NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

(APPELLATE JURISDICTION)

Company Appeal (AT) (INS) No. 248 of 2023

(Under Section 61(1) of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the `Impugned Order' dated 06.01.2023 in CP (IB) No. 596 (PB) / 2021, passed by the `Adjudicating Authority', `National Company Law Tribunal', Principal Bench, New Delhi)

In the matter of:

Pankaj Mehta
Having Residence at 155R,
Model Town, Rohtak,
Haryana – 124001 …. Appellant

V.

M/s. Ansal Hi-tech Township Limited
Registered Address at 115, Ansal Bhawan,
16, Kasurba Gandhi Marg,
New Delhi – 110001 …. Respondent

Present:

For Appellant : Mr. Sahil Sethi, Mr. Samriddh Bindal & Mr. Vikash Kumar, Advocates

For Respondent : Mr. Anshuj Dhingra, Ms. Shubhangda Singh & Ms. Muskan Banga, Advocates

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

Justice M. Venugopal, Member (Judicial):

Introduction:

The Appellant / Applicant (the Authorised Representative of the `Allottees', has preferred the instant Comp. App (AT) (INS.) No. 248 of 2023, before this `Tribunal' as an `Aggrieved Person', in respect of the `Impugned Order', dated 06.01.2023, in CP (IB) No. 596 (PB) / 2021, passed by the `Adjudicating Authority', `National Company Law Tribunal', Principal Bench, New Delhi.

2. Earlier, before the `Adjudicating Authority' / `National Company Law Tribunal', Principal Bench, New Delhi, the `Appellant / Applicant', along with Others, had preferred CP (IB) No. 596 (PB) / 2021 as `Financial Creditors', under Section 7 of the I & B Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority Rules, 2016), while passing the `Impugned Order', dated 06.01.2023, the `Adjudicating Authority' / `National Company Law Tribunal', among other things, at Paragraph Nos. V to VIII, had observed the following, and finally dismissed the main `Company Petition':

> *V. ``The Corporate Debtor vide letter dated 22.07.2011 addressed to the allottees, including the Applicants, claimed that the 'Sushant Megapolis' Project is progressing well and construction work in the project is in good shape. Further, the Corporate Debtor indicated that the possession of certain houses & plots is expected to be handed over in the year 2011 itself. The Corporate Debtor also assured the allottees that there is no dispute regarding land in the project and the project 'Sushant Megapolis'*

is not affected by any rulings passed by the Hon'ble High Court of Allahabad as well as the Hon'ble Supreme Court of India. However, the possession of the said units was not handed over to the allottees, including the Applicants, within the timeline provided in the respective allotment agreements and in fact possession has not been handed over to any of the Applicants till date.

VI. That despite inordinate delay by the Corporate Debtor in completing development works within the project and handing over possession, the Applicants made all possible efforts to reach a mutually acceptable amicable resolution however, to no avail. That the Applicant No.1 herein, through his Counsel even issued a legal notice dated 17.10.2019 calling upon the Corporate Debtor inter-alia to refund the amount paid by the said Financial Creditor along with the interest. However, the Corporate Debtor failed to refund the said amount as paid by the said Applicant and did not even respond to the notice.

VII. The Applicants till date have not received possession of their said units and the construction of the said project is still far from completion. It is submitted that a representative group of allottees of the project 'Sushant Megapolis' even approached the Hon'ble National Consumer Disputes Redressal Commission ("NCDRC") under the provisions of Section 12(1)(c) of the Consumer Protection Act, 1986 (that provides class action by consumers) on behalf of all such allottees of the project who wanted a refund of the amount paid to the Corporate Debtor. That the Hon'ble NCDRC noted that in the case of the project 'Sushant Megapolis', development works are not complete even in 12 years and therefore allowed the consumer complaint vide order dated 16.10.2020 with directions to the Corporate Debtor to refund the entire principal amount received from the allottees along with compensation in the form of simple interest @ 8% per annum, to the allottees of plots in the project 'Sushant Megapolis' who do not wish to wait anymore for possession. It is submitted that the Corporate Debtor even failed to honor the order of the Hon'ble NCDRC and execution proceedings (Execution Application No. 77 of 2021) under the provisions of the Consumer Protection Act, 1986 are going on.

