

**NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH (COURT-II)**

**Inv. Pett. No. 05/ND/2024, Inv. Pett. No. 14/ND/2024 and I.A.**  
**No. 2892/ND/2022**

**IN**

**Company Petition No. (IB)-97(ND)/2022**

**IN THE MATTER OF (IB)-97(ND)/2022:**

**(Under Section: 95(1) of IBC, 2016)**

**Indiabulls Housing Finance Ltd.**

**... Applicant/  
Financial Creditor**

**Versus**

**Dr. Subhash Chandra**

**... Respondent/  
Personal Guarantor**

**AND IN THE MATTER OF INV. PETT. NO. 05/ND/2024:**

**(Under Section: 60(5) of IBC, 2016)**

**Axis Bank Limited**

Axis House, Wadia International Centre,  
Pandurang Budhkar, Worli,  
Mumbai-400025

**... Applicant/Intervener**

**Versus**

**1. Indiabulls Housing Finance Limited**

M-62 and 63, 1<sup>st</sup> Floor,  
Connaught Place, New Delhi-110001

**2. Dr. Subhash Chandra**

B-10, Lawrence Road Industrial Area,  
Delhi-110035

**... Respondents**

**AND IN THE MATTER OF INV. PETT. NO. 14/ND/2024:**

**(Under Section: 60(5) of IBC, 2016)**

**IDBI Trusteeship Services Limited**

Ground Floor, Universal Insurance Building,  
Sir Phirozshah Mehta Road, Fort, Bazargate,  
Mumbai, Maharashtra-400001

**... Applicant/Intervener**

**Versus**

**1. Dr. Subhash Chandra**

18th Floor, A Wing, Marathon  
Futurex, N.M. Joshi Marg, Lower  
Parel Mumbai-400013

**2. Indiabulls Housing Finance Ltd.**

5th Floor, Building No. 27, KG Marg  
Connaught Place, Central Delhi,  
New Delhi- 110001, India

**... Respondents/  
Corporate Debtors**

**AND IN THE MATTER OF IA. NO. 2892/ND/2022:**

**(Under Section: 99 of IBC, 2016)**

**Raj Kamal Saraogi**

First Floor, N-17A, Green Park Extn.,  
New Delhi-110016

**... Applicant/  
Resolution Professional**

**Order Delivered on: 22.04.2024**

**CORAM:**

**SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)**

**SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)**

**PRESENT:**

**For the Applicant :** Adv. Sumesh Dhawan, Adv. Shaurya Shyam, Adv. Chirag Sharma, Adv. Shikhar Misra

**For the PG :** Adv. Vaibhav Gaggar, Adv. Ritwika Nanda, Adv. Shefali Mande, Adv. Maitry Bhandari, Adv. Dev Karan

**For the RP :** Adv. Vinod Chaurasia, Adv. Rajkamal Sawroop

**For the IDBI :** Adv. Gaurav Mitra, Adv. Sachin Chandarana, Adv. Sanidhya Kumar, Adv. Manan Bhindora in Inv. Pett.-14/2024

**For the Axis Bank:** Mr. Abhinav Vasisht, Sr. Adv., Adv. Priya Singh, Adv. Manmeet Singh, Adv. Yashvardhan Bandi, Adv. Ishu Gupta, Adv. Maulik Khurana in Inv. Pett.-05/2024

**ORDER**

As can be derived from the petition, the Creditor i.e. India Bulls Housing Finance Limited viz. a housing finance company regulated by the RBI, primarily, engaged in, "the lending business" entered into four loan agreements with Vivek Infracon Private Limited and other entities seeking

financial facilities for an amount of Rs.726 crores. The financial facility was secured by Personal Guarantees as well as securities. The details of the financial facilities, as mentioned in the written synopsis, furnished by the Creditor with the application filed under Section 95 of IBC, 2016, reads thus:-

<b>S.No.</b>	<b>Borrower(s)</b>	<b>Amount (in Crores)</b>
1.	Gnex Projects Private Limited and Essel Home Private Limited	116
2.	Vivek Infracon Private Limited and Essel Home Private Limited	170
3.	Renu Realtech Private Limited and Essel Home Private Limited	210
4.	Gnex Infrabuild Private Limited and Essel Home Private Limited	230
	<b>Total</b>	<b>726</b>

2. One of the Agreements entered into between the Creditor and the Principal Borrower is dated 13.12.2016, in terms of which the Creditor extended the financial facilities of an amount of Rs. 170,00,00,000/- (Rupees One Hundred and Seventy Crores Only) through Loan Account No. S000239650. In terms of the Loan Documents the Principal Borrowers was to furnish/maintain a minimum Security/Cover-Securities. As the Principal Borrower.

3. As can be gathered from the IA-2892/2022 filed by the RP, in pursuance of the Loan Agreement(s), Applicant/Financial Creditor disbursed Rs. 170,00,00,000/- (Rupees One Hundred and Seventy crores only) in three tranches viz. (i) on 17.12.2016 an amount of Rs. 110,00,00,000/- (Rupees One Hundred and Ten Crore Only); (ii) on 26.12.2016 an amount of Rs. 35,00,00,000/- (Rupees Thirty-Five Crore Only); and (iii) on 24.08.2017 an amount of Rs. 25,00,00,000/- (Rupees Twenty-Five Crore Only).

4. The Applicant/Creditor sent a notice on 14.11.2018 to the borrowers informing them about non-maintenance of minimum Security Cover-Securities (as stipulated in the Loan Documents). Further, the Financial Creditor called upon the Corporate Debtor and Other Borrowers, to either pay a sum of INR 287,85,49,976/- (Rupees Two Hundred and Eighty-Seven Crores Eighty- Five Lakh Forty-Nine Thousand Nine Hundred and Seventy-Six only) or pledge additional shares to the sum of INR 341,82,78,097/- (Rupees Three Hundred and Forty-One Crores Eighty Lakh Seventy-Eight Thousand and Ninety-Seven only). As per the averments made in the application, the Applicant also sent reminder dated 15.11.2018 to the Corporate Debtor and Other Borrowers, to return the debt amount or provide additional security to maintain the Security Cover. The reminder is placed on record Annexure A-8 to the application.

5. The Principal Borrower, Co-Borrower and Other Borrowers, gave an Additional Undertaking dated 29.11.2018 committing thereby:- (i) to make prepayment of Rs. 100 crores, to be appropriated towards the principal amount of the loan, by 31.12.2018, (ii) cause Dr. Subhash Chandra to execute the deed of guarantee by 05.12.2018 to secure all obligations of the obligor(s) including payment of the borrowers' dues to the Applicant, and (iii) to execute first-ranking mortgage over the properties as described in Schedule II of the Additional Undertaking, by 31.12.2018. The undertaking is available on record at Annexure A-10 the application.

6. Deed of Guarantee executed on 05.12.2018 by Dr. Subhash Chandra (Respondent) in favour of the Applicant/ Financial Creditor, committing inter alia, to pay the Lender Rs. 726 crores upon failure of the Principal Borrower,

Co- Borrower and other Borrowers, to perform their obligations has been enclosed by the Applicant as Annexure A-3 to the application.

7. The Applicant / Financial Creditor sent a notice dated 04.02.2019 to the Principal Borrower, Co-Borrower, Personal Guarantor / Respondent (Dr. Subhash Chandra) and the Other Borrowers asking for refund of the entire outstanding loan amount, disbursed in terms of the four Loan Agreements, thus recalled the loan facility and invoked the personal guarantee given by the Respondent to Applicant and in respect of the Principal Borrowers. The Guarantee is on record at Annexure A-4 to the application.

8. A Demand Notice in FORM – B prescribed under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 was sent to the Personal Guarantor / Respondent on 18.01.2022 seeking repayment of dues to the tune of Rs. 178,78,52,577/- (Rupees One Hundred Seventy-Eight Crore Seventy-Eight Lakh Fifty-Two Thousand Five Hundred and Seventy-Seven only) including pending TDS, in lieu of the financial facility extended to the Corporate Debtor and Co-Borrower. The notice is on record as Annexure A-12 to the Affidavit of Counsel.

9. Receiving no positive results/response from the Personal Guarantor, the Applicant preferred the application (in Form C) under Section 95 of the IBC, 2016 read with rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019] on 08.02.2022, praying for

initiation of Insolvency Resolution Process qua the Respondent/Personal Guarantor. The Part-III and IV of the application reads thus:-

<b>Part-III</b>		
<b>PARTICULARS OF DEBT</b>		
<b>1.</b>	<b>Total debt (including any interest or penalties)</b>	The Financial Creditor is a housing finance company providing housing finance including home loans. Rs. 178,78,52,577/- (Rupees One Hundred Seventy Eight Crore Seventy Eight Lakh Fifty Two Thousand Five Hundred and Seventy Seven only)
<b>2.</b>	<b>Amount in default</b>	Rs. 178,78,52,577/- (Rupees One Hundred Seventy Eight Crore Seventy Eight Lakh Fifty Two Thousand Five Hundred and Seventy Seven only)
<b>3.</b>	<b>Date on which debt was due</b>	<u><b>04.02.2019</b></u> The Financial Creditor sent notice to the Corporate Debtor, Co-Borrower, Guarantor along with Other Borrowers, seeking payment of the entire outstanding amount and recalling the loan facility and invoking the Personal Guarantee dated 05.12.2018.  <u><b>08.02.2019</b></u> Default occurred.  <u><b>18.01.2022</b></u> Demand Notice under Section 95(4)(b) of the IB Code, read with Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personnel Guarantors to Corporate Persons) Rules, 2019 on the Respondent demanding the Payment of the unpaid debt in default amounting to Rs. 178,78,52,577/-  The default is continuing and subsisting.

