribunal. Thus, the Applicant is attempting to receive monies without following express procedure as set out in the Code. Moreover, the reliefs sought in the present application are declaratory in nature which cannot be granted by this Tribunal.

5.2. The Respondent 1 denies the Applicant's interpretation of the various clauses of the Option Agreement. It is submitted that the Option Agreement stood terminated on 14.09.2020 and the Option Deposit ought to have been refunded in September 2020 itself.

5.3. It is submitted that the subject matter of the Option Agreement was the Option FSI generated from the development of Radius LLP property. Admittedly, the Letter of Intent (LoI) dated 24.07.2013 issued by the Slum Rehabilitation Authority (SRA) in favour of Radius LLP stood terminated on 20.09.2021. However, a revised LoI dated 12.04.2023 has been issued by the SRA in favour of R-2. It is submitted that as the substratum of the Option Agreement does not exist, no rights under the same can be enforced by the Applicant.

5.4. Objections to insufficiently stamped and unregistered Option Agreement is also taken.

5.5. It is submitted that the Respondent 1 in its email dated 17.01.2024 clearly stated that the Applicant could file a relevant form for the alleged claim, however, no claim has been filed and the statutory period for filing claim has also expired. Thus, the Financial Statements of Radius Company or Radius LLP cannot be relied upon.

5.6. It is submitted that Radius Company is not entitled to any protective or injunctive relief in relation to the FSI and further, the pleadings in the present application do not support such an assertion.

5.7. As far as the prayer relating to disclosure of assets of Radius LLP is concerned, it is submitted that it is not relevant as to whether the RP of Radius Company is aware or not aware of the assets of Radius LLP. There is no provision under the Code to compel a RP to provide a list of assets of a Corporate Debtor.

5.8. The advance amount under the Option Agreement was not "entrusted" to Radius LLP but was paid to it as an advance for the Option FSI that would be generated. Every amount that is 'deposited' with another person in the hope of purchasing goods or services in future cannot by and of itself create a trust in favour of that person. The present case simply give rise to a contractual claim for refund which is evident from the Option Agreement which provides for 'adjustment' of the Option Deposit towards the Option FSI to be generated. Nothing in the Option Agreement suggest that any relationship in the nature of a "trust" was created or could be implied.

The subject transaction was a commercial transaction for purchase of Option FSI.

5.9. The advance amount paid by Radius Company to Radius LLP did not create any trust and the claim of Radius Company is nothing but a monetary claim against Radius LLP. It is submitted if the contentions of the Applicant are accepted then every person who made an advance payment to any corporate debtor would be entitled to say that the advance payment is not a claim but an amount held in ‘trust’ by Radius LLP.

6. **Reply of Respondent 2**

6.1. There exists no privity of contract between Radius Company and the Resolution Applicant. The dispute in the present proceedings pertains to and emanates from an option agreement executed on 14.09.2015 between Radius Company and Radius LLP to which the Resolution Applicant was not a party and therefore, cannot be made liable for any claim arising therefrom.

6.2. As far as the terms of the revised LoI dated 12.04.2023 is concerned, it is submitted that under the said revised LoI, the Resolution Applicant has been appointed as the developer of a slum rehabilitation project in place of Radius LLP and any reimbursement of expenses to be made by Resolution Applicant will be made as per applicable law and in no event can be claimed by Radius Company.

6.3. The Applicant has also not filed any claim to the RP and the CIRP of Radius LLP is at an advanced stage for approval of the plan by the Adjudicating Authority.

6.4. It is further submitted that Respondent No. 2 is undertaking the construction and development of the said Slum Scheme in accordance with law and neither Radius LLP nor Radius Company have any right, title or interest of whatsoever nature in the free sale component/ FSI to be generated from the said Slum Scheme whatsoever. The entitlements flowing from the said Slum Scheme form an asset of the Resolution Applicant.

Analysis & Findings

7. Heard Ld. Counsel for the parties at length and considered submissions advanced by them. Perused the record.

8. The present Application is moved by the RP of Radius & Deserve Land Developers Private Limited (**Radius Company**), a related entity of the Corporate Debtor, Radius & Deserve Builders LLP (**Radius LLP**) seeking refund of Rs. 240,85,00,000 which was paid by Radius Company to Radius LLP as 'Option Deposit' under Option Agreement dated 14.09.2015, claiming it to be 'trust money'.

9. In a nutshell, the Applicant's case is that under the Option agreement, Radius Company had option right to purchase FSI any time during the option period of 60 months ending on 14.09.2020, for which option money of Rs. 240,85,00,000 was deposited with Radius LLP. Since Radius Company did not exercise the option, Radius LLP was liable to refund the Option Deposit. This, according to the Applicant, indicates that the Option deposit of Rs. 240.85 crores was in the nature of 'trust' and is therefore, not subject to moratorium under section 14 of the Code qua Radius LLP.

10. On the other hand, it is the case of the Respondents that the option deposit was not "entrusted" to Radius LLP and the said Option Deposit cannot be a 'trust-money'. Nothing in the option agreement suggests that any relationship in the nature of trust was created or implied the same was never the understanding of the parties. The option money was not deposited in a separate account for specified purpose but was allowed to be intermingled. The right to exercise the option had expired on 14.09.2020 and admittedly, the management of Radius Company had not taken any steps for the refund of the option deposit since then till Radius Company was admitted to CIRP and the management was taken over by the RP.

11. As the facts are undisputed, the neat legal question that arises for determination is:

Whether the Option Deposit advanced by the Applicant to Radius LLP has the character of a "trust" and is required to be kept outside the CIRP of Radius LLP for being outside the scope of moratorium under section 14 of the Code?

12. The law of trust in India is governed by the Indian Trusts Act, 1882 (**ITA/ 'the Act'**). We would like to refer to some of the sections in the ITA which may be relevant in the present case.

(i) ***Section 3*** of ITA defines the term ***"trust"*** as *"an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner"*. Under the Act, the person who reposes or declares the confidence is called the *"author of the trust"*; the person who accepts the confidence is called the *"trustee"* and the person for whose benefit the confidence is accepted is called the *"beneficiary"*.