VIII. The Applicants placed the following documents on record:

a) Ledger/ Payment receipts issued by the Corporate Debtor to the Financial Creditors. ANNEXURE A-2 (Ref: Page 485 - 1387 of the Application).

b) Three kinds of agreements entered between the Corporate Debtor and the Applicants, which are as follows:

i. Plot Allottee agreement

ii. Built-up Unit Allottee agreement

iii. Apartment Allottee agreement

ANNEXURE A-3 (Ref: Page 1388, 1412, 1443 of the Application).

c) Letter dated 22.07.2011 sent by the Corporate Debtor to the Applicants herein. ANNEXURE A-4 (Ref: Page 1503 of the Application).

d) Chart and details of each applicant reflecting payments made by the Financial Creditors of the Corporate Debtor.

ANNEXURE A-6 (Ref: Page 1511 of the Application).

e) Sanctioned plan of Sushant Megapolis' as available on the website of UP RERA. ANNEXURE B (Ref: Page 71 of I.A. 1935/2022 IN CP (IB) 596 (PB)/2021).

f) Environmental Clearance dated 09.10.2009 with respect to the project 'Sushant Megapolis' ANNEXURE A (Ref: Page 42 of I.A. 1935/2022 IN CP (IB) 596 (PB)/2021).

g) Brochure of the project `Sushant Megapolis'. Annexure C (Ref: Page 81 of I.A. 1935 / 2022 in CP (IB) 596 (PB) / 2021)''

and finally `dismissed' the main `Company Petition', as `not maintainable'.

Appellant's Contentions:

3. Assailing the correctness, propriety and validity of the `Impugned Order', dated 06.01.2023, passed by the `Adjudicating Authority', Principal Bench,

NCLT, New Delhi in CP (IB) No. 596 (PB) / 2021, the Learned Counsel for the Appellant, submits that the `Appellant', is the `Authorised Representative' of the `Allottees', who had preferred the `Application', under Section 7 of the `Code', before the `Adjudicating Authority' / `Tribunal', and directly, is affected by the `Impugned Order', and as such, has a right to be `Heard', to protect the `Financial Interest' of `Hundreds of Home Buyers / Allottees', and in the `Judgment', dated 02.08.2022 in Mr. Anil Kaushal V. M/s. Colliers International (India), vide Comp. App AT (INS) No. 448 / 2022, the same was held by this `Tribunal'.

4. The Learned Counsel for the Appellant submits that the `Impugned Order', dated 06.01.2023 of the `Adjudicating Authority' / `National Company Law Tribunal', Principal Bench, New Delhi, in CP (IB) No. 596 (PB) / 2021, holding that the `Section 7 Petition', filed under I & B Code, 2016, is `not maintainable', since the `Allottees', belong to different `Projects', and the `Impugned Order', was passed without, considering the facts, placed on record.

5. It is represented on behalf of the Appellant that the `Impugned Order', came to be passed, without considering the fact that all the `Applicants', before the `Adjudicating Authority' / `Tribunal', in `Section 7 Application' of the I & B Code, 2016, had entered into respective `Buyer / Builder' Agreements, much before the `Real Estate (Regulation and Development) Act, 2016 (16 of 2016)',

came into force. In fact, the said `Agreements', specifically, defines that `Sushant Megapolis' / `Megapolis', as one complete `Project'.

6. It is the version of the Appellant that `Adjudicating Authority' / `Tribunal', had wrongly interpreted explanation (ii) of Section 5 (8) of the I & B Code, 2016, to mean that each `RERA Registration', would constitute a `Real Estate Project', and Creditors in a `Class / Allottees', while filing an `Application', under Section 7 of the I & B Code, 2016, shall have to meet the criteria (Viz. `100 Allottees' or `10% of the Allottees'), in accordance with the `RERA Registrations', granted to a `Real Estate Project'.

7. According to the Appellant, the `Adjudicating Authority' / `Tribunal', had failed to note that explanation (ii) merely states that for the purpose of Section 5 (8) (f) of the I & B Code, 2016, the expression `Allottee' and `real estate project', shall have the meanings respectively assigned to them in clause (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016.

8. The Learned Counsel for the Appellant, points out that the `Appellant' is an `Allottee', who had purchased a `Plot', in the Project `Sushant Megapolis', being developed by the `Corporate Debtor', and that the `Project', comprises of `Plots', `Builtup Plots', `Row Houses' / `Flats' / `Floors', `High-rise Apartments', under various allocated Site, within the same `Real Estate

Project'. The time for `Handing over the Possession of the `Allotted Unit', is from 36 months to 42 months, from the date of sanction of the `Layout Plan' of the `Allotted Unit' (vide Clause 4.1 at Page 85 of the Appeal Paper Book (Vol. I).