4.	Date on which default occurred	08.02.2019
5.	Nature of the debt	Guarantee given in respect of term loan
6.	Secured debt including particulars of security held, the date of its creation, its estimated value as per the creditor (as applicable)	<ul style="list-style-type: none"> <li>• No shares have been have been pledged by the Guarantor, Dr. Subhash Chandra. However, the shares are pledged for securing repayment has been created by other parties.</li> <li>• No mortgage or hypothecation has been created by Guarantor, Dr. Subhash Chandra. However, mortgage/ hypothecation for securing repayment has been created by other parties.</li> </ul>
7.	Unsecured debt (as applicable)	Subject to Sr. No. 6
8.	Details of retention of title arrangements (if any) in respect of goods to which the debt refers (attach a copy)	N.A.
9.	Details of any mutual credit, mutual debts, or other mutual dealings between the guarantor and the creditor, which may be set-off against the claim (attach proof)	N.A.
10.	Particulars of an order of a court, tribunal or arbitral panel adjudicating on the default, if any (attach a copy of the order)	N.A.
11.	Record of default with the information utility, if any (attach a copy)	N.A.
12.	Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925 (10 of 1925) (attach a copy)	N.A.
13.	Provision of law, contract or other document under which debt has become due (attach a copy)	<p>Copy of the Sanction Letter dated 09.12.2016 is annexed herewith and marked as <u>ANNEXURE A-1</u>.</p> <p>Copy of the Loan Agreement dated 13.12.2016 with Vivek Infracon Private Limited (Corporate Debtor) and Essel Home Private is annexed herewith and marked as <u>ANNEXURE A-2</u>.</p> <p>Copy of the Deed of Guarantee dated 05.12.2018 is annexed herewith and marked as <u>ANNEXURE A-3</u>.</p> <p>Copy of the notice dated 04.02.2019 is annexed herewith and marked as <u>ANNEXURE A-4</u>.</p> <p>Copy of the Demand Notice dated 18.01.2022 is annexed herewith</p>

		and marked as <u>ANNEXURE A-5.</u>
14.	A statement of bank account where deposits are made or credits received normally by the creditor in respect of the debt of the corporate debtor, from the date on which the debt was incurred (attach a copy)	Copy of the Statement of Account is annexed herewith and marked as <u>ANNEXURE A-6.</u>  Copy of Foreclosure statement dated 17.01.2022 is annexed herewith and is marked as <u>ANNEXURE A-7.</u>
15.	List of documents attached to this application in order to prove the existence of debt and the amount in default	1. Sanction Letter dated 09.12.2016 2. Loan Agreement dated 13.12.2016 3. Deed of Guarantee dated 05.12.2018 4. Guarantee Invocation Notice dated 04.02.2019 5. Demand notice dated 18.01.2022 6. Statement of Account 7. Foreclosure statement dated 17.01.2022 8. Letters dated 14.11.2018 and 15.11.2018 is annexed herewith and is marked as <u>ANNEXURE A-8 (COLLY).</u> 9. Undertaking dated 19.11.2018 is annexed herewith and is marked as <u>ANNEXURE A-9.</u> 10. Additional undertaking dated 29.11.2018 is annexed herewith and is marked as <u>ANNEXURE A-10.</u>
16.	Statement by creditor in respect of excluded debts	1. Uttam Kumar for Indiabulls Housing Finance Limited for which the insolvency resolution process application is filed does not include any-  (i) liability to pay fine imposed by a court or tribunal; (ii) liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation; (iii) liability to pay maintenance to any person under any law for the time being in force;

		(iv) liability in relation to a student loan; (v) any other debt prescribed under section 79(15)(e) of the Code.
17.	If you are a secured creditor, tick the applicable box in the right column relating to forfeiture of right to enforce security during the period of the repayment plan, which will determine the voting share as per section 110 of the Code	I do not agree to forfeit my right to enforce my security [insert description] during the period of the repayment plan.

**PART-IV**

<b>PARTICULARS OF &amp; DECLARATION BY INSOLVENCY PROFESSIONAL (IF APPLICATION FILED THROUGH INSOLVENCY PROFESSIONAL)</b>			
1.	Title and full name	Not Applicable	
2.	Address	Present	Permanent
		Not Applicable	Not Applicable
		Business	
		Not Applicable	
3.	E-mail address(es)	Not Applicable	
4.	Contact number	Home	Mobile
		Not Applicable	Not Applicable
		Business	
		Not Applicable	
5.	Declaration by insolvency professional	Not Applicable	

10. In terms of the order dated 30th May 2022 this Tribunal appointed Resolution Professional (RP) qua the Personal Guarantor and required him to act in terms of the provisions of Section 99 of IBC, 2016, and submit a Report under section 99 of the IBC, 2016.

11. The RP preferred IA-2892/2022, espousing therein as under:-

**“D. Actions undertaken by the Resolution Professional:**

*a) The RP received the copy of the order dated 30.05.2022 vide e-mail sent by the Court Officer NCLT New Delhi, Court No. II*

on 31.05.2022.(Copy of Order dated 30.05.2022 is attached and marked as **Annexure A**).

- b)** RP received an e-mail from M/s Jaitley & Bakhshi, the Counsel on record for the Applicant on 01.06.2022 sharing soft copies of a Certified Copy of the Order dated 30.05.2022, the Application filed under Section 95 of the Insolvency and Bankruptcy Code, 2016, and Additional Documents filed in the matter by the Applicant/Financial Creditor.
- c)** RP gave his consent in **Form A**, under regulation 4(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 on 02.06.2022 and filed with IBBI.
- d)** RP communicated with Dr Subhash Chandra, Personal Guarantor on whatsapp message on 02.06.2022 on Mobile no. +91 91360 12977 requesting to confirm his email ids ([Dinesh.kanodia@zee.esselgroup.com](mailto:Dinesh.kanodia@zee.esselgroup.com) & [Shubham.shree@essel.group.com](mailto:Shubham.shree@essel.group.com)) **taken from the application filed by Applicant.** There was no response to the message.
- e)** The RP sent an e-mail as Intimation to Dr Subhash Chandra, Personal Guarantor to M/s Vivek Infracon Private Limited under Section 99 (2) of IBC, 2016 - In the Matter of M/s Indiabulls Housing Finance Limited vs Dr Subhash Chandra on above e-mail ids. Mail on both email ids bounced.RP immediately brought the fact in the knowledge of M/s Jaitley & Bakhshi, the Counsel on record for the Applicant. M/s Jaitley & Bakhshi vide email dated 03.06.2022, shared the email ids of the Personal Guarantor / Respondent ([Dinesh.kanodia@zee.esselgroup.com](mailto:Dinesh.kanodia@zee.esselgroup.com) & [Shubham.shree@esselgroup.com](mailto:Shubham.shree@esselgroup.com)) and email id of Ms. Ritwika Nanda ([ritwikananda@trustlegal.in](mailto:ritwikananda@trustlegal.in)), the counsel who represented the Personal Guarantor/ Respondent before

the Hon'ble Adjudicating Authority. RP resent the intimation on email ids ([Shubham.shree@esselgroup.com](mailto:Shubham.shree@esselgroup.com) & [ritwikananda@trustlegal.in](mailto:ritwikananda@trustlegal.in)) on 03.06.2022. These emails did not bounce. (Copy of Intimation Letter dated 02.06.2022 & e-mail communication to Respondent/Personal Guarantor is collectively attached and marked as **Annexure B**)

- f)** RP simultaneously, shared the copy of the order dated 30.05.2022 and copy of intimation letter to Personal Guarantor / Respondent through Whatsapp message on 02.06.2022 on his mobile no. +91 91360 12977, which were delivered and read. (Copy of whatsapp message is attached herewith as **Annexure C**)
- g)** RP also served the intimation letter through Speed Post on 03.06.2022 to both the addresses (**10, Lawrence Road, Industrial Area, New Delhi 110035&18th Floor, Wing A, MarathaonFuturex, N. M. Joshi Marg, Lower Parel Mumbai, Maharashtra 400013**) of Personal Guarantor/ Respondent available on the Order dated 30.05.2022. Both the letters were delivered on 06.06.2022. (Copy of Speed post Tracking Report is attached herewith as **Annexure D**)
- h)** Through the above emails and intimation Letters among other information requested, RP, in terms of the provisions of Section 99(2) of IBC, 2016, called upon Personal Guarantor/ Respondent to prove repayment of the debt claimed as unpaid by the creditor by furnishing –
- (a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor;**
  - (b) evidence of encashment of a cheque issued by the debtor: or**
  - (c) a signed acknowledgment by the creditor accepting receipt of dues.**

- i) On 06.06.2022 RP contacted Dr Subhash Chandra on his mobile no. +91 91360 12977. He responded with a request that he will call back. He called undersigned through another mobile no. +91 91458 21506. He confirmed having received the intimation letter. Undersigned requested him to provide the requested details and information. He mentioned that since he is contesting for Rajya Sabha Election and the election is scheduled on 10.06.2022, it is not possible for him to respond to the Intimation Letter till 11.06.2022. He will respond only thereafter.*
- j) RP, in terms of direction in the Order dated 30.05.2022 filed Compliance Affidavit that there is no disciplinary proceeding pending against him on 06.06.2022 through e-filing no. 0710102010862022. (Copy of Compliance Affidavit is attached and marked as **Annexure E**)*
- k) On 07.06.2022, RP had meeting with dealing persons team in the Office of M/s Indiabulls Housing Finance Limited, Applicant/Financial Creditor at their Gurgaon Office and on 08.06.2022 virtual meeting with them along with their Counsel on record M/s Jaitley & Bakhshi to discuss for clarification on documents shared by them. It was also clarified by Applicant that "**No payment received from Corporate Debtor M/s Vivek Infracon Private Limited and/or from Dr Subhash Chandra after issuance of Form B on 18.01.2022 to Dr Subhash Chandra**".*
- l) Accordingly, in terms of the Provision of Section 99 and as directed in the Order, RP is filing the report in absence of any information / documents being made available by the Respondent/Personal Guarantor within the due date of filing of report*
- m) The RP has referred to the following documents shared with him:*