(ii) ***Section 6. Creation of trust -***
Subject to the provisions of section 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee.

(iii) ***Section 51. Trustee may not use trust-property for his own profit -***
A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust.

13. As per section 3 of the Indian Trust Act, ‘confidence’ is an important element which is reposed by the Owner of the property on the Trustee for the benefit of beneficiary. Further, as per section 51 of the Act, trust property cannot be used for any purpose other than for which it is entrusted under the trust. Trust is generally created by a written instrument with clear terms and conditions involving fiduciary relationship where the trustee holds property for the benefit of the beneficiary. Thus, it can be seen, while trust involves fiduciary relationship, often seen by requirement of segregation of funds, an ordinary debt is mere obligation to repay funds without the fiduciary duties and merely as a debtor and creditor.

14. Some other instances of trust money are:

Example 1: A person, being an employer of an establishment who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him.

Example 2: A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, shall be deemed to have been entrusted with the amount of the contribution so deducted by him.

Example 3: According to Section 200 of Income Tax Act, 1961, any person deducting any sum as per the provisions of the Income Tax Act (popularly called TDS), is required to pay the sum so deducted, within the prescribed time, to the credit of the Central Government. This is another example of trust which places the deductor in a fiduciary relationship, holding government money in trust.

15. Before we begin the analysis, certain pertinent facts to be noticed are that Radius Company and Radius LLP are related parties and were influenced by a common management at the time when the Option Agreement was executed. Further, when the RP of the Applicant initially raised demand against Radius LLP for refund on 01.06.2023 and 17.07.2023, the ex-management of Radius LLP gave no response. The Applicant subsequently filed IA/3741/2023 in CP/892/2022 (Radius Company Petition) against Radius LLP seeking refund, however, none appeared on behalf of Radius LLP. When Radius LLP was subsequently admitted to CIRP on 27.09.2023, the suspended directors of Radius LLP immediately sent a letter dated 30.09.2023 to the RP of Applicant informing about the CIRP and suggested to send an email to the RP of Radius LLP.

16. Pursuant thereto, IA/3741/2023 was disposed of vide order dated 03.10.2023 with liberty to approach the RP of Radius LLP or otherwise approach the Bench. Thereafter, the Applicant sent letter dated 21.11.2023 addressed to the RP of Radius LLP demanding the refund. The RP of Radius LLP has rejected the refund demand of the Applicant and suggested to file a claim under the Code. However, it is the submission of the Applicant that since the Option Deposit is trust-money, the same cannot be treated as asset of the Corporate Debtor as per Section 18(1)(f) of the Code and there is no question of filing a claim before the RP.

17. Now, we turn to examine the relevant clauses of the Option Agreement as extracted below:

ARTICLE 1

DEFINITIONS

...

*1.1.5 "**Effective Date**" shall mean the date on which this Agreement is executed by the Parties.*

*1.1.7 "**Option**" shall mean Option to purchase (but not the obligation) granted to the Option Holder to purchase Option FSI for the Option Consideration and as: specified in **Article 2** hereto.*

1.1.8 "**Option Value**" shall mean an amount equivalent to the product of rights comprising the Option FSI and the Option Price.

1.1.9 "**Option Advance**" shall have meaning ascribed to it in Article 3.1 hereto.

1.1.10 "**Option Notice**" shall have the meaning as ascribed to it in Article 4.2 hereto.

1.1.11 ''**Option Period**" shall have the meaning ascribed to it in Article 2.2 hereto.

1.1.12 "**Option FSI**" shall mean Free Space Index (FSI) admeasuring in aggregate 4,00,000 sq. ft. (Built up), in the said property, which has been generated and for which all necessary required permissions have been procured by the LLP.

1.1.13 "**Option Price**" shall mean a sum of Rs. 8,000/- per sq. ft. (carpet)

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ARTICLE 2

GRANT OF OPTION AND OPTION PERIOD

2.1 In consideration of the mutual covenants between the Parties hereto, the LLP hereby grants to the Option Holder Option to purchase Option ESI for the Option Value.

2.2 The Option granted under **Article 2.1** above may be exercised by the Option Holder at any time (i) within Sixty (60) months from the Effective Date; ("**Option Period**") in accordance with the terms of this Agreement.

ARTICLE 3

OPTION DEPOSIT

3.1 The Option Holder has on execution of this Agreement placed an interest free Deposit of Rs. 70,50,00,000/- (Rupees Seventy Crores Fifty Lacs only) with, the LLP (the receipt whereof the LLP doth hereby admit and acknowledge). The Option Holder shall further give an aggregate of 50% of deposit within 6 months from the date of execution of this Agreement and balance 50 % of the deposit within further 6 months from the date of the aforesaid payment aggregating the option *deposit of Rs. 220 Crores or such other enhanced or reduced advance deposit as may mutually agreed between the Parties hereto from time to time shall hereinafter be referred to as the "**Option Deposit**".*

3.2 The Option Deposit shall be (i) adjusted, against the Option Value on exercise of the Option by the Option Holder; or (ii) refunded to the Option Holder in the event of non-exercise of the Option by the Option Holder or cancellation of the Option by the LLP during the Option Period.

ARTICLE 4

EXERCISE OF OPTION

4.1 During the Option Period, the Option Holder shall have the option but not the obligation to exercise the Option to purchase the Option FSI from the LLP on payment of Option Consideration subject to LLP obtaining all necessary permissions including NOC of Yes Bank Limited, with regard to the Option FSI.

4.2 The Option Holder shall be entitled to exercise the Option by issuing a written notice to the LLP ("Option Notice") specifying its intent to exercise the Option to purchase the Option FBI at the Option Consideration.
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ARTICLE 5

NON EXERCISE OF OPTION

5.1 In the event, the Option Holder does not exercise the Option granted in respect of the Option FSI on or before the expiry of the Option Period, then within a period of fifteen (15) Business Days from the date, of expiry of the Option Period the LLP shall refund the Option deposit to the Option Holder."