9. The `Unitholders', had entered into `Allotment Agreements' (vide Page 53 of the Vol-I of the Appellant's Appeal Paper Book), with the `Corporate Debtor', which states that the `Corporate Debtor', is the one responsible to allot and construct the `Units of different specifications and sizes and handover possession' (vide Clause f at Page 55 of the Vol-I of the Appellant's Appeal Paper Book).

10. The Learned Counsel for the Appellant, brings to the notice of this `Tribunal', that presently, the `Corporate Debtor', is in the hands of the present Management, is not in a position, to handover the possession of the `Flats / Units / Plots', purchased by the `Allottees'. Hence, it is necessary to initiate `Corporate Insolvency Resolution Process', against the `Corporate Debtor', with a view to revive the `Corporate Debtor', so that the `Appellant' and the `other Unitholders', can take possession of their `Units'.

11. It is pointed out on behalf of the Appellant that the term `Project', is defined under `Recital Clause b', to the `Plot Allottee(s) Arrangement' dated 07.01.2011, between the Respondent / Corporate Debtor / Company and the

Appellant / Petitioner (vide Page 54 of the Vol. I of the Appeal Paper Book), which runs as under:

> *``The `Consortium / Developer Company', is developing Hi-tech Township located adjoining Greater Noida by the name of ``MEGAPOLIS'', comprising of various PLOT's, Row Houses / Flats, Bungalows, High-rise Apartments, Schools / Educations Institutions, Hospitals / Health Centres, Corporate Parks, Commercial and Retail Centres, Hotels / Clubs and Leisure Areas etc., apart from all such areas that would be required for development of a modern township on the Scheduled Property (`Project') in accordance with sanctioned plans and approvals and as provided for a Hi-Tech Township Scheme of the Government.''*

12. According to the Appellant, the `Single Layout Plan', for the Hybrid Project `Sushant Megapolis / Megapolis, reflecting Group Housing, Plots and EWS Units as part of `one Project', comprising of `2504 Acres of Property', and that the Recital Clause (e) of the Allotment Agreement, indicate that a `Single Layout Plan', was submitted by the `Corporate Debtor', for an `Approval', by the `Competent Authority'. Also that, a perusal of the `Supplementary Development Plan', submitted by the `Corporate Debtor' (To the `Competent Authority') as on November 2016, and available on the `RERA Website', reveals that the entire `Hightech City / Township Megapolis', even in the year 2016, was shown as `One Project' (vide Page 176 of Vol. II of the Appellant's Appeal Paper Book).

13. On behalf of the Appellant it is brought to the notice of this `Tribunal', that a `Single and Composite Application', for an `Environmental Clearance', was filed by the `Corporate Debtor', for the entire `Hightech Township' / `Sushant Megapolis' (vide Page 186 of the Vol. II of the Appellant's Appeal Paper Book). Indeed, the Letter dated 07.10.2009, issued by the `Environment Impact Assessment Authority', Uttar Pradesh, reveals that `Environmental Clearance', was granted, to the entire `Hitech Township / Sushant Megapolis', as a `Single Project'.

14. It comes to be known that the `Corporate Debtor', through a Letter dated 22.07.2011 (vide Page 168 of the Vol. II of the Appellant's Appeal Paper Book), itself considers the `Sushant Megapolis', as the `Project' and addressed a common Correspondence, to all the `Allottees' of `Megapolis Township Project', claiming that the Project `Sushant Megapolis', is progressing well and construction work in the Project, is in good shape. Added further, the `Brochure', made available to the `Allottees' (vide Page 132 of the `Rejoinder', and also available on the `Project', itself shows `Sushant Megapolis', as single Project). In fact, the Letter dated 10.08.2023,issued by the `Corporate Debtor' to one of the `Unitholders', on the Letterhead of `Sarvottam Megapolis', denoting `Sarvottam Megapolis', as `One Project' (vide Page 172 of the `Rejoinder', filed before this `Appellate Tribunal).

15. The contention of the Learned Counsel for the Appellant, is that the above stated facts will demonstrate `without any doubt' that the `Real Estate Project', in question, is a `Single Real Estate Project', for the purposes of Section 7 of the I & B Code, 2016, in realty, the term `Single Real Estate Project', has to interpreted on facts and circumstances of each case, the name of the `Project' Viz. `township, town or city, would have no bearing, and the analysis of a `Real Estate Project', also revolves on the `commonality of the Project', the `identity of the Developer', `interconnected Infrastructure', `Integrated Marking and Sales', `Geographical Proximity', etc.