- i. *Sanction Letter dated 09.12.2016 issued by the Applicant/Financial Creditor to the Corporate Debtor M/s Vivek Infracon Private Limited which is at **Annexure A-1 Page no. 24-28 of the application***
- ii. *Loan Agreement dated 13.12.2016 between the Applicant/Financial Creditor and Corporate Debtor M/s Vivek Infracon Private Limited which is at **Annexure A-11 Page no. 04-36 of the Affidavit of Counsel.***
- iii. *Notice dated 14.11.2018 from Applicant/Financial Creditor to the Corporate Debtor informing them about non-maintenance of minimum Security Cover-Securities (as stipulated in the Loan Documents) and called upon the Corporate Debtor and Other Borrowers, to either pay a sum of INR 287,85,49,976/- (Rupees Two Hundred and Eighty-Seven Crores Eighty-Five Lakh Forty-Nine Thousand Nine Hundred and Seventy-Six only) or pledge additional shares to the sum of INR 341,82,78,097/- (Rupees Three Hundred and Forty-One Crores Eighty Lakh Seventy-Eight Thousand and Ninety-Seven only) Reminder Letter dated 15.11.2018 from Applicant/Financial Creditor to the Corporate Debtor and Other Borrowers, as a reminder to the pay the funds or provide additional security to maintain the Security Cover- Securities, which is at **Annexure A-8 Page no. 107-117 of the application.***
- iv. *Additional Undertaking dated 29.11.2018 by the Corporate Debtor, Co-Borrower and Other Borrowers, to Applicant/Financial Creditor stating agreeing inter alia, (i) to make prepayment of Rs. 100 crores, to be appropriated towards the principal amount of the loan, by 31.12.2018, (ii) cause Dr. Subhash Chandra to execute the deed of guarantee by 05.12.2018 to secure*

*all obligations of the obligor(s) including payment of the borrowers' dues to the Applicant, and (iii) to execute first-ranking mortgage over the properties as described in Schedule II of the Additional Undertaking, by 31.12.2018 which is at **Annexure A-10 Page no. 130-145 of the application.***

V. *Deed of Guarantee dated 05.12.2018 executed by Dr. Subhash Chandra, Personal Guarantor / Respondent which is at **Annexure A-3 Page no. 61-76 of the application.***

vi. *Notice dated 04.02.2019 from Applicant/ Financial Creditor to the Corporate Debtor, Co-Borrower, Personal Guarantor / Respondent (Dr. Subhash Chandra) and the Other Borrowers seeking payment of entire outstanding amount as under the four Loan Agreements, thereby inter alia recalling the loan facility and **invoking the personal guarantee of the Respondent** which is at **Annexure A-4 Page no. 77-89 of the application.***

vii. *A Demand Notice in **FORM-B** was sent on 18.01-2022 to the - Personal Guarantor / Respondent seeking repayment of dues to the tune of **Rs. 178,78,52,577/- (Rupees One Hundred Seventy-Eight Crore Seventy-Eight Lakh Fifty-Two Thousand Five Hundred and Seventy-Seven only)** including pending TDS, in lieu of the loan facility granted to the Corporate Debtor and Co-Borrower which is at **Annexure A-12 Page no. 37-45 of the Affidavit of Counsel.***

viii. *Statement of Account of Loan Account no. S000239650 in the Books of Applicant / Financial Creditor which is at **Annexure A-13 Page no. 46-55 of the Affidavit of Counsel.***

ix. Foreclosure Statement Dated 17.01.2022, which is at **Annexure A-14 Page no. 56 of the Affidavit of Counsel**

x. Application filed on 08.02.2022 under Form C with the Adjudicating Authority for initiation of Insolvency Resolution Process of Personal Guarantor Dr. Subhash Chandra and Additional Documents filed in the matter by the Financial Creditor and Affidavit of Counsel dated 16.02.2022.

xi. Documents as available on the e-filing portal of Hon'ble NCLT in C.P.(IB)97(ND)2022.

**n)** The RP has reviewed the above-mentioned documents for determination of his recommendation.

**o)** The recommendation of the RP is strictly a comment upon the acceptance/rejection of the application and no determination/comment has been made by the RP in respect of the claim amount filed by the Applicant.

**p) Observation of RP:**

The Deed of Guarantee dated 05.12.2018 given by Personal Guarantor to Applicant/ Financial Creditor is for Loan granted to following Companies:

S.No.	Borrower(s)	Amount (in Crores)
1	Gnex Projects Private Limited and Essel Home Private Limited	116
2	Vivek Infracon Private Limited and Essel Home Private Limited	170
3	RenuRealtech Private Limited and Essel Home Private Limited	210
4	GnexInfrabuild Private Limited and Essel Home Private Limited	230
	Total	726

Applicant has filed following Applications:

Application	Date of Application	Application No.	Pending before Hon'ble NCLT	Amount of Default Rs.
To initiate CIRP Process u/s 7 against Vivek Infracon Private Limited	24.03.2022	CP (IB) 236/2022	Principal Bench, New Delhi	178,78,52,577/-
To initiate Insolvency process u/s 95 against Dr Subhash Chandra,	08.02.2022	CP (IB) 97/2022	New Delhi Bench	
Personal Guarantor for Guarantee for Loan given to Vivek Infracon Private Limited			(Court – II)	
To initiate CIRP Process u/s 7 against Gnex Projects Private Limited	24.03.2022	CP (IB) 242/2022	New Delhi Bench (Court – VI)	120,30,44,667/-
To initiate Insolvency process u/s 95 against Dr Subhash Chandra, Personal Guarantor for Guarantee for Loan given to Gnex Projects Private Limited	07.02.2022	CP (IB) 98/2022	New Delhi Bench (Court – III)	

12. In the aforementioned backdrop, the RP recommended that the application filed under Section 95 of IBC, 2016, may be accepted. The recommendation so made by the RP and the reasons stated by him in support thereof reads thus:-

**“E. Recommendation:**

*In view of the above given facts and circumstances, the undersigned is of the considered opinion that the instant application satisfies all the requirements as set out under section 95. I recommend accepting the application against Dr. Subhash Chandra filed by Indiabulls Housing Finance Limited to initiate Insolvency Resolution Process.*

**F. Reasoning for such Recommendation:**

- a) *I have examined the application **C.P. (L.B.) No. 97(ND)/2022** and the same is found to be satisfying all the requirements of Section 95 of the IBC, 2016.*
- b) *I have not received any evidence of repayment of the debt claimed in Section 95 petition from Dr. Subhash Chandra.*
- c) *I have not received any document cancelling/revoking the personal guarantee offered by Dr. Subhash Chandra for the borrowing made by the Corporate Debtor Vivek Infracon Private Limited sanctioned & disbursed by Indiabulls Housing Finance Limited.*
- d) *Application filed is within limitation being Loan recall Notice dated 04.02.2019 is the date of default and the Demand Notice in **FORM-B** was sent on 18.01- 2022 to the Personal Guarantor / Respondent seeking repayment of dues.*
- e) *I have not received any order of court or any other forum whereby the personal guarantee offered by Dr. Subhash Chandrawas cancelled or set aside.*

*Therefore, I place the report as well as the observation before this Hon'ble NCLT to pass an appropriate and necessary order.”*

13. Opposing the Report/IA-2892/2022, the Personal Guarantor filed detailed reply. The salient contention espoused by him therein are:-

- I. The Deed of Guarantee is vitiated, as the same is obtained by misrepresentation, coercion, undue influence and fraud.
- II. The Respondent stood as Personal Guarantor in the backdrop of the condition mentioned in undertaking dated 29.11.2018 i.e. a payment of Rs. 100,00,00,000/- (Rupees One Hundred Crores Only) would be made by the borrowers/co-borrowers to the Creditor on or before 29.11.2018 and once the borrowers did not make such payment, the

circumstances in which the Guarantee was given could change, resultantly, the Respondent got absolved from the liability in terms of the Guarantee.

- III. The ramification of the undertaking dated 29.11.2018 was that in the event of fulfilment of the conditions stipulated therein, there could be no occasion of default and in case of breach of undertaking, the conditions in which the Respondents stood as Personal Guarantor could be changed, resultantly, the Guarantee given by the Respondent turned redundant and could not have been invoked.
- IV. If any default in terms of the notice dated 14.11.2018 and 15.11.2018 had occurred, the Guarantee dated 05.12.2018, which is of subsequent date stood extinguished.
- V. In the wake of non-fulfilment of the conditions of undertakings dated 19.11.2018 and 29.11.2018, the Applicant was entitled to invoke the notices dated 14.11.2018 and 15.11.2018, on which dates there was no Guarantee furnished by the Respondent.
- VI. The Applicant had unequivocally represented to the Respondent that Deed of Guarantee was only for the comfort of the Applicant and was not to be invoked by it.
- VII. The undertakings dated 19.11.2018 and 29.11.2018 need to be read as instrument in whole as the same is indivisible.
- VIII. In respect of the Loan Agreement dated 13.12.2016, the Applicant filed the application titled Indiabulls Housing Finance Limited vs. Vivek Infracon Pvt. Limited [CP (IB)-236 of 2022], which was allowed to be withdrawn in terms of the order dated 23.05.2023, as the Applicant and the Principal Borrower (CD) had entered into a Settlement Agreement

and the issues between the parties stood resolved. Thus, when the parties entered into settlement qua the Loan Agreement dated 13.12.2016, in respect of the terms of which the Respondent stood as Personal Guarantor, the Applicant has no cause of action to file the present application.