18. On examination of the various clauses of the option agreement, we do not find any clause in the Agreement which expressly refers to creation of trust as per section 6 of the Indian Trust Act. Nowhere in the Option Agreement, we find any provision relating to the entrustment of the Option Deposit with Radius LLP as trust money.

19. During oral submissions, Mr. Gaurav Joshi, Ld. Sr. Counsel appearing for the Applicant, has extensively referred to the judgment of Hon'ble Supreme Court in ***Rai Bahadur Seth Jessa Ram***

Fatehchand vs. Om Narain Tankha, 1967 SCC OnLine SC 248 (Rai Bahadur judgment) to contend that even in absence of an express provision in an agreement, the Courts can determine whether amounts provided as deposits are in the nature of 'trust' or not, based on the facts and circumstances of the case. Interestingly, the above judgment has been also referred to by the Ld. Counsel for the Respondents.

20. It would be apposite to refer to the ***Rai Bahadur judgment*** *(supra)* in which Hon'ble Supreme Court had the occasion to consider whether a security deposit can be treated as a trust money and has laid down certain guiding principles/tests for determination of a deposit as a trust money:

> *"5. The two main terms of the agreement, viz. Nos. 8 and 9 between the appellant and the Mills which call for consideration in the present case are these:-*
>
> > *"(8) That the firm has deposited sum of Rs.50,000/ with the said Mill as a security for the due performance of the contract on their part, on which amount the Mill shall pay interest to the said firm at the. rate of 6 per cent per annum.*
> >
> > *(9) That the Mill shall refund the said security deposit of Rs.50,000/- with interest thereon at the rate on termination of the agency. In case the said amount is not refunded with interest thereon the firm shall be entitled to commission at the rates mentioned above as if agency has not terminated. In other words, as long as security with interest is not refunded and commission due is not paid this agreement will not be terminated."*
>
> *It may be mentioned that the agreement was for a period of one year which, as already indicated, had not expired before the winding up order was passed on November 8, 1949.*
>
> *6. It will be seen from the terms of the agreement already set out: that there was no stipulation that the amount of Rs. 50,000/- deposited as security would be kept as a separate fund by the Miffs and it would not use it for its own purposes. On the other hand, it is clear that interest had to be paid and*

there was nothing in the agreement to prevent the Mills from using the money as its own so long as it paid interest on it. It is true that the money was to be re- funded along with interest on the termination of the agency, but cl. (9) further provided that in case the money was, not refunded after one year, the appellant would be entitled to commission as if the agreement had not terminated. As the agreement itself puts it, it will remain alive even after the period of one year so long as the security with interest was not refunded and the commission due was not paid. The last words of cl. (9) of the agreement put the security deposit and the commission due on the same footing. It is because of this provision that the learned Company Judge held that as the security deposit and the commission due were put on the same footing and the commission could only be a debt, the security deposit in the circumstances of this agreement could not be treated on a higher footing. It seems to us that the view taken by the learned Company Judge so far as this agreement is concerned (which was upheld by the Division Bench) is correct.

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13. We are of opinion that the question whether the security deposit in a particular case can be said to be impressed with a trust will have to be decided on the basis of the terms of the agreement and the facts and circumstances of each case, without any leaning one way or the other on the fact that the money was given as a security deposit. ***If the terms of the agreement, if it is in writing, clearly indicate that the deposit was in the nature of a trust, the court will come to that conclusion in spite of the fact that interest is provided for in the agreement.*** *But where the terms of the agreement do not clearly indicate a trust, the court will have to consider the facts and circumstances of each case along with the terms to decide whether in fact something in the nature of a trust was impressed on the security deposit. In such a case the fact whether segregation was provided for or not would be one circumstance to be taken into consideration. Where segregation is provided for the court would lean towards the deposit being in the nature of a trust.* ***But where segregation is not provided for and the deposit is permitted to be mixed up with the funds of the person with whom the deposit is made, the court may come to the conclusion that anything in the nature of trust was not intended,*** *for generally speaking in view of s. 51 of the Indian Trust Act, (No. 2 of 1882) a trustee cannot use or deal with the trust property for his own profit or for any other purpose unconnected with the trust. It is true that where there is a clear trust and the trust deed if any provides that the trustee may use the trust property as he likes, the fact that the trustee can mix the trust property with his own may not make any difference.* ***But where there is no clear indication that a security deposit was impressed with a trust, absence of segregation would be a circumstance against there being a trust.***

14. Another circumstance which may have to be taken into account in a case where the agreement does not indicate clearly that the security deposit is impressed with a trust is the payment of interest. Where there is no payment of interest provided for an inference may be readily drawn that the deposit was in the nature of a trust. But where the person with whom the deposit is made is to pay interest it may be possible to infer that payment of interest is a pointer towards there being no trust. Further any other provision in the agreement and any other circumstance as to the manner in which the deposit was dealt with may also have to be taken into account in coming to the conclusion whether the security deposit in a particular case was impressed with a trust or not.
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19. A consideration of these English and American cases also in our opinion shows that the first question in each case where the court is dealing with a security deposit is to ask whether on the agreement in writing, if any, and on the facts and circumstances of the case and conduct of the parties it can be said that the security deposit was impressed with some kind of a trust. If that can be said then the question whether interest was provided for and whether the trustee could mix the deposit money with his own money would not be of importance and would not take away the character of the deposit being impressed with a trust. The mere fact that money was deposited as a security is not sufficient to come to the conclusion that it must be treated as trust money. The court will have to look to all the terms of the agreement if in writing and to the facts and circumstances of the case and to the conduct of the parties before coming to the conclusion whether with a trust. If a trust can clearly be spelled out from the terms *of the agreement that ends the matter. But if the trust cannot be spelled out clearly the fact there was no segregation provided for and the fact that interest was to be paid would go a long way to show that the deposit was not impressed with the character of a trust particularly where the person with whom the deposit was made could mix it with his own money and could use it for himself. In such a case the inference would be that the relationship between the parties was that of a debtor and creditor. Further besides these circumstances if there is any other term which suggests one kind of relationship rather than the other than will also have to be taken into account. Illustrations of this will be -found both in the Bombay case (i.e. in Manekji's case(1) and in the Allahabad case (i.e., Maheshwari Brothers' case(1). In the Bombay case besides absence of segregation and presence of interest there was a further fact that in certain circumstances segregation had been provided for. The court was entitled to take that fact into consideration and hold that the deposit was not impressed with trust till segregation took place. In the Allahabad case a floating charge was created which failed for want of registration, and that circumstance was also used to show that the relationship between the parties was that of a debtor and creditor and not that of a trustee and beneficiary.*