16. The Learned Counsel for the Appellant submits that the `Adjudicating Authority' / `Tribunal', without considering decision of Hon'ble Supreme Court in Manish Kumar v. Union of India & Ors., reported in 2021, at Page 1, wherein, it is observed that a `real estate' Project, can be `composite one', for `Plots' and `Apartments' or for `Plots & Buildings'.

17. Further, the definition of `Allottee', is split into three Categories, broadly – `Plot', `Apartment' and `Building' and the `Purchasers' of these are covered under the term `Allottee' at Paragraph No. 153 of the decision the Hon'ble Supreme Court, in Manish Kumar v. Union of India & Anr., reported in (2021) 5 SCC OnLine SCC 1. Also, it was laid down, in cases where a `real estate project', is a `Hybrid' Project, consisting of `development of land into Plots'

and also `development of Buildings', then, even a `Transferee of a Plot', will be an `Allottee'.

18. The Learned Counsel for the Appellant, refers to the decision of Hon'ble Supreme Court in Manish Kumar's case, reported in (2021) 5 SCC, Page 1 and Spl Pg: 98, wherein, at Paragraph No. 158 of the aforesaid decision, it is observed as under:

> ``*As to what would constitute a real estate project, it must depend on the terms and conditions and scope of a particular real estate project in which allottees are a part of. These are factual matters to be considered in the facts of each case.''*

19. The Learned Counsel for the Appellant, contends that the `Adjudicating Authority' / `Tribunal', has incorrectly interpreted the explanation of Section 3 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016), with the Section 2 (zn) of the said RERA Act, while deciding Section 7 of the `Application', the Hon'ble Supreme Court in Manish Kumar's case, had although, referred to Section 2 (zn) and Section 3 of the RERA Act, 2016 (vide Paragraph 113 & 114 of Manish Kumar's case), however even then, the Hon'ble Court had opined that `what would constitute a real estate project', will depend on a `fact-based enquiry', on what was offered to the `allottees', to be decided on case-to-case basis. Hence, it is contended on behalf of the Appellant that the `Adjudicating Authority' / `Tribunal', had passed the `Impugned

Order', without going into the facts and circumstances of the instant case, but only relied on `RERA Registrations', secured by the `Corporate Debtor', pursuant to the `RERA Act, 2016'.

20. The Learned Counsel for the Appellant, comes out with a plea that the `Corporate Debtor', apart from furnishing a `self serving interpretation', to the provisions of the `RERA Act, 2016', and the I & B Code, 2016, took the defence, of separate `RERA Registrations', which is an `incorrect' one. Indeed, the provisions of the `RERA Act, 2016', came into force, only on 01.05.2016, much after the creation of `Allotment', in favour of the `Unitholders', and therefore, the `Corporate Debtor', cannot seek shelter, under the provisions of the `RERA', specifically, Section 3 of the said Act, and in this connection, the `Appellant', places reliance upon the `Order', dated 16.06.2023 in Mr. Neerav Bhatnagar & Ors. v. M/s. Sequel Buildcon Private Ltd. & Anr. (vide Paragraph No. 4 of C.P. (IB) No. 555 (ND) / 2021).

21. The Learned Counsel for the Appellant submits that a blanket interpretation by the `Adjudicating Authority' / `Tribunal', in the `Impugned Order', holding that the term `Real Estate Project', will be equated with the phase-wise Registration, under `RERA', by the `Corporate Debtor', cannot be sustained and in short, the `Adjudicating Authority' / `Tribunal', had committed an `error', while equating Section 2 (zn) with Section 3 of the `RERA' Act, 2016.

22. In this connection, it is represented on behalf of the Appellant that it is a settled law that as long as there is no ambiguity in the Statutory Language one, should not resort an external interpretative process, especially when the Hon'ble Supreme Court in Manish Kumar's case, has, after analysing the provisions of `RERA Act, 2016 and I & B Code, 2016', had held that the `Real Estate Project', has to be judged on case-to-case basis.

23. It is the version of the Appellant that the `Reason' for mandating that the `Allottees', should be of the same `Real Estate Project', is only because such `Allottees', have `commonality of interests'. In the instant case, since, the `Complete Township', which is divided into several `Sub-Projects' (as per RERA 2016) and has `commonality, altogether remains `incomplete', for a `long period of time', therefore, it is necessary that the `Corporate Insolvency Resolution Process', may be initiated against the `Complete Township', being a single Project, in terms of the relied on, by the `Appellant'.