- IX. In respect of the Loan Agreement dated 13.12.2016, with reference to the terms of which, the Respondent stood as Guarantor, the Applicant had also invoked the Arbitration clause and the notice of invoking the Personal Guarantee has been challenged by the Applicant before the Ld. Arbitrator.
- X. Even the enforceability of the Personal Guarantee has also been challenged by the Respondent/Personal Guarantor, before the Ld. Arbitrator.
- XI. An amount of Rs. 225 Crores was paid to the Financial Creditor in June, 2020 against which the Financial Creditor has released two securities, furnished to secure the financial facilities. As it was the understanding between the parties that the Personal Guarantee stood released on payment of Rs. 225 Crores, with the payment of such amount to the Creditor, the Respondent stands discharged from his liability to repay the amount of debt qua which he stood as Guarantor to the Creditor. If the Financial facility extended by the Applicant was not satisfied, there could be no reason for him to release the securities.
- XII. The Applicant has also sold the pledged shares after 04.02.2019 i.e. after invoking the Personal Guarantee.

XIII. Since April, 2023 the Creditor had been taking adjournment in the Arbitral proceedings on the ground that the settlement between the Applicant and the Borrowers/Co-Borrowers was in progress.

XIV. The report filed under Section 99 of IBC, 2016 is premature and is filed without giving any opportunity to the Personal Guarantor to file the relevant documents. It also does not take note of the defence of the Personal Guarantor.

14. We heard the counsels for the parties and perused the record. As far as the plea regarding Deed of Guarantee being obtained by fraud, misrepresentation, coercion or by using undue influence is concerned, the factual position espoused by the Personal Guarantor is that no occasion had arisen to invoke the Guarantee Deed, by way of letter dated 04.02.2019, as since the Applicant had threatened the Borrowers/Co-Borrowers that the collateral qua the financial facility would be sold, the Borrowers/Co-Borrowers were forced to obtain the Personal Guarantee from the Respondent/PG. Paras 3 to 3.9 of the reply reads thus:-

*“3. It is stated that the purported invocation of the Deed of Guarantee by way of the Letter dated 04.2.2019 by the Applicant is untenable and bad in law inasmuch as that there had arisen no occasion in terms of the Deed of Guarantee dated 05.12.2018 to warrant the invocation of the said Deed of Guarantee of the Personal Guarantor and for reasons thereof, the Application is untenable, baseless and frivolous and liable to be rejected at the threshold.*

*3.1. It is stated that on 13.12.2016, four Loan Agreements were executed by the Applicant which are as hereunder:*

*i. Applicant with Gnex Projects Pvt. Ltd & Essel Home Pvt. Ltd.*

- ii. *Applicant with Gnex Infrabuild Pvt. Ltd & Essel Home Pvt. Ltd.*
- iii. *Applicant with Vivek Infracon Pvt. Ltd & Essel Home Pvt. Ltd.*
- iv. *Applicant with Renu Realtech Pvt. Ltd. & Essel Home Pvt. Ltd. Gnex Projects Pvt. Ltd, Essel Home Pvt. Ltd., Gnex Infrabuild Pvt. Ltd., Vivek Infracon Pvt. Ltd. and Renu Realtech Pvt. Ltd. are collectively referred to as "Borrowers/Co-Borrowers".*

3.2. *Thereafter, on 14.11.2018, it is understood that the Applicant issued a Letter to the Borrowers/Co-Borrowers, inter alia, alleging that the value of the shares/securities provided as a collateral in connection with the loans had allegedly fallen considerably and the minimum security cover -securities was not being maintained. Vide the letter, the Borrowers/Co-Borrowers were called upon to pay a sum of Rs 287,85,49,976/- (Rupees Two Hundred and Eighty Seven Crores Eighty Five Lakhs Forty Nine Thousand Nine Hundred and Seventy Six Only) or pledge/charge in favour of the Lender additional listed shares of at least Rs 341,82,78,097/- (Rupees Three Hundred and Forty One Hundred Eighty Two Lakhs Seventy Eight Thousand and Ninety Seven Only) within three working days.*

*A copy of the Letter dated 14.11.2018 by the Applicant to the Borrowers/Co-Borrowers is attached herewith as **Annexure R/1** and has been also attached as Annexure A-8 @ pg. no. 107-117 of the Application.*

3.3. *Thereafter on 15.11.2018, it is understood that the Applicant yet again vide a letter inter alia, informed the Borrowers/Co-Borrowers that they should pay the Applicant adequate funds or provide additional securities so as to maintain the Security Cover- Securities. Vide the letter the Applicant further stated that the failure to provide the additional security/fund as mentioned shall be treated as an Event of*

*Default under the Loan Agreement consequent to which the Applicant shall be constrained to (a) initiate appropriate proceedings and/or (b) enforce/sale the Security (including shares/securities).*

*A copy of the Letter dated 15.11.2018 of the Applicant to the Borrowers/Co-Borrowers is attached herewith and marked as "**Annexure R/2**"*

3.4. *Thereafter on 19.11.2018, it is understood that on the insistence of the Applicant and on the threat of the Applicant to sell the collaterals with the Applicant in the open market, the Borrowers/Co-Borrowers had to sign and issue a letter/undertaking to the Applicant in the format as provided for by the Applicant wherein it was inter alia, stated as under:*

- *A sum of Rs 50 crores (towards principal] shall be prepaid /foreclosed by us on or before November 30th, 2018, and*
- *The balance total outstanding amount of the Loan(s] shall be prepaid/foreclosed on or before December 15th, 2018.*

*A copy of the Letter/ Undertaking dated 19.11.2018 by the Borrowers/Co-Borrowers to the Applicant is attached herewith and marked as "**Annexure R/3**"*

3.5. *It is understood that the Borrowers/Co-Borrowers were unable to organise a sum of Rs 50 crores which was to be payable by 30.11.2018.*

3.6. *It is understood that yet again, the Borrowers/Co-borrowers were at the mercy of the Applicant, who continued to threaten the Borrower/Co- borrower that the Applicants shall sell the collateral in the open market recklessly thereby leading and causing the group companies of the Borrower/Co-borrower*

*alongwith the shareholders of such companies to sustain irreparable loss and damage.*

*3.7. At this juncture it is pertinent to state, that in the aforementioned situation, the Applicant, who had executed a one -sided unilateral loan agreement and other security agreements with the Borrower/Co- borrower, were helplessly at the mercy of the Applicant, who kept the sword of the threat sale of shares etc. dangling over the Borrowers/Co-borrowers.*

*3.8. In this background, the Applicant yet again dictated and forced an alternative three fold arrangement to the Borrowers/Co-Borrowers, with staggered timelines.*

*3.9. It is at this juncture that the Applicant dictated and coerced the Borrower/Co- borrowers to obtain a Deed of Personal Guarantee from the Personal Guarantor.”*

15. As can be seen from the aforementioned factual backdrop narrated by the Personal Guarantor himself in the reply (ibid), by no stretch of imagination, one can infer that the Personal Guarantee furnished by the Respondent could be obtained by misrepresentation, coercion, undue influence and fraud. Indubitably, a Creditor is entitled to utilise the security/collateral to recover the loan amount/financial facility extended by it to the Debtor. If, just to ensure that the collateral are not utilised by the Creditor, the Debtor/Borrowers furnished the Bank Guarantee, no one can say that there was any element of misrepresentation, coercion, undue influence or fraud in furnishing the Personal Guarantee by the Respondent in respect of the Borrowers and to the Applicant. The terms coercion, undue

influence, fraud and misrepresentation have been defined in Sections 15 to 18 of Indian Contract Act, 1872, which reads thus:-

**“15. "Coercion" defined.**—*"Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.*

*Explanation.*—*It is immaterial whether the Indian Penal Code (45 of 1860) is or is not in force in the place where the coercion is employed.*

**16. "Undue influence" defined.**—*(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.*

*(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another--*

*(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or*

*(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.*

*(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.*

*Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).*

**17. "Fraud" defined.**—*"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto of his agent, or to induce him to enter into the contract:—*

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;*
- (2) the active concealment of a fact by one having knowledge or belief of the fact;*
- (3) a promise made without any intention of performing it;*
- (4) any other act fitted to deceive;*
- (5) any such act or omission as the law specially declares to be fraudulent.*

*Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.*

**18. "Misrepresentation" defined.**—*"Misrepresentation" means and includes—*

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;*
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him;*
- (3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement."*

16. It is not understood that how the Applicant:- (i) could extend any such threat to the Respondent, which was forbidden by Indian Penal Code or unlawful detaining or threatening to detain to the prejudice of any person or the Respondent (coercion) OR (ii) enjoyed the position to dominate the will of the Respondent, to obtain unfair advantage over him, (as the Respondent furnished the Guarantee in respect of the Borrowers/Co-Borrowers and it is not the case of the Respondent (Personal Guarantor) that the Applicant had any such relation with the Respondent that it could influence his will to disadvantage) OR (iii) committed any fraud OR (iv) made misrepresentation.