20. Let us now apply these principles to the facts of the present case. The facts show that there was no segregation in this case and the Mills could mix the security deposit with its own money and use it for its own purpose. Further because the Mills could use the money for its own purpose, it had to pay interest. In addition to these two circumstances which would incline one to the view that the relationship was that of a debtor and creditor, there is the further fact that cl. (9) of the agreement provides that even though the period fixed in the agreement would continue if the security deposit is not refunded and the commission due is not paid. We agree with the learned Company Judge that the last words in cl.(9) make the security deposit and the commission due on a par. The commission due can be nothing other than a debt; the security deposit is put on a par with that. That is a further indication that the relationship in the present case was that of a debtor and creditor. In the circumstances we are of opinion that the High Court was right in its view as to the nature of the security deposit in the present case."

(emphasis supplied)

21. The Hon'ble Supreme Court considered some of English and American cases such as ***Gee v. Liddell*** *[(1866) 55 E R 1038]*, ***Knatchbull v. Hallett*** *[(1879-80) XIII Ch D 696]*, and ***Frank M. McKey v. Mauritius Paradise*** and opined that the question in each case in dealing with security deposit is to ask whether on considering (i) the agreement in writing, (ii) the facts and circumstances of the case and (iii) conduct of the parties, it can be said that the security deposit was impressed with a trust. The Hon'ble Apex Court has highlighted the importance of intent of parties, the conduct of parties, segregation of funds and fiduciary relationships in establishing trusts and has provided guidelines/tests for determining whether the security deposit in a particular case, can be said to impressed with a trust.

22. The first test would be to examine the agreement, if it is in writing. If the agreement clearly indicates that the deposit is in the nature of a trust, then no further consideration is required and it has to be treated as trust money. Applying this in the present case, as already recorded in preceding paras, the Option Agreement does not indicate that the Option Deposit was entrusted to Radius LLP in the nature of a trust. Thus, as per the first test in ***Rai Bahadur*** *(supra)* the option deposit cannot be impressed with a trust.

23. Next, we have to consider the facts and circumstances along with the terms of the agreement to decide whether something in the nature of a trust was impressed on the option deposit. For this purpose, two indicators have been discussed – segregation of funds and payment of interest on it. Mr. Joshi, Ld. Sr. Counsel for the Applicant, would argue that considering both these indices, the option money qualifies to be trust money. Let us analyse the submission put forth by Mr. Joshi on these two indices.

A. Segregation of Option Deposit
B. Stipulation of Interest

Segregation of Option Deposit

24. Mr. Joshi has referred to the financial statements of Radius LLP. Under the head *"Details of outstanding to/from related parties",* the option deposit has been separately shown. This, according to Mr. Joshi, amounts to segregation of the Option Deposit liability from the rest of its liabilities and therefore, once the segregation is established, the option money can be treated as trust money.

25. On careful examination of the various articles of the Option Agreement, it is unequivocal that the Option Agreement contemplates for purchase of Option FSI in the Radius LLP Property by Radius Company. The Option FSI which admeasures 4,00,000 sq. ft. (Built up) may be purchased by Radius Company from Radius LLP for the Option Value as provided in the Agreement. We note that the term 'Option Value' as defined in the Option Agreement is not quantified and is merely defined as the *"amount equivalent to the product of rights comprising the Option FSI and the Option Price".* Similarly, the term 'Option Deposit' defined in Article 3.1 is also not quantified and it states, *"Rs. 220 crores or such other enhanced and reduced advance deposit".* Article 3.1 further states that the Option deposit shall be such amount as the parties may mutually decide from time to time. Thus, the option deposit is more or less a floating amount which may be revised at the discretion of the parties. Yet, we find no clause in the Option Agreement that warrants Radius LLP to keep the receipts of monies from Radius Company in a separate/escrow account.

26. There is no provision in the Option Agreement which provides the manner for utilisation of the deposit anywhere. In fact, option deposit is also referred to as advance deposit obviously for purchase of certain built-up area. Thus, the Option Agreement does not suggest that Radius LLP was mandatorily required to keep the Option Deposit in a separate account and was prohibited from mixing it with the funds of Radius LLP.

27. We are unable to agree with Mr. Joshi that separate classification of option deposit under the financial statements of Radius LLP amounts to segregation of the deposit. In our view, mere representation of option deposit liability under a separate head under financial statement does not amount to segregation of funds. On perusal of the Financial Statement of Radius LLP for the Financial Year ended 31.03.2019, we note that under the head *"Details of outstanding to/from related parties",* outstanding dues payable to other related parties are also stated under different sub-headings. If we go by the submission of the RP of Radius Company, then all the amounts classified under separate heads under related party transactions in Note 27.3 would have to be considered as 'trust-money' which would lead to absurd situation.

28. Mr. Joshi next argued that segregation of monies in a separate account is not a *sine qua non* and is only one of the indices for assessing whether monies deposited are held in trust. He submitted that as per the Agreement, the Option Deposit was for specified i.e. purchase of FSI. If the purchase of FSI was not concluded, Radius LLP was bound to return the same to Radius Company and therefore, Radius LLP held and continues to hold the same in trust till it is returned to Radius Company.