24. The Learned Counsel for the Appellant contends that the `interpretation' of the `Adjudicating Authority' / `Tribunal', in the `Impugned Order', will give an `irrational meaning', to the provisions of the I & B Code, 2016. For eg., if in case a `Project', comprises of `three buildings', which are to be developed, along with common areas such connecting Roads, Parks, Swimming Pools, etc., then the developer, in compliance with Section 3 of the RERA will `obtain three separate RERA registrations', for each of the `Buildings.

25. The Learned Counsel for the Appellant, points out that the `Unitholders', invest their `hard earned money', into the Project', not only to the `Unit', but, also, the `surrounding facility', which are `Habitable'. Hence, as per the `Impugned Order' of the `Adjudicating Authority' / `Tribunal', the `CIRP' of `one of the Buildings', may be initiated, however, despite successful `CIRP' of the said Building, the `Unitholders', will not be able to peacefully reside in the `said premise peacefully', since, the other part of the `Project', still be under `construction', which might include commonalities like Clubs, Schools, Parks, Roads, etc. Moreover, it will be cumbersome, for the `Allottees', to meet the `threshold', prescribed under second proviso of Section 7 of the `Code', on a `per building' basis, which was never the intent behind inserting the proviso. As such, the interpretation, laid down by the `Adjudicating Authority' / `Tribunal', is an `incorrect' one, because it defeats the object of the I & B Code, 2016, and `Legislative Intent', behind recognising `Allottees', as `Financial Creditors', through explanation, added to Section 5 (8) (f) of the I & B Code, 2016.

26. The Learned Counsel for the Appellant, submits that the `Adjudicating Authority' / `Tribunal', while adjudicating the `Application', filed under Section 7 of the I & B Code, 2016, only has to be satisfied with `Debt' and `Default', the provisions of the I & B Code, 2016, have left `no scope', for the `Corporate Debtor', to take the `Defence of Force Majeure', and relies upon the

decision of the Hon'ble Supreme Court of India in M. Sureshkumar Reddy v. Canara Bank & Ors., reported in (2023) 8 SCC at Page 387.

27. According to the Appellant, the `Corporate Debtor's Claim' that the construction of the `Project', is `delayed', `on account of resistance from the Farmers and the Land Owners', is an `incorrect' and a `baseless' one, because of the fact the `Corporate Debtor', through a letter dated 22.07.2011, had assured the `Allottees' that in `Sushant Megapolis' Lands, were purchased on market rates with the consent of Landowners and Farmers and there is `no dispute on the lands', in the `Project', whatsoever.

28. Apart from that, it is the responsibility of the `Corporate Debtor', having already entered into `Allotment Agreements', with `Hundreds of Allottees' and collected `Hundreds of Crores of Rupees', to `acquire peaceful possession of the Lands', for the `Project'.

29. According to the Appellant, all the `107 Allottees', who were parties to the Section 7 Application of the Code, belong to the `Real Estate', the documents, such as the sanctioned Map of the Project, Agreements, entered between the `Developer' and the `Allottees', Environmental Clearance, `Marketing Brochure' and `Letters', were issued by the Respondent, were placed before the `Adjudicating Authority' / `Tribunal' and despite the said documents clearly demonstrating that a `Single Project', in question, namely

`Sushant Megapolis', and hence, `all the Applicant Allottees', belong to the same `Real Estate Project', the `Adjudicating Authority' / `Tribunal', contrary to entering into a `fact based Assessment' of the Terms and Conditions of `Allotment' and `scope' of the `Real Estate Project', as mandated by the Hon'ble Supreme Court in Manish Kumar's decision, through the `Impugned Order', dated 06.01.2023, had dismissed the Section 7 Application, filed under the I & B Code, 2016, that the `Applicant Allottees', are not from the same `Real Estate Project', relying mainly on the numerous `RERA Regulations', obtained by the `Corporate Debtor' for different phases of the project `Sushant Megapolis'.

30. The Learned Counsel for the Appellant by referring to the Paragraph 151 of Manish Kumar's decision of the Hon'ble Supreme Court (2021) 5 SCC 1 at Spl Pg: 95, points out that the expansive definition, of real estate project, in Section 2 (zn) was noted, and it was observed by the Hon'ble Supreme Court ``it will depend on what is offered by the promoter under the project. It may be real estate project, which seeks to develop a building and sale of the building. It may be a project for the construction of apartments, with the agreements, to convey the undivided interest of land also. It may be a project which envisages converting an existing building or a part into an apartment. It may be a project for merely development of land into plots and sale of the plotted land as such. It

may be also that the same person may also develop either apartments or building to be sold''.