17. The Applicant/Creditor was well within its right to utilise the collateral/security pledged to it for extending the financial facility. It can be seen from the letter dated 14.11.2018, as the securities were not being maintained by the Borrowers due to sharp decline in the prices of shares held as security, the Creditor had to call upon them to pay back the amount of loan. The relevant excerpt of the notice dated 14.11.2018 (Annexed with the reply) reads thus:-

***“Subject: Notice for non-maintenance of the Security Cover - Securities (as stipulated to the Loan Documents) and payment of funds***

***This has reference to the Loan Agreement(s) (as mentioned in Schedule I hereunder) and/or any amendment(s)/addendum(s) thereto hereinafter referred to as the “Loan Agreement(s)” for the Loan(s) as mentioned in Schedule I hereunder) executed between (s) the Borrower(s) (as mentioned in Schedule I hereunder which shall include Co-Borrower(s), if any, as mentioned in the Schedule I hereunder and (b) the Lender (as mentioned in Schedule I hereunder) and/or the other Loan Documents.***

***As the value of shares /securities provided as collateral In connection with the Loan(s) has fallen considerably and the minimum Security Cover – Securities (as stipulated in the Loan Documents) is not being maintained, hence, in view of the provisions of the Loan Documents, we hereby call upon you to either forthwith pay to the Lender a sum of Rs. 287,85,49,976/- (Rupees Two Hundred Eighty Seven Crores Eighty Five Lacs Forty Nine Thousand, Nine Hundred Seventy Six only) or pledge/charge in favour of the Lender additional listed shares (acceptable to the Lenders) of at least Rs. 341,82,78,097/- (Rupees Three Hundred Forty One Crore Eighty Two Lacs Seventy Eighty Thousand and Ninety Seven only) within three (3) working days from the date of this letter, so as to maintain this stipulated Security Cover – Securities as per the terms and conditions of the Loan Documents.***

***This is without prejudice to, and shall not affect (a) the provisions of the Loan Documents; and (b) the Lender's rights claims, interests and/or remedies under the Loan Documents and/or the applicable laws and (c) any obligations of the Obligor(s) as mentioned in the Loan Documents.***

***Any capitalized terms used and not defined herein shall have the meaning ascribed to them under the Loan Documents.***

***We expect prompt action on your part.***

18. Similarly, the notice dated 15.11.2018 reveals that in the wake of non-maintenance of security properly, the Creditor had called upon the Borrowers/Co-borrowers to either pay to it the adequate funds or to provide additional securities as per the provisions of the loan documents. The relevant excerpt of the notice dated 15.11.2018 reads thus:-

**Ref.: noticed dated November 14, 2018 (for providing additional Security and/or funds under the Loan Document(s) issued by M/s Indiabulls Housing Finance Ltd. ("Lender") to all the above addresse(s) ("Said Notice")**

This has reference to the Said Notice and the Loan Agreement(s) (as defined in the Said Notice) and/or the other related Loan Documents.

You are once again requested to either forthwith pay to the Lender adequate funds or provide additional Security (to the Lender's satisfaction) as per the provisions of the Loan Documents & the Said Notice, so as to maintain the Security Cover-Securities (as defined in the Loan Agreement(s)).

We wish to inform you that failure to provide the additional Security/fund as mentioned above shall be treated as an Event of Default under the Loan Documents and consequent to which, the Lender shall be constrained to (a) initiate appropriate proceedings against you and/or (b) enforce/sale the Security (Including shares/securities).

Further, you shall be liable to pay the Default Interest as per the provisions of the Loan Documents.

Any capitalized terms used and not defined herein shall have the same meaning as ascribed to such terms under the Loan Documents.

Kindly treat this as urgent.

Yours truly,

For Indiabulls Housing Finance Limited

19. It is admitted position that with reference to the aforementioned notices dated 14.11.2018 and 15.11.2018, the Principal Borrowers/Co-Borrowers had given an undertaking dated 19.11.2018 that they would prepay/foreclose the entire amount of loan and also pay the other amounts payable to the lender as per the provisions of the loan documents. The relevant excerpt of the undertaking reads thus:-

**Sub: Undertaking to prepay/foreclose the Loan(s) (as defined below)**

**Ref: (1) Notice dated November 14,2018 for providing additional security and/or funds under the Loan Document(s) issued by M/s Indiabulls Housing Finance Ltd. (Lender) to all the Borrower(s) and the Co-Borrower(s) ("Said Notice")**

**(2) Reminder letter dated November 15, 2018 sent by the Lender to all the Borrower(s) and the Co-Borrower(s)**

**(3) Letter from GNEX Projects Private Ltd. Dated November 16,2018 to the Lender.**

This has reference to the loan agreement(s) executed between (a) the Borrower(s) (more particularly mentioned in Schedule hereunder) and/or the Co-borrower(s), if any, named in Schedule I hereunder and (b) the Lender for the Loan(s) more particularly mentioned in Schedule I hereunder and/or any amendment(s)/addendum(s) thereto ("Loan Agreement(s) )

and or the other Loan Documents.

In view of the said notice from the Lender, we hereby declare, represent, undertake and confirm to the Lender that we shall prepay/foreclose the total outstanding amount of the Loan(s) and also pay the other amounts payable to the Lender as per the provisions of the Loan documents as follows:

- a. A sum of Rs. 50 Crores (towards the principal) shall be prepaid by us on or before November 30,2018 and
- b. The balance total outstanding amount of the Loan(s) shall be prepaid/foreclosed by us on or before December 15,2018.

We further undertake that failure to, *inter alia*, prepay/foreclose the entire Loan(s) as aforesaid and/or breach of the undertaking/letter by us shall be an event of default under the loan documents and the lender shall have absolute right as its sole discretion to take any action as it deems fit including to (a) initiate appropriate proceedings against us and/or (b) enforce/sale security (including shares/securities) without further notice to us.

Any capitalized terms used and not be defined herein shall have the same meaning as ascribed to such terms under the Loan documents.

20. On 29.11.2018 the Borrower/Co-Borrowers could furnish additional undertaking. The relevant excerpt of the undertaking reads thus:-

1. This is reference to the loan agreement(s) executed between (a) the borrower(s) more particularly mentioned in Schedule I hereunder and/ or the Co-Borrower(s) named in Schedule I hereunder and (b) Indiabulls Housing Finance Limited (hereinafter referred to as " Lender") for the Loan(s) more particularly mentioned in Schedule I hereunder and/or any amendment(s)/addendum(s) thereto ("Loan Agreement(s) and/ or the other Loan Documents.
2. This also has reference to the undertaking in prepay/foreclose Loan(s) dated November 19, 2018 executed by us in your favour (" Said Undertaking")
3. As per the terms of the said undertaking we had undertaken to, *inter alia*, prepay/foreclose the Loan(s) to the extent of INR 50,00,00,000/- (India Rupees Fifty Crores Only) on/before November 30, 2018.
4. In furtherance to what is contemplated in the said undertaking and pursuant to our discussions, we hereby declare, represent, undertake and confirm the following:
  - a. We shall make the prepayment and/or foreclosure of the Loan(s) cumulatively to the extent of INR 100,00,00,000 (Indian Rupees Hundred Crores Only) in accordance with the provisions of the Loan documents on or before December 31, 2018 and the same shall be appropriated towards the repayment of the principal of the Loan(s) in the manner deem fit by the lender. It is clarified that no prepayment/ foreclosure charges/penalty shall be payable by the Borrower(s) pursuant to such prepayment.

- b. In the event we fail to make the aforesaid prepayment/foreclosure within stipulated timeline, we undertake to, inter alia, pay the prepayment/foreclosure charges/penalty as per the provisions of the Loan agreement and that this shall be without prejudice to the other rights and remedies available to the Lender under the Loan documents and/or applicable law for such failure.
- c. We shall, on or before December 5 2018 cause Dr. Subhash Chandra and to provide irrevocable guarantee in favour of the Lender by executing execute guarantee deed(s) (in the form and substance satisfactorily to the Lender) to secure the fulfillment of all obligations of the obligor(s) under the loan documents including payment of the borrowers dues to the Lender. We shall on or before December 31, 2018 arc and/or cause to be created first ranking mortgage over the property mentioned in Schedule II hereunder (properties) exclusively in favour of the lender alongwith escrow (~~ILLEGIBLE~~) receivables arising from the Properties in order to secure the fulfillment of all the obligations of the obligor(s) including payment/repayment of the Borrower's due to the Lender.
5. We agree and acknowledge that as per the provision of the loan documents , the lender may at any time reschedule the repayment of the balance Borrower's Due payable, by us to the lender in the manner the lender deems fit
6. We further state that any failure to abide by the contents of the additional undertaking shall be an Event Default under the Loan Documents and the Lender shall have absolute right at its sole discretion to take any action as if deems fit including(a) to initiated appropriated proceeding against us and/or (b) enforce/ sell the security (including shares/securities) without further notice to us.
7. We hereby undertake to indemnify and keep indemnified the lender against for any loss, damage for any loss, damage, cost and/or expense suffered incurred by the Lender arising out any act, omission, false statement suppression of fact and/or any breach of this additional undertaking.

21. As can be seen from para 4 (c) of the undertaking, the Borrower/Co-Borrowers had committed that on or before 05.12.2018, they would cause Dr. Subhash Chandra (the Respondent) in the present proceedings to provide irrevocable guarantee in favour of the Applicant by executing the Guarantee Deed.

22. From the aforementioned, it is clear that the PG/Respondent had furnished the Guarantee in terms of the undertaking given by the Borrower/Co-Borrowers. Subsequent to the aforementioned undertakings, the Petitioner sent letter dated 04.02.2019 to Ms. GNEX Projects Private Limited, M/s. Vivek Infracon Private Limited, M/s. Renu Realtech Private Limited, M/s. Essel Home Private Limited, Dr. Subhash Chandra, M/s. GNEX Buildtech Private Limited, M/s. CFG International Private Limited, M/s. GNEX Realtech Private Limited, invoking the guarantees furnished by the Guarantors. The text of the letter reads thus:-

**“Subject: Notice under the Loan Documents and /or the applicable laws for inter-alia, (a) Invocation of the Guarantee Deed(s) (defined below) issued by the Guarantor(s) (defined below); and (b) payment of the overdue amount(s) under the Loan Documents.**

**Ref: Our earlier notice(s) dated 14 November, 2018 and 15 November 2018 (“Captioned Notice(s)”) and your undertaking(s) dated 19 November, 2018 and 29 November, 2018 (“Captioned Undertaking(s)”)**

***This has reference to the deed of guarantee(s) (as mentioned in Schedule I hereunder) (“Guarantee Deed(s)”) executed by the guarantor(s) (as mentioned in Schedule I hereunder) (“Guarantor(s)”) In relation to the loan(s) more particularly mentioned in Schedule I (“Loan(s)”) availed by the Borrower(s) (as mentioned in Schedule I hereunder which shall include the Co-Borrower(s), if any, named in Schedule I hereunder) M/s, Indiabulls Housing Finance Limited (“Lender) pursuant to the loan agreement(s) and/or any amendment(s)/addendum(s) thereto (“Loan Agreement(s)”) (as mentioned in Schedule 1 hereunder) executed between (a) the Borrower(s) and (b) the Lender and/or the other loan documents in connection with the***