29. We cannot lose the basic character of 'trust' is in dealing with trust property which is third party fund and segregation would mean that the funds under trust would be segregated and not permitted to be mixed up with the funds of the trustee. The Hon'ble Supreme Court in ***Rai Bahadur judgment*** *(supra)* in para 13 has stated that *"But where segregation is not provided for and the deposit is permitted to be mixed up with the funds of the person with whom the deposit is made, the court may come to the conclusion that anything in the nature of trust was not intended, for generally speaking in view of s. 51 of the Indian Trust Act, (No. 2 of 1882) a trustee cannot use or deal with the trust property for his own profit or for any other purpose unconnected with the trust…….. But where there is no clear indication that a*

security deposit was impressed with a trust, absence of segregation would be a circumstance against there being a trust." Applying the test of segregation in the present case (as there is no express indication in the option agreement that the option deposit is in the nature of trust), we find that Radius LLP has not kept a separate account for the option deposit. Nothing has been placed on record to show that Radius Company did not permit Radius LLP to intermingle the option deposit with the funds of Radius LLP. In other words, the option deposit was permitted to be mixed up with the funds of Radius LLP. Furthermore, there is also no clause in the option agreement which says that the option deposit shall be used only for development of the project from which applicant is granted the option to purchase FSI.

30. Even after expiry of the option period of 60 months on 14.09.2020, there was no communication from the suspended directors of Radius Company to Radius LLP for return of the deposit money. We are satisfied that the terms of the Option Agreement did not provide for segregation of the Option Deposit and the amount was allowed to be intermingled with the funds of Radius LLP. Thus, on the test of segregation, the option deposit does not qualify to be trust- money.

Stipulation of Interest

31. Mr. Joshi would then argue that one of pointers leaning towards the deposit being trust money is that there is no payment of interest on the deposit money which indicates that deposit was a trust money. However, Ld. Counsel for the corporate debtor contended that the Applicant while demanding refund of the Option Deposit also claimed interest thereon. It is correct that in the letter dated 01.06.2023 addressed by the RP of the Applicant to the management of Radius LLP, the Applicant had demanded refund of Option Deposit with interest. But it is equally true that there is no clause in the Option Agreement which provides for payment of interest by Radius LLP on the Option Deposit. We also note that in the subsequent letter dated

21.11.2023 addressed by the Applicant to the RP of Radius LLP, no such interest was claimed.

32. The issue remains whether merely on the fact that there is no interest payable to Radius Company, can the option deposit be treated as trust money with Radius LLP. The Apex Court in ***Rai Bahadur*** *(supra)* has illustrated interest payment as one of the circumstances which may have to be taken into consideration, in following terms:

> *"Where there is no payment of interest provided for an inference may be readily drawn that the deposit was in the nature of a trust. But where the person with whom the deposit is made is to pay interest it may be possible to infer that payment of interest is a pointer towards there being no trust. Further any other provision in the agreement and any other circumstance as to the manner in which the deposit was dealt with may also have to be taken into account in coming to the conclusion whether the security deposit in a particular case was impressed with a trust or not."*

33. In the wake of above observation, we can safely say that interest payment is not the ultimate test for deciding the nature of the deposit. Non-payment of interest may indicate towards deposit being in nature of trust. But that is not the final test and it is equally important to consider other circumstances and the manner in which the deposit was dealt with in coming to any conclusion. Nothing has been placed on record by the Applicant to show that Radius Company had, during the option period of 5 years, sought details of the utilization of the option money for the specified purpose. The intent and conduct of parties is clear that Radius Company merely treated the option deposit as advance paid to Radius LLP which would be adjusted towards purchase of FSI in future. It is pertinent to note that Radius Company had never exercised the right to purchase FSI within the option period, so as per the agreement, the consequence of not exercising the option right would be that Radius Company would be entitled to refund of the option deposit within 15 days from the date of expiry of the option period. However, despite expiry of option period on 14.09.2020, the original parties to the option agreement never

took steps for refund of the deposit amount. It was only after Radius Company was admitted into CIRP on 03.05.2023 that RP of the applicant demanded refund of the deposit almost after 2.5 years of the due date. These circumstances indicate that parties never intended the option deposit to be entrusted as trust money.

34. Let us now deal with other submissions of the Applicant. Mr. Joshi also referred to the judgment of Hon'ble Calcutta High Court in the case of ***Ganesh Export and Import Co. vs. Mahadeolal Nathmal [1956 SCC OnLine Cal 17]*** to submit that if money or property is entrusted for a specific purpose and if that purpose fails or is not feasible, the property does not become part of the general assets of the recipient, but he must hold it in trust for the person who entrusted it. Para 6 of this judgment is extracted below:

> *"…. If the monies have been kept separate, they must be handed back. Even if they have been mixed up with other funds of the company, an equal amount, if deductions, if any, as may be provided for by the trust itself. In order, however, that a Property may be excluded from the assets of a company, divisible among its creditors, it not necessary that it should be held formally in trust for a third party. Where there such a trust, the company has obviously no beneficial interest in it of the nature divisible among creditors upon Insolvency. But there may also be a trust in effect. Property held by an insolvent in a fiduciary capacity is treated as property held in trust for the purposes of the insolvency laws and property held for a specific purpose in treated as clothed with a species of trust subject to the same principles as trust property."*

35. The Hon'ble Calcutta High Court has clearly indicated that if the monies are kept separate satisfying the fiduciary relationship and principles of trust property, then only such money has to be returned back.

36. Reliance was also placed on ***New Bank of India vs. Pearey Lal [AIR 1962 SC 1003]*** and ***The Official Assignee of Bombay vs. Abdul Havee [AIR 1933 Bom 437].*** The judgment of ***Rai Bahadur*** *(supra)*

by the Hon'ble Supreme Court is later in time and takes into account all relevant factors for considering the deposit to be trust money or not. Therefore, we not deem it necessary to deal with this judgment of Hon'ble Calcutta High Court as it would be mere repetition. What is fundamental in the present case is the intent and conduct of the parties and that Radius Company as well as Radius LLP were related parties controlled by a common director when the option agreement was executed. Neither the terms of the option agreement nor the intent and conduct of the parties indicate that option deposit was being entrusted as trust money.