31. The Learned Counsel for the Appellant, contends that, even if a `factual assessment', would have been made by the `Adjudicating Authority' / `Tribunal', then, the `Applicant Allottees', fail to meet the `threshold', as the `Applicant Allottees', had `purchased different facilities from the Respondent', i.e. some had purchased `plots', and others have purchased `apartments', `without prejudice to the submissions' that `no reasoned fact based Assessment', as mandated by the Hon'ble Supreme Court of India in Manish Kumar's case, was made by the `Adjudicating Authority' / `Tribunal' and the `Application' was dismissed, solely, on the basis of `several RERA Registrations', procured by the Respondent.

32. According to the Appellant, as held in the decision of Hon'ble Supreme Court in Manish Kumar v. Union of India & Another, reported in (2021) 5 SCC, On-Line SCC 1 (vide Paragraphs 170-173) and was relied upon by this `Tribunal', in Mist Direct Sale Private Ltd. v. Mitin Batra & Ors. (vide CA AT INS No. 1478 / 2022) all that proviso to Section 7 of the I & B Code, provides his `Endorsement' of Section 7 `Application', by 100 or 10% of the `Allottees', whichever is less of the same `Real Estate Project'. In fact, the proviso, nowhere imposes an `embargo on Allottees', having purchased different facilities Viz.

`Plot' or `Apartment' from coming together, to meet the `threshold', prescribed under second proviso to Section 7 of the I & B Code, 2016.

33. The Learned Counsel for the Appellant contends that, `if in case a `Project', comprises of three buildings, which are to be developed, along with the common areas, such as connecting Roads, Parks, Swimming Pools, etc., in different places, then the `Developer', in compliance with Section of the `RERA', will obtain three separate RERA Registrations', for each of the Buildings'.

34. The Learned Counsel for the Appellant takes a plea that as per the `Impugned Order' of the `Adjudicating Authority' / `Tribunal', 100 or 10% of the `Allottees', from the `same Building', and `not from the same `Real Estate Project', will then, have to come together, to meet the threshold, prescribed under second proviso to Section 7, on a `per Building basis', which was never the intent behind inserting the proviso. As such, the interpretation, laid down by the `Adjudicating Authority' / `Tribunal', is an `incorrect' one, besides, defeating the `Object of the Code' and `Legislative Intent', behind recognising `Allottees', as `Financial Creditors', through explanation added to Section 5 (8) (f) of the `Code'.

35. The Learned Counsel for the Appellant, refers to Paragraph 177 of the decision of the Hon'ble Supreme Court in Manish Kumar v. Union of India & Anr., reported in (2021) 5 SCC On-line SCC 1, wherein, it is observed as under:

> *177. ``The rationale behind confining allottees to the same real estate project is to promote the object of the Code''. The Hon'ble Supreme Court notes that ``if on the other hand the requirement was to make a search for allottees of different projects, as would be the case, if the entirety of the allottees, under different projects, were to be reckoned, the task would have been more cumbersome''.*

36. The Learned Counsel for the Appellant points out that by drawing reference from the explanation of Section 3 of the RERA Act, 2016, the `Impugned Order', passed by the `Adjudicating Authority' / `Tribunal', had incorrectly interpreted the term `same real estate project', although, it is settled `Law' that an explanation `cannot alter the scope of a Section of the other Legislations', places reliance upon Paragraph 53 of the Hon'ble Supreme Court of India's decision in S. Sundaram Pillai v. V.R. Pattabiraman [(1985)] 1 SCC 591.

37. While rounding up, prays for allowing of the instant Comp. App (AT) (INS) No. 248 of 2023, by setting aside the `Impugned Order', dated 06.01.2023, passed by NCLT, Principal Bench, New Delhi in CP (IB) No. 596 (PB) / 2021.

Respondent's Submissions:

38. The Learned Counsel for the Respondent, contends that the Hon'ble Supreme Court in the decision in Manish Kumar v. Union of India, reported in (2021) SCC at Page 1, upheld the `Constitutional' validity of the provisos, added to Section 7 of the I & B Code, 2016, such that, by the second proviso thereto a minimum threshold requirement of one-tenth or 100 allottees from the same real estate project, whichever is less, has been prescribed in relation to filing a Petition under Section 7 of the Code for `invocation of Corporate Insolvency Resolution Process', there against.