**Loan(s) ("Loan Documents"), the Captioned Notice(s) and the Captioned Undertaking(s).**

**We note than an Event of Default has occurred under the Loan Documents read with the Captioned Notice(s) and the Captioned Undertaking(s) due to failure to (a) pay the outstanding amount(s) to the Lender under the Loan Documents read with the Captioned Notice(s) and the Captioned Undertaking(s); and/or (b) comply with the other provisions of the Loan Documents and with the conditions of the Captioned Notice(s) and the Captioned Undertaking(s).**

**Kindly note that, as on February 04, 2019, the total outstanding dues payable by the Obligor(s) to the Lender under the Loan Documents is Rs. 476,56,91,037/- (Rupees Four Seventy Six Crores Fifty Six Lakhs Ninety One Thousand Thirty Seven only) (after adjustment of proceeds received from sale of shares as already informed to you) ("Said Outstanding Amount(s)").**

**In view of the above, the Guarantee Deed(s) executed by the Guarantor(s) stands invoked and the Lender hereby calls upon you to forthwith pay the Said Outstanding Amount(s) (including interest & default Interest till the date of actual payment) to the Lender under the Loan Documents within 7 (seven) days from the date of receipt of this notice.**

**Any capitalized terms used and not defined herein shall have the same meaning as ascribed to such terms under the Loan Documents.**

**We expect prompt action on your part."**

23. It is seen from the Deed of Guarantee dated 05.12.2018 (Annexure-3) to the IA preferred by the Applicant, the Respondent could execute the Deed of Guarantee in the presence of two witnesses. Besides, when there were different transactions and the Respondent stood as Guarantor to the Creditor

qua all of those and in respect of all the Borrowers/Co-Borrowers, it is not understood that how such Guarantee given by him can be alleged to have been given under coercion, misrepresentation, undue influence or fraud.

24. As far as the issue regarding the undertakings dated 19.11.2018 and 29.11.2018 are concerned, it is seen therefrom that the Borrowers had committed to repay the amount of 100 Crore (50 crores plus 50 Crores) by 30.11.2018 and the Guarantee Deed was executed on 05.12.2018. Thus, we do not find any force in the contention raised on behalf of the Applicant that he gained confidence to stand as Guarantor, only because of the undertaking by the Borrowers to pay Rs. 100 Crores to the Creditor as he felt safe to do so.

25. Regarding the plea espoused on behalf of the Respondent that, in the event of fulfilment of the condition stipulated in the undertaking dated 29.11.2018, his Guarantee could be released and in the event of breach of the same, the circumstances in which Guarantee was given could be treated as changed, we find that at the time of execution of Guarantee Deed, the undertaking regarding payment of Rs. 100 Crores by 30.11.2018 had already been flouted. Besides, in terms of Clause 4(c) of the undertaking, it was provided that the Guarantee of the Respondent was in addition to the other conditions. The clause 4(c) of the undertaking reads thus:-

**c. We shall, on or before December 5 2018 cause Dr. Subhash Chandra and to provide irrevocable guarantee in favour of the Lender by executing execute guarantee deed(s) (in the form and substance satisfactorily to the Lender) to secure the fulfillment of all obligations of the obligor(s) under the loan documents including payment of the borrowers dues to the Lender. We shall on or before December 31, 2018 are and/or cause to be created first ranking mortgage over the property mentioned in Schedule II hereunder (properties) exclusively in favour of the lender alongwith escrow (--ILLEGIBLE--) receivables arising from the Properties in order to secure the fulfillment of all the obligations of the obligor(s) including payment/repayment of the Borrower's due to the Lender.**

26. In view of the aforementioned clause in the undertaking, the plea raised on behalf of the Applicant that the Breach of Undertaking could absolve him from the liability in terms of the Guarantee is misconceived and is liable to be rejected. In fact, the undertaking itself had the ramification that the Guarantee of the Respondent to the Creditor qua the amount of debt, in respect of the borrowers would be furnished.

27. Here, it would not be out of context to note that in terms of the provisions of Section 141 of the Indian Contract Act, 1872, a surety is entitled to the benefit of every security which the Creditor has against the Principal Debtor at the time when the contract of suretyship is entered into, whether the surety knows of existence of such security or not and if the Creditor loses or without the consent of surety, part with such security, the surety is discharged to the extent of the value of the security. The provisions of Section 141 of the Indian Contract Act, 1872, reads thus:-

**“141. Surety's right to benefit of creditor's securities.—**A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.”

28. The best argument, on behalf of the Applicant in the present situation, may be that in the event of non-payment of Rs. 100 Crore, his security/Guarantee may not be held valid to the extent of the amount of Rs. 100 Crore and may be held good only for the remaining amount. Nevertheless, the amount of default alleged in Part-III of the IB-97/ND/2022

is Rs. 178,78,52,577/-. The Part-III of the petition has already been Inv. Pett. 05 of 2024, Inv. Pett. 14 of 2024 and I.A. 2892 of 2022 in (IB)-97 of 2022 Indiabulls Housing Finance Ltd. vs. Subhash Chandra

reproduced hereinabove. In any case, in terms of the provisions of the notification dated 15.11.2019, the threshold limit of amount of default to initiate IRP qua the Personal Guarantor is only Rs. 1000/-. The notification reads thus:-

**MINISTRY OF CORPORATE AFFAIRS**

**NOTIFICATION**

***New Delhi, the 15th November, 2019***

**S.O. 4126(E).**—*In exercise of the powers conferred by sub-section (3) of section 1 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby appoints the 1st day of December, 2019 as the date on which the following provisions of the said Code only in so far as they relate to personal guarantors to corporate debtors, shall come into force:—*

*(1) clause (e) of section 2;*

*(2) section 78 (except with regard to fresh start process) and section 79;*

*(3) sections 94 to 187 [both inclusive];*

*(4) clause (g) to clause (i) of sub-section (2) of section 239;*

*(5) clause (m) to clause (zc) of sub-section (2) of section 239;*

*(6) clause (zn) to clause (zs) of sub-section (2) of section 240; and*

*(7) section 249.”*

29. The notification provides for application of Section 78 of IBC, 2016, also to the Personal Guarantors. The Section reads thus:-

**“78. Application.**—*This Part shall apply to matters relating to fresh start, insolvency and bankruptcy of individuals and partnership firms where the amount of the default is not less than one thousand rupees:*

*Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one lakh rupees.”*

30. The reading of the aforementioned notification does not specifically indicate that the Section 78 would apply also to Personal Guarantor, and a reading of the same creates only such fragile semblance. Thus, we make it clear that our present order is not founded on the notification at all.

31. In view of the fact that the condition of furnishing the guarantee by the Respondent was parallel to payment of Rs. 100 Crores and non-payment of such amount was not sine qua non to furnishing the same, we reject the plea raised on behalf of the Respondent that the non-payment of Rs. 100 Crores changed the conditions of his furnishing the Personal Guarantee and resulted in his absolutions from the liability in terms of the same.

32. In terms of the view taken in Para 31 above, the arguments raised on behalf of the CD, noted at point nos. IV and V mentioned in para 13 above are nixed.

33. When, the Ld. Counsel for the Respondent argued with vehemence that in terms of the commitment to pay Rs. 100 Crores, made by the Borrowers and default in payment of the same absolved the Respondent from liability in terms of the Personal Guarantee, we fail to appreciate that how the argument raised on behalf of the PG that the default in payment of debt occurred on 14.11.2018 and 15.11.2018, thus in terms of the Guarantee Deed dated 05.12.2018, he is not liable to repay the amount of debt. In fact, it was in sequel of the letters dated 14.11.2018 and 15.11.2018 only that the undertakings dated 19.11.2018 and 29.11.2018 were given and the Deed of

Guarantee was executed by the PG. Thus, we are not inclined that as the default related back to 14.11.2018 and 15.11.2018, the Guarantee furnished by the Respondent is otiose.

34. The Section 126 of the Indian Contract, 1872, defines the Contract of Guarantee, surety, Principal Debtor and Creditor. In terms of the definition, a contract of Guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default. The provisions of Section 126 (ibid) reads thus:-

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

35. Thus, when the Applicant had contacted to perform the promise to discharge the liability of Borrower, at the point of time where the Creditor had alleged that the value of the shares/securities provided as collateral in connection with the loan had fallen considerably and the minimum security cover (as stipulated in loan documents) was not maintained, we are unable to appreciate that how in terms of the provisions of Section 126 and 127 of the Indian Contract Act, 1872, the Respondent is not bound by the Deed of Guarantee dated 05.12.2018. The provisions of Section 127 of the Indian Contract Act reads thus:-

**“127. Consideration for guarantee.—***Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.*”

36. In view of the aforementioned, the plea that non-payment of Rs. 100 Crores by the Borrowers to the Creditors could result in relating the default back to 14.11.2018/15.11.2018 is rejected.