37. Mr. Joshi then submitted that if the agreement between the parties contemplates the return/refund of the monies to the deposit-maker and if the primary purpose for which the money was entrusted fails, then till such time as the monies are actually returned, the recipient shall hold them in trust in a fiduciary capacity. Reliance is placed on ***Canbank Financial Services Ltd. vs. Custodian and Ors. [(2004) 8 SCC 355]*** and ***Barclays Bank Ltd. vs. Quistclose Investments Ltd [1970 AC 567]***. All other submissions of the Applicant are premised on the ground that option deposit was held in trust.

38. Per contra, Mr. Shyam Kapadia, Ld. Counsel for Radius LLP, would submit that the terms of the Option Agreement merely indicate that the Option Deposit is liable to be either adjusted against Option Value in case of exercise of Option or refunded upon non-exercise of the option, and does not restrict Radius LLP from dealing with the monies disbursed under the Option Agreement in any manner as it may deem fit. The Option Agreement is a commercial transaction in the nature of advance deposit for purchase of FSI in future which may be generated from the said LLP Property.

39. Mr. Zal, Ld. Sr. Counsel for the Resolution Applicant, also emphasized that segregation of deposit is an essential ingredient to establish 'trust' and that mere purpose of deposit is not relevant, especially when the agreement does not have an express provision.

40. It is seen that Article 3.2 enumerates two circumstances on the treatment of Option Deposit. Firstly, if Radius Company exercises its option to purchase FSI then the Option Deposit shall be adjusted against the Option Value. Secondly, if Radius Company does not exercise the option or the option is cancelled, then the Option Deposit has to be refunded to Radius Company. Clearly, the circumstances stated in Article 3.2 are mere probabilities and the applicability of Option Deposit under Article 3.2 is contingent upon the happening and not happening of the events set out therein.

41. The other relevant definition is of "Option period" which is defined in Article 2.2 as 60 months from the date of Agreement. Radius Company is accorded the option to purchase FSI at any time before the expiry of the Option Period. Admittedly, Radius Company had been paying the Option deposit to Radius LLP from time to time (i.e. Rs. 203,35,00,000 during FY 2016-2017 and Rs. 40,50,00,000 during FY 2017-18) and no elucidation whatsoever has been provided in the Agreement as to how the Option Deposit is to be utilised by Radius LLP between the date of receipt of the deposit and the exercise of option by Radius Company.

42. We further note that Article 7 that deals with 'Terms and Termination' expressly state that the agreement shall stand automatically terminated upon non-exercise of the Option by Radius Company. This indicates that when the Option Period i.e. 14.09.2020 expired and Radius Company did not exercise his option to purchase FSI, the Option Agreement automatically stood terminated. Yet, the erstwhile management of Radius Company, which had actually entered into the option agreement had never sought refund of the Option Deposit from Radius LLP. It was only after the appointment of the IRP that the IRP, had sent emails/letters to Radius LLP seeking refund of the deposit and in the letters too, the IRP did not say return of 'trust money'. The present interpretation of the option agreement and the option deposit thereunder seems to have been given by the RP of Radius Company, who, in fact, was not a party at the time of the

execution of the option agreement. The original parties were controlled by one Mr. Sanjay Chhabaria. Therefore, the express provisions under the agreement, conduct of the parties and other circumstances like parties being related to each other, are relevant factors for consideration in determining the nature of the option deposit. The intent of the parties to the Option Agreement, as already stated above, is manifested in their act. The conduct of the management of Radius Company of not demanding any refund from Radius LLP for almost three years from the date of the expiry of the Option Period speaks volume about the intent of the parties indicating that the Option deposit was not entrusted as trust money.

43. In fact, the Option Agreement seems to be more in the nature of interest free advance deposit given by the Radius Company to Radius LLP for developing a project under the Slum Authority and in return it was agreed that the Applicant, which was also in the business of developing slum project, may purchase the Option FSI with a caveat that if the FSI is not purchased, the money would be refunded to the Applicant within 15 days. In fact, the option agreement, in article 1.1.9 defines "***Option Advance***" to be as per Article 3.1. Article 3.1 in turn, states *".... the option deposit of Rs. 220 Crores or such other enhanced or reduced advance deposit as may mutually agreed between the Parties hereto from time to time shall hereinafter be referred to as the **Option Deposit**."* Thus, the parties have used Option advance to mean option deposit. This also indicates the intent of the parties to adjust the option advance against option price in future. On non-exercise of option right, Applicant is merely entitled to refund of the option advance. The Applicant did not exercise the option to purchase FSI. There is nothing on record to evidence that Radius Company demanded return of option deposit on account of failure by Radius LLP. Thus, the option deposit is given as an advance as any other creditor would give.

44. We are also persuaded by the fact that no segregation has been made to keep the Option Deposit in a separate account. Though Mr. Joshi

strenuously argued that such segregation is only one of the indicators, however, when neither the Option Agreement nor the conduct of parties support the premise of treating the Option Deposit as 'trust', the fact that there was no provision for segregation further goes against the case of the Applicant.

45. The judgments cited by the Applicant also cannot be applied plainly to the present case when there are other factors which clearly corroborates the absence of trust. Even otherwise, we note that in the judgments cited by the Applicant, there were segregation of the trust money to substantiate the arrangement and the terms also clearly spelled out that the intention of the parties therein was to create a trust, which is not the case herein.