39. The Learned Counsel for the Respondent points out that the `purpose' and `intent' of the `Legislature', and the `objectives', behind it, were canvassed in detail, by the Hon'ble Supreme Court of India, bearing in mind the `three distinguishing characteristics', attributed to the real estate `Allottees', that `distinguishes' Allottees, from the other `Class of Financial Creditors', which are (a) Numerosity, (b) Heterogeneity and (c) Individuality in decision making leading to high level of subjectivity.

40. According to the Learned Counsel for the Respondent in the aforesaid Manish Kumar's Judgment, the Hon'ble Supreme Court, had clearly observed and held that `the said provisos and requirements for maintaining a Petition by `one tenth' or `at least 100 Allottees', in a `real estate project', under Section 7

of the I & B Code, 2016, to be constitutional in terms of the objects of the Code which provides for the interest of various Stakeholders, including the non-parties to the Petition, as in the present case, who may oppose the Application by the selective few Allottees and thus, cannot be considered to be the ``critical mass of allottees', in a real estate Project, and is clearly not aimed at being a recovery proceeding which remedy otherwise has been provided to the allottees under the RERA Act, 2016, as well as the Consumer Protection Act''.

41. The Learned Counsel for the Respondent, comes out with a `plea' that the `proceedings', under the I & B Code, 2016, are in `Rem', as per decision of the Hon'ble Supreme Court of India in Manish Kumar's case and if no safeguard, as in the form of provisos to Section 7 of the `Code', are provided thereto, then, the same would lead to an `Abuse of Process', and `defeating the purpose of the Code', in the hands of a `Single Allottee', in a `Real Estate Project', who has the sole intent of seeking `Recovery' / `Refund' of the `Amount', deposited. Whereas, other `thousands of allottees' of the same `Project', very well are to be considered, to be the `critical mass of Allottees', such Project, are still desirous of taking possession of their units and still have their faith, reposed in the existing management of the `Corporate Debtor'.

42. The Learned Counsel for the Respondent, brings to the notice of this `Tribunal', that the Hon'ble Supreme Court of India, has devised the aforesaid three distinctive features, including that of `Heterogeneity', relating to this

`class of Financial Creditors, i.e. `Allottees', and further, opined in this regard, there can be further `sub-classification' and `differences', in the said `Category of Allottees', in a given `Real Estate Project', who can be said to be similarly situated, in regard to the purpose of the I & B Code, 2016, which includes `elimination of public mischief', as well as `achievement of positive public good'.

43. The Learned Counsel for the Respondent contends that predominantly, in Manish Kumar's case discernment as to what constitutes an `Allottee', under the I & B Code, 2016, has extensively been made, however, as regards the definition of `Real Estate Project' (though there being no clear indication in the said connection), reference of Section 2(zn) of the RERA Act has been made and it has further been expounded that as the definition of the word `Allottee', appears to be split up into three categories broadly, (a) Plot, (b) Apartment and (c) Buildings. However, a conspectus of the provisions of the RERA Act, 2016, and IBC, 2016 in the said regard, would exhibit, that having regard to the legislative intention the term `Allottees', as defined, in Section-2(d) of the RERA Act 2016, must be understood, undoubtedly, on its `own terms predominantly', but, at the same time, the other provisions, which form part of the RERA Act 2016, and therefore, the `Scheme', must also be borne in mind. Similarly, the definition of the `Real Estate Project', is to be construed, having

regard to, the `Scheme' of the `RERA Act 2016', in addition to Section 2(zn) thereof.

44. According to the Learned Counsel for the Respondent, it is clarified by the Hon'ble Supreme Court of India, that the `task of ascertaining who will be `Allottees', and therefore, what would constitute one-tenth of total number of `Allottees', must depend upon the nature of the `Real Estate Project', in question. Further, it will depend on what is offered by the `Promoter', under the project. It may be `Real Estate Project', which seeks, to `Develop' a `building', and sale of the Building. It may be a project for the Construction of Apartments with the `Agreements', to convey, the `undivided interest of land' also. It may be a project which envisages, `converting an existing Building' or `a part into an Apartment'. It may be a `Project', which envisages an `existing Building' or a part in to an Apartment for merely `development of land' into plots and the sale of the `plotted land', as such.