37. Regarding the plea of comfort given by the Respondent to the Debtor, we are of the view that the ramification of such comfort was only that the Respondent had committed to pay the defaulted amount to the Creditor. The relevant excerpt of the Deed of Guarantee reads thus:-

**“2.1 Guarantees and Indemnity**

*In consideration of the Loan(s) (or any part thereof) disbursed/to be disbursed by the Lender pursuant to/under the Loan Documents, the Guarantor hereby irrevocably and unconditionally:*

- 2.1.1 guarantees to the Lender punctual performance by the Borrower(s) of all of the Borrower(s)' obligations under the Loan Documents and in the event of the Borrower(s) failing to perform any of its obligations under the Loan Documents, the Guarantor shall, on first demand by the Lender and without any demur, contest or delay, shall pay to the Lender, the Guarantee Amount as stipulated in **Schedule I** of this Deed ("**Guarantee Amount**") and in addition thereto shall also pay all interest, additional interest(s), delayed payment charges, costs, charges, expenses payable by the Obligor(s) to the Lender under the Loan Documents or any part thereof;*
- 2.1.2 undertakes with the Lender that whenever any Obligor(s) do/does not pay any amount when due and/or payable under or in connection with the Loan Documents and/or does not comply with the terms and conditions of the Loan Documents, the Guarantor, without making any delay or demur, shall, within three (3) days of demand by the Lender, pay that amount to the Lender as if the Guarantor were the principal obligor;*

2.1.3 as a primary obligation, indemnifies the Lender immediately on demand against any cost, loss or liability suffered by the Lender if any obligation guaranteed by the Guarantor is or becomes unenforceable, invalid or illegal. The amount of the cost, loss or liability shall be equal to the amount which the Lender would otherwise have been entitled to recover; and

2.1.4 accepts and acknowledges that the obligations hereunder are joint and several and independent of the obligations of the Borrower(s), and a separate action or actions may be brought against the Guarantor alone or jointly with the Borrower(s).

**X X X**

#### **4. GUARANTOR'S OBLIGATIONS**

The obligations of the Guarantor and the Collateral Rights of the Lender shall not be discharged, impaired or otherwise affected by:

- (i) any winding-up, dissolution, judicial management, administration or re-organisation of or other change in any Obligor(s) or any other company, corporation, partnership or other person;
- (ii) any of the obligations of any person in respect of the Loan Documents being at any time illegal, invalid, unenforceable or ineffective;
- (iii) time or other indulgence being granted to the Guarantor or any other company, corporation, partnership or other person;
- (iv) any amendment, variation, waiver or release of any of the obligations of any person in respect of the Loan Documents;
- (v) any failure to take or failure to realize the value of any other collateral in respect of the obligations of the Borrower(s) under the Loan Documents or any release, discharge, exchange or substitution of any such collateral;
- (vi) any other act, event or omission which but for this provision would or might operate to impair, discharge or otherwise affect the obligations of the Guarantor hereunder or the Collateral Rights;
- (vii) any change in the situation of the Lender;
- (viii) any bankruptcy, insolvency or death of the Guarantor or bankruptcy or death of the Borrower(s)

*as the case may be; (ix) the absence or deficiency of powers on the part of the Guarantor to give the guarantees and/or indemnities or any irregularity in the exercise of such power; and/or (x) any revocation of this Guarantee by the Guarantor during the subsistence of the Loan Agreement(s).*

## **5. EFFECTIVENESS OF GUARANTEE**

*5.1 The rights and remedies of the Lender under this Guarantee shall be cumulative, in addition to and independent of every other guarantee or security which the Lender may at any time hold for the obligations of the Borrower(s) under the Loan Documents or any rights, powers and remedies provided by law.*

*5.2 This Deed shall remain in full force and effect as a continuing arrangement unless and until the Lender discharges it upon fulfillment of all the obligations of the Obligor(s) under the Loan Documents including payment/repayment of Borrower's Dues to the Lender and shall not cease by reason of any intermediate payment or satisfaction of any of the obligations of the Borrower(s) under the Loan Documents or for any other reason; however, if the obligations of the Guarantor under this Deed cease to be continuing for any reason, the liability of the Guarantor at the date of such cessation shall remain, regardless of any subsequent increase or reduction in the obligations of the Borrower(s) under the Loan Documents.*

*5.3 No failure on the part of the Lender to exercise, or delay on its part in exercising, any Collateral Rights shall operate as waiver thereof, nor shall any single or partial exercise of a Collateral Rights preclude any further or other exercise of that or any other Collateral Rights. The rights and remedies provided in this Deed are cumulative and not exclusive of any rights or remedies provided by law.*

*5.4 Any settlement or discharge given by the Lender to the Guarantor in respect of the Guarantor's obligations under this Deed or any other agreement reached between the Lender and the Guarantor in*

- relation to it shall be, and be deemed always to have been, void if any act on the faith of which the Lender gave the Guarantor that settlement or discharge or entered into that agreement is subsequently avoided by or in pursuance of any provisions of law.*
- 5.5. *The Guarantor hereby agrees that, without the concurrence of the Guarantor, the Lender shall be at liberty to vary, alter or modify the terms and conditions of the Loan Agreement(s) and/or the other Loan Documents and in particular to defer, postpone or revise the repayment of the Loan(s) and/or payment of interest and other moneys payable by the Obligor(s) to the Lender on such terms and conditions as may be considered necessary by the Lender including any increase in the rate of interest. The Lender shall also be at liberty to absolutely dispense with or release all or any of the security / securities furnished or required to be furnished by the Obligor(s) to the Lender to secure the Loan(s). The Guarantor agrees that the liability under this Deed shall, in no manner be affected by any such variations, alterations, modifications, waiver, dispensation with or release of security, and that no further consent of the Guarantor is required for giving effect to any such variation alteration, modification, waiver, dispensation with, or release of security.*
- 5.6. *The Guarantor hereby agrees that the Lender shall have full liberty, without notice to the Guarantor and without in any way affecting this Guarantee, to exercise at any time and in any manner any power or powers reserved to the Lender under the Loan Agreement(s) and/or the other Loan Documents, to enforce or forbear to enforce payment of the Loan(s) or any part thereto, or interest or other moneys due to the Lender from the Obligor(s) or any of the remedies or securities available to the Lender, to enter into any composition or compound with or to grant time or any other indulgence or Loan(s) to the Borrower(s) to give/grant temporary or extra overdrafts or other advances / credit facilities to any of the Obligor(s) and to appropriate payments made to it by the Obligor(s) towards repayment / payment of such overdrafts/advances /*

*credit facilities from time to time and the Guarantor shall not be entitled to question such appropriations, or to require the Lender to appropriate such payments towards previous disbursements under the Loan Agreement(s) so as to reduce the liability of the Guarantor hereunder on account of any such payments and the Guarantor shall not be released by the exercise by the Lender of its liberty in regard to the matters referred to above or by any act or omission on the part of the Lender or by any other matter or thing whatsoever which render the law relating to sureties would but for this provision have the effect of so releasing the Guarantor and the Guarantor hereby waive in favour of the Lender so far as may be necessary to give effect to any of the provisions of this Guarantee, or the suretyship and other rights which the Guarantor might otherwise be entitled to enforce. The Guarantor also agrees that the Guarantor will not be entitled to the benefit of subrogation vis-à-vis securities or otherwise until all the moneys due to the Lender under the Loan Documents are fully repaid/paid.*

- 5.7. The Guarantee shall be enforceable against the Guarantor notwithstanding that any security or securities comprised in any instrument(s) executed or to be executed in favour of the Lender shall, at the time when the proceedings are taken against the Guarantor on this Guarantee, be outstanding or unrealized or lost.*
- 5.8. The Guarantor hereby agrees and gives consent to the sale, mortgage, release, etc. of any of the assets by the Obligor(s) from time to time as may be approved by the Lender or the transfer of any of the assets of the Obligor(s) from one unit to the other or to the release or lease out by the Lender any or whole of the assets charged to the Lender on such terms and conditions as the Lender may deem fit and this may be treated as a standing and continuing consent for each and every individual act or transfer, mortgage, release or lease of any of such assets of the Obligor(s). The Guarantor hereby declares and agrees that no separate consent for each such transfer, mortgage, release or lease any of such assets would be necessary in future.*

- 5.9. *The rights of the Lender against the Guarantor shall remain in full force and effect notwithstanding any arrangement which may be reached between the Lender and the other guarantor(s), if any, or notwithstanding the release of that other or others from liability and notwithstanding that any time hereafter the other guarantor(s) may cease for any reason whatsoever to be liable to the Lender, the Lender shall be at liberty to require the performance by the Guarantor of their obligations hereunder to the same extent in all respects as if the Guarantor had at all times been solely liable to perform the said obligations.*
- 5.10. *To give effect to this Guarantee, the Lender may act as though the Guarantor were the principal debtor to the Lender.*
- 5.11. *The Guarantor shall not in the event of the liquidation / insolvency of any Obligor(s) prove in competition with the Lender in the liquidation/insolvency proceedings.*
- 5.12. *The Borrower's Dues certified in writing by any authorised official(s) of the Lender shall be conclusive evidence against the Guarantor for the purposes of this Deed and/or in any action or proceeding brought against the Guarantor.*
- 5.13. *This Guarantee shall not be wholly or partially satisfied or exhausted by any payments made to or settled with the Lender by the Borrower(s) and shall be valid and binding on the Guarantor and operative until repayment in full of all moneys due to the Lender under the Loan Agreement(s) and/or the other Loan Documents.*
- 5.14. *The Guarantee shall be irrevocable and the obligations of the Guarantor hereunder shall not be conditional on the receipt of any prior notice by the Guarantor or by any Obligor(s) and the demand or notice by the Lender as per this Deed shall be sufficient notice to or demand on the Guarantor.*
- 5.15. *Any present or future debt(s) and other amounts payable/repayable by any Obligor(s) to the Guarantor is/are hereby subordinated to the Borrower's Dues on and from the date of occurrence of any Event of Default under the Loan Documents.*

*5.16 The absence or infirmity of borrowing powers on the part of the Borrower(s) or any irregularity in the exercise thereof shall not affect the Guarantor's liability under this Deed and the Loan(s) (or any part thereof) advanced/lent by the Lender and the Borrower's Dues shall be deemed to be due and owing notwithstanding such absence, infirmity or irregularity.”*

38. In view of the aforementioned, the comfort extended by the Respondent to Creditor means his commitment to repay the amount of debt and that he should stand by such comfort/commitment. Thus, we find no force in the contention that Deed of Guarantee being only the extension of comfort by the Guarantor to the Creditor, the present Petition should not lie.

39. Even the conjoint reading of the undertakings dated 19.12.2018, 29.11.2018 and that of letters dated 14.11.2018 and 15.11.2018 together with Deed of Guarantee make the Respondent liable to repay the amount of debt to the Creditor and the reading of the undertakings (ibid) would not absolve the Applicant from the terms of the Deed of Guarantee.