46. We refer to ***IFFCO Tokio General Insurance Company Limited vs. Cox and Kings Limited, [Company Appeal (AT) (Ins) No. 208/2022]*** wherein the Hon'ble NCLAT observed as follows:

> *"9. Having regard to the facts and circumstances of the attendant case on hand, in the absence of any separate trust account and specifically in the absence of any specific segregation/demarcation of the amount collected by the 'Corporate Debtor' under the terms of the Agreement, we are of the considered view that no trust can be said to have come into the existence in favour of the 'Carrier' in the present case as the goods that are said to be held in trust is the 'Money'/amounts collected by the 'Corporate Debtor'. There is no documentary evidence on record to establish that any steps were taken for creation of any separate trust account by the parties to the Agreement. Further, we are also conscious of the fact that the Appellant or the 'Carrier' did not take any action to recover the assets which they are claiming today prior to the initiation of the CIRP i.e., prior to 21.10.2019."*

47. In ***Jal Engineers Private Limited vs. Dinesh Kumar Agarwal [2023 SCC OnLine NCLAT 92]***, the Hon'ble NCLAT had the occasion to analyse the following between corporate debtor and its consortium partner which read as follows:

"5. ....

xxx

THE PARTIES HEREBY AGREE AS UNDER

1) *Member 1 as the leader of the Consortium will arrange the Bid bond bank guarantee for INR 2,16,77,308/- which is to be submitted as part of the Consortium bid.*

2) *Member 2 will transfer INR 50,00,000/- to Member 1 being their share for bid bond bank guarantee.*

3) *The amount of INR 50,00,000/- will be returned back by Member 1 to Member 2 within 7 days of release of the bid bond by ONGC in any of the following events*

   a) If the said tender no. MR/ES/MM/ PCWPP-II/01/2018/P85ICI8002 for Protective Coating of Wellhead Platforms Project-II is awarded to a party other than the Consortium.

   b) If the tender is cancelled by ONGC.

   c) If the tender is awarded to the Consortium then upon Member 1 submitting the performance bank guarantee to Oil & Natural Gas Corporation Limited and Member 2 submitting counter guarantee to Member 1 for their portion."

48. In this also, the Appellant argued that the amount was given in trust since it was for specific purpose, hence, it should be kept out of the assets of the Corporate Debtor and had relied on ***Ganesh Export judgment (supra) and Canbank Financial Services***. However, the Hon'ble NCLAT rejected their contention in following terms:

> *"The agreement dated 24.10.2018 which was basis of the claim of the Appellant in no manner indicate that the amount was given in trust to the Corporate Debtor. Amount was given by the Appellant as his share to submit Bid Bond Bank Guarantee. Thus, the submission of the learned counsel for the Appellant that the amount given by the Appellant was the amount given in trust to the Corporate Debtor is wholly unfounded and cannot be accepted."*

49. In the wake of the discussions, we are of considered view that the deposit money does not have the character of any 'trust' and that the

relationship between Radius LLP and Radius Company is that of 'debtor-creditor'. That being the case, the RP of Radius LLP is not under any obligation to keep aside the option deposit outside the CIRP of Radius LLP. Accordingly, the question framed in Para 11 is answered in negative.

Resolution Plan for Radius LLP and treatment of Option Deposit

50. Since, we have held that the Option Deposit is not a trust money, the Applicant is now a creditor of Radius LLP. However, in absence of a claim submitted by the Applicant, the Option Deposit was not included in the admitted claims of the corporate debtor.

51. It is pertinent to note that the resolution Plan for the corporate debtor submitted by the Resolution Applicant/Respondent 2 has already been approved by the CoC by 100% votes and the IA No. 72/2024 seeking sanction of the Resolution Plan by Adjudicating Authority is being disposed of by a separate order of even date.

52. We observe that Section 3(B)(I) of the Resolution Plan provides for treatment of the Applicant's option deposit. It states as follows:

> *"**1.5 Unsecured financial creditors (other than financial creditors belonging to any class of creditors)***
> *...*
> *(b) xxx*
> *Without prejudice to what is stated above, if the claim of Radius & Deserve Land Developers Private Limited is finally held by NCLT or any other competent court or tribunal to be a valid claim against Radius LLP, then Radius & Deserve Land Developers Private Limited will be paid <u>NIL amount</u>, in full and final settlement of its entire claim and all amounts due and payable to it. Radius & Deserve Land Developers Private Limited shall be deemed to have relinquished any claim for any other dues. The debt/claim shall be converted into capital of Radius LLP and subsequently will be subject to Capital Reduction as specified in Section 5 (Acquisition as a Going Concern) of this Resolution Plan. This will be in full and final settlement."*

53. Thus, under the Resolution Plan, the Applicant is proposed Nil payment. It is to be noted that the another unsecured financial creditor (not belonging to any class) is M/s Raghueela Builders Private Limited with an admitted claim of Rs. 77,91,50,000 and is also proposed to be paid Nil amount under the Resolution Plan. Both the Applicant as well as M/s Raghueela Builders Private Limited are related parties to Radius LLP. There is no provision in the Code which mandates payment to related parties should be made at parity with other class of creditors. Thus, we do not find any non-compliance or violation of any of the provisions of the Code regarding the treatment of the claim of the Applicant and therefore, the Tribunal's interference in this regard is unwarranted.

54. In view of our observations made above, prayers **'a'** and **'e'** being interconnected are **rejected**.

Option FSI

55. The Applicant in prayer 'b' has sought a declaration that the Option FSI is an asset of the Applicant and further sought injunction order against Radius LLP/Respondent 2 from dealing with the Option FSI. Under the Option Agreement, the Applicant was given an option to exercise or not exercise its option of purchasing the FSI. Had the Applicant exercised its option under the agreement, the Option FSI might have been the asset of the Applicant. However, that is not the case here. The Applicant had not exercised its option and therefore, did not purchase the FSI within the expiry Option Period i.e. 14.09.2020 and precisely, the entire case herein revolves around the consequence of non-exercise of the Option by the Applicant. Thus, when the Applicant itself admits that the FSI was not purchased and seeks refund on this ground, it cannot now seek a blanket injunction against Radius LLP/Respondent 2 from utilising the Option FSI.

56. Further, as per Article 7 of the option Agreement, upon the expiry of the Option Period and non-exercise of the option by Applicant, the Option Agreement stood automatically terminated on 14.09.2020.

Furthermore, the development rights of Radius LLP under the LoI dated 24.07.2013 was also terminated in the year 2021 itself and the said land was subsequently handed over to the Respondent 2 by the SRA vide LoI dated 12.04.2023 for development purpose.