40. As far as the plea of settlement is concerned, the Ld. Counsel for the Creditor submitted that the settlement could not be implemented and the amount in terms of the settlement was not paid. Though, the Ld. Counsel for the Corporate Debtor could rely upon the order dated 23.05.2023 passed by the Principal Bench of this Tribunal in IB-236(PB)/2022 to buttress the plea of the settlement, but a perusal of the same only reveals that a settlement Deed had been entered into between the Financial Creditor and the Creditor decided not to pursue the petition. The order does not reveal that the amount of debt had actually been repaid by the Borrowers or the Guarantors. The order passed by this Tribunal reads thus:-

**ORDER**

**New IA-2841/2023**

Mr. Sumesh Dhawan, Ld. Counsel for the Petitioner has filed this application placing before us the settlement deed as entered into between the Financial Creditor and Corporate Debtor. On the basis of the same, this application has been moved to state that the issue between the parties has been resolved and the Financial Creditor is not pursuing this matter against the Corporate Debtor and the main case can be closed.

In view of the above, the Company Petition **(IB)-236(PB)/2022** stands dismissed. All the pending IAs are also disposed of.

41. Section 99 (2) of the IBC, 2016, provides that where an application is filed under Section 95 of the Code, the Resolution Professional may require the Debtor to prove the repayment of the Debt claimed as unpaid by the Creditor. In the present case, the Respondent never tried to espouse the actual repayment of debt by furnishing – (a) evidence of electronic transfer of the unpaid amount from the bank account of the Debtor; (b) evidence of encashment of cheque issued by the Debtor OR (c) signed acknowledgment by the Creditor. Section 99 (2) of the IBC, 2016, reads thus:-

**“99. Submission of report by resolution professional. –**

....

*(2) Where the application has been filed under section 95, the resolution professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing –*

- (a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor;*
- (b) evidence of encashment of a cheque issued by the debtor;*  
*or*
- (c) a signed acknowledgment by the creditor accepting receipt of dues.”*

42. In terms of the provisions of Section 95(4) of IBC, 2016, an application under Section 95(1) of IBC, 2016, should be accompanied with the details and documents relating to;- (i) debt owed by the Debtor to the Creditor or Creditors submitting the application for Insolvency Resolution Process as on date of application; (ii) the failure by the Debtor to pay the debt within a period of 14 days of service of the notice of demand and relevant evidence of such default or non-repayment of debt.

43. In terms of the provisions of Section 99 (4) of the Code, for the purpose of examining the application the Resolution Professional may seek such information or explanation in connection with the application as may be required from the Debtor or Creditor or any other person who in the opinion of the Resolution Professional may provide such information. In terms of the provisions of Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, before filing an application, the Creditor need to serve a notice in terms of the provisions of Rule 7(1) of the said rules upon the Debtor/Personal Guarantor, demanding the amount of debt. In the present case, the Creditor had sent such notice to Debtor on 18.01.2022, demanding the amount of default. When no payment of debt within the period of 14 days of the notice was made, the default occurred.

44. The Statement of Loan Account in the books of applicant/Financial Creditor viz. S000239650 to show the non-receipt of defaulted amount has been enclosed at page no. 46-45 of the Affidavit of Counsel. The Deed of Guarantee espouses the debt owed by the Respondent.

44. The RP filed his report, espousing the compliance of Section 95(4), 99(2) and 99(4) of IBC, 2016. The relevant excerpt of the report of the RP has already been reproduced hereinabove.

45. From the reproduced portion of the report of RP it is clear that the RP has recommended the admission of the petition filed under Section 95 of IBC, 2016.

46. As far as the plea of the pendency of arbitral proceedings is concerned, in view of the provisions of Section 96 of IBC, 2016, in the wake of the moratorium the proceedings may not continue. Section 96 of the Code reads thus:-

**“96. Interim- moratorium. –**

*(1) When an application is filed under section 94 or section 95 –*

*(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and*

*(b) during the interim-moratorium period –*

*(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and*

*(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.*

*(2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application.*

*(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.”*

47. Even otherwise also, in terms of the provisions of Section 238 of IBC, 2016, the proceedings under the Code have overriding effect qua any other proceedings. The Section reads thus:-

**“238. Provisions of this Code to override other laws.—***The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*”

48. In the wake, we are unable to accept the plea raised on behalf of the Applicant that the pendency of the Arbitral proceedings would stand in the way of this Tribunal in passing the order under Section 100 of IBC, 2016.

49. Since, the Respondent has not adduced any evidence in terms of the provision of Section 99 (2) of IBC, 2016, to prove the repayment of debt, merely on the basis of Settlement Agreement with the Principal Borrower we may not avoid passing the order under Section 100 of IBC, 2016, thus the Settlement Agreement may not come for the rescue of the Guarantor.

50. As far as the plea of repayment of certain amount of debt to the Creditor and sale of the pledged shares are concerned, in terms of the provisions of Section 141 and 146 of Indian Contract Act, the Respondent is liable only to such amount of debt which remains unpaid by the co-sureties, out of proceed of securities and the Principal Borrower. The provisions of Sections 141 and 146 of the Indian Contract Act (ibid) reads thus:-

**“141. Surety's right to benefit of creditor's securities.—***A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent*

*of the surety, parts with such security, the surety is discharged to the extent of the value of the security.”*

**XXX**

**146. Co-sureties liable to contribute equally.**—*Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.”*

51. The ramification of the present order passed under Section 100 of IBC, 2016, would be that the Debtor shall prepare a repayment plan in consultation with the RP, as per the provisions of 105 of the Code. The Section 105 reads thus:-

**“105. Repayment plan.**—(1) *The debtor shall prepare, in consultation with the resolution professional, a repayment plan containing a proposal to the creditors for restructuring of his debts or affairs.*

(2) *The repayment plan may authorise or require the resolution professional to –*

- (a) *carry on the debtor's business or trade on his behalf or in his name;*
- (b) *realise the assets of the debtor; or*
- (c) *administer or dispose of any funds of the debtor.*

(3) *The repayment plan shall include the following, namely: -*

- (a) *justification for preparation of such repayment plan and reasons on the basis of which the creditors may agree upon the plan;*
- (b) *provision for payment of fee to the resolution professional;*
- (c) *such other matters as may be specified.”*

52. While preparing the repayment plan, the Guarantor/Respondent will be entitled to take benefit of such amount of debt which has already been repaid to the Creditor, by Principal Borrowers, other sureties and/or by release and disposal of the securities. At this stage, we may not comment upon his plea in this regard.

53. Might be on certain date of hearings, the Ld. Counsel for the PG took the plea of settlement but when he was required to show the proof of repayment in terms of the provisions of Section 99 (2) of IBC, 2016, he preferred to argue the matter. Thus, merely because the plea of Settlement qua the amount of debt was raised by the Ld. Counsel for the PG, which was denied by the Ld. Counsel for the Creditor it cannot be held that the order under Section 100 of IBC, 2016, cannot be passed.

54. From the report of RP, it is clear that the steps were taken to contact the Creditor and the Respondent, but the Debtor did not adduce any such evidence, as provided in Section 99 (2) of IBC, 2016, or any other evidence to prove the repayment of the debt as claimed unpaid by the Creditor. In the wake, we are left with no option but to admit the petition filed under Section 95 of IBC, 2016. **Ordered Accordingly.**

55. Ergo we order the initiation of the IR process in respect of Mr. Subhash Chandra, Respondent/Personal Guarantor with immediate effect.

56. Consequent to the admission of the present application, a moratorium under Section 101 of IBC, 2016 shall commence in relation to all the debts of the Respondent/Personal Guarantor. During the moratorium period –

- (a) Any pending legal action or proceedings in respect of any debt qua the Respondent shall be deemed to have been stayed;
- (b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt qua the Respondent; and
- (c) the Respondent shall not transfer, alienate, encumber, or dispose of any of the assets or his legal right or beneficiary interest therein.

The moratorium shall cease to have effect at the end of the period of 180 days.

57. A public notice shall be issued by the RP, within seven days of passing of this order, inviting claims from all creditors within 21 days of such notice. The notice shall include details of the present order, particulars of the Resolution Professional with whom the claims have to be registered, and the last date for the submission of the claims. The said notice shall be –

- (a) published in two national newspapers, one in English and another one in Vernacular, in circulation in the State where the debtor resides;
- (b) affixed at the visible place in the premises of this Adjudicating Authority; and
- (c) placed on the website of the Adjudicating Authority.

58. The RP shall discharge all such duties as are incumbent upon him in terms of the provisions of Sections 104, 105, 106, 107, 108, 112, and 113 of IBC, 2016, with due deference to the procedure enshrined in Regulations 5, 7, 8, 9, 11, 12, 13, 14, 15 and 17 of IBBI (Insolvency Resolution Process for Personal Guarantor to Corporate Debtors) Regulations, 2019 and also in terms of the other extent provisions of the aforementioned code/ regulations and/or

any other provisions of law applicable to him, in the discharge of his duties as RP.

59. A copy of this order along with a copy of the application as also the report of the Resolution Professional shall be provided to the Creditor (Applicant), Respondent/Personal Guarantor, and IBBI, by the Registry/Court Master within 7 days from today by e-mail.

**60. IA-2892/2022 is disposed of accordingly. To come up for consideration of Status Report to be filed by RP, within 8 weeks.**

**Inv. Pett. No. 14/ND/2024 and Inv. Pett. No. 05/ND/2024**

In view of the order passed in IA-2892/2022 and IB-97/ND/2022, the petitions have become infructuous and are disposed of accordingly.

**Sd/-  
(SUBRATA KUMAR DASH)  
MEMBER (T)**

**Sd/-  
(ASHOK KUMAR BHARDWAJ)  
MEMBER (J)**