57. We refer to the judgment of ***MCX Stock Exchange vs. Securities and Exchange Board of India & Ors. [2012 SCC OnLine Bom 397]*** wherein the Hon'ble Bombay High Court has observed as follows:

> *"81. In a buy back agreement of the nature involved in the present case, the promisor who makes an offer to buy back shares cannot compel the exercise of the option by the promise to sell the shares at a future point in time. If the promisee declines to exercise the option, the promisor cannot compel performance. A concluded contract for the sale and purchase of shares comes into existence only when the promisee upon whom an option is conferred, exercises the option to sell the shares. Hence, an option to purchase or repurchase is regarded as being in the nature of privilege."*

58. Taking cue from the above observations, we are of the view that any right over the Option FSI cannot be now claimed by the Applicant when it itself chose not to purchase the FSI within the stipulated time. In any case, as already observed, this Tribunal in summary jurisdiction under the Code cannot decide on the rights of the parties over any property which may be having jurisdiction before Civil Court. Therefore, based on our discussions, we are not inclined to pass any injunction order as sought by the Applicant. Thus, prayer '**b**' is also **rejected**.

59. Prayers 'c', 'd' 'f', 'g' and 'h' are interim reliefs. Since the matter is finally being disposed of prayers '**c**', '**d**' '**f**', '**g**' and '**h**' are rendered infructuous.

60. Before parting, we note that the Applicant has also made submissions on the Respondent 2/Resolution applicant's duty to reimburse amount to Radius LLP as per the revised LoI dated 12.04.2023 issued

by the Slum Rehabilitation Authority in favour of Resolution Applicant. The relevant extract of the revised LoI is reproduced below:

> *"7. the new developer M/s. Chandak Realtors Pvt. Ltd. to reimburse the amount as per the above valuation report & addendum valuation report if any submitted by the valuer in future to the old developer M/s. Radius & Deserve Builders LLP. as per prevailing policy."*

61. In this regard, the Applicant has relied on an Article published in the Hindustan Times and submitted that an amount of Rs. 56 crores is payable by the Resolution Applicant to Radius LLP. The said article dated 05.09.2023 is annexed as 'Exhibit T'. It is *inter alia* stated therein that:

> *"In May 2022, SRA appointed valuer submitted a valuation report assessing that Radius Developers had spent Rs. 56 crore excluding transit rents, MCGM premiums etc., on this project. In January 2023, the three slum societies invited fresh proposals from developer and selected Chandak Realtors Ltd as the new developer with 90% eligible slum dwellers voting for the developer.*
>
> *In May 2022, SRA appointed valuer submitted a valuation report assessing that Radius Developers had spent Rs. 56 crore excluding transit rents, MCGM premiums etc., on this project. In January 2023, the three slum societies invited fresh proposals from developer and selected Chandak Realtors Ltd as the new developer with 90% eligible slum dwellers voting for the developer."*

62. Besides the above article, there is no other material placed before us evidencing that such amount is payable by the Resolution Applicant to Radius LLP. Ld. Counsel for the Resolution Applicant submits that any amount payable as reimbursement to Radius LLP shall be made in accordance with the Slum Rehabilitation Rules. The Resolution Plan also has a mention about this in following terms:

*"**2. <u>Background</u>***

xxx

J. By and under an Order dated 20th September 2021, ("the SRA Order") passed by the SRA in the proceedings initiated under Section 13(2) of the Slum Act, the SRA inter alia:

(a) terminated Radius LLP as the developer under the said Scheme;

xxx

(b) granted liberty to the said Societies for appointing a new developer of their choice, as per rules, regulations and policy of the SRA;

(c) directed the Executive Engineer, SRA to appoint a valuer to ascertain the expenses incurred by Radius LLP while implementing the said scheme; and

(d) directed the new developer to pay Radius LLP for the costs and expenses incurred by Radius LLP towards the said Scheme ("the Reimbursement Amount").

xxx

L. By and under a Revised Letter of Intent dated 12th April 2023 read with Revised Letter of Intent dated 3rd April 2024, the SRA has sanctioned the said Scheme in favour of the Resolution Applicant under the provisions of Regulation 33 (10) of the OCR read with the applicable provisions of the Development (Control and Promotion) Regulations for Greater Mumbai, 2034 as amended from time to time ("DCPR"). in the manner and on the terms and conditions as set out therein.

xxx

W. Under this Resolution Plan, the liabilities of Radius LLP will be settled in the manner as specified in this Resolution Plan and the Resolution Applicant/ its nominees will hold the entire partnership interest in Radius LLP, subject to the terms and conditions specified in this Resolution Plan.

xxx

3. B. (I) ...

(b) Without prejudice to what is contained elsewhere in this Resolution Plan, the Resolution Applicant shall not and shall not be required to make any payments to Radius & Deserve Land Developers Private Limited as alleged or at all under the Application or even otherwise. Additionally, and without prejudice to what is stated hereinabove, Radius & Deserve Land Developers Private Limited (through its Resolution Professional or otherwise) or any successor thereof shall have no claim over the Reimbursement Amount or any part thereof under any circumstances whatsoever.

G. The Resolution Applicant states that the Resolution Plan has been filed and the commercial terms set out herein have been *offered based on the Resolution Applicant being entitled to determine the manner and terms on which the Reimbursement Amount will be utilized by Radius LLP and that no creditor or claimant will be entitled to the Reimbursement Amount or any part thereof or make any claim thereto. This sub-Clause G is an intrinsic part of the offer made under the Resolution Plan."*

63. Thus, the Reimbursement Amount has been given treatment in the Plan and that the Plan has been approved by CoC by 100% voting and no objections/representation from Slum Rehabilitation Authority has been received. Moreover, we also note that no final relief is sought by the Applicant in this regard as also this Tribunal is not the appropriate forum to decide on the reimbursement issue. Thus, we are not inclined to make any further observations or pass any directions in this regard.

64. The logical sequitur to the analysis in the preceding paragraphs, is that the application *sans* merit and is liable to be dismissed. Accordingly, IA/1041/2024 is **dismissed**, however with no cost.

Sd/-
Hariharan Neelakanta Iyer
Member (Technical)

Sd/-
Lakshmi Gurung
Member (Judicial)

Uma