45. The Learned Counsel for the Respondent, points out that the 'Appreciation of Allotment', by the Hon'ble Supreme Court of India, to further, illuminate the questions, as to the `Allottees' and a `Real Estate Project', such that, it is opined that "what is required is Allotment and not promised Flats as per `Brochure'. It is also not the `total constructed units'. This is as what is relevant under the impugned provisos, read with Section-5(8)(f) explanation of

the I & B Code, 2016, and Section-2(d) of RERA read with Section-11(1)(b) of the `Act' and the rules made thereunder is the 'Booking of Apartments or Plots.'

46. Continuing further, the Hon'ble Supreme Court of India, had observed that in the teeth of an argument that `10%' is dynamic and what is `1/10' in the `morning', may fall short by night, if more Allotment is made, the Hon'ble Apex Court, held that the mere difficulties in given cases, to comply with a `Law', can hardly furnish a ground to strike it down. As to what would constitute the `Real Estate Project', it must depend on the `Terms & Conditions', and scope of a particular `Real Estate Project', in which the `Allottees', are, a `part of'. These are factual matters, to be considered in the `facts of each case'.

47. The Learned Counsel for the Respondent points out that the Hon'ble Supreme Court of India, pertaining to the construction of the terms such as 'Allottee', 'Real Estate Project' and `Allotment', had observed the following:

> *"We have referred to the definition of the word allottee and real estate project and Section 3 of the Act which requires prior registration. We have also referred to the definition of real estate project. In all these definition clauses, the words "as the case may be" are found after the words plot, apartment or building. Thus, the Act is meant to regulate the dealings in plots, apartments and buildings. A real estate project, in other words, as defined, is the development of a building or apartments or the development of land into plots or apartments. The development is contemplated as being towards selling apartments, plots or buildings. It would also necessarily include common areas. The expression "apartment", as defined in RERA, is a very comprehensive one."*

48. According to the Respondent, a `Project', would be in relation to `Plots', `Apartments' or `Buildings'. It could also be for a `composite one', for `Plots' and `Apartments' or for `Plots' and `Buildings'.

49. It is represented on behalf of the 'Respondent', that as opposed to the limited argument of the 'Appellant', as to what constitutes 'a real estate project', the aforesaid entire context, is to be borne in mind, which not only includes the terms and conditions of the Project, but, also the scope of the Project, the `Scheme of the Law', the objects of the `Code', and further understanding, as to what exactly has been offered by the `Promoter', while taking into account the `three distinctive features', of the `Real Estate Allottees'.

50. The Learned Counsel for the Respondent, points out that the 'Adjudicating Authority / Tribunal', had made 'inquiry' and considered all the records pertaining to the "Township Sushant Megapolis" including the allotment agreements of the allottees which time and again show the intent of the Promoter to sell a unit in a project in the Township, which factum, as stated even in Manish Kumar, cannot help to construe the entire `Township', to be a `Single Project', neither other facts, as to sanctioning of Single Layout Plan', for the entire Township, as available on the `RERA website'.

51. The Learned Counsel for the 'Respondent', takes a stand that from the 'Impugned Order', passed by the 'Adjudicating Authority / Tribunal', it is evident from the 'findings' in para 9(iv) thereof that the entire record of the 'Corporate Debtor', including the `Pre-RERA Allotment Agreements', layout plans, environmental clearances, obtained for the 'Township Sushant Megapolis', as well as the `RERA Registration of 25 separate Projects', in the said 'Township Sushant Megapolis', were taken into account, based on the same, the 'Adjudicating Authority / Tribunal', had opined, that the `Corporate Debtor', has submitted RERA registration details, which contain 25 projects, having separate `RERA Registrations'. Also he had shown the break-up of the number of Applicants in the present Petition, in respect of the 9 categories of the projects (as seem from perusal of the `Allotment Agreements', and other records of the `Township', to discern the scope of the `Real Estate Project', within the said `Township', as offered by the `Promoter.'

52. The forceful plea of the 'Respondent' is that, in none of the `Project / Project categories', the 'Petitioners', meet the `threshold limit of 10%' or `100 persons', whichever is less. Moreover, it is pointed out, on behalf of the Respondent that even the documents, with the Appellant, has placed reliance, to contend that the separately `Registered 25 Real Estate Projects', in truth, is 'one single project', nowhere, shows any such averment or statement in the said documents to that effect or even semblance thereof, to infer any such `intent', of

the ‘Promoter’. In fact, the documents i.e. ‘Brochure’, ‘Allotment Agreement’, etc., clearly go to establish the intendment of the `Promoter’, towards `Separate 25 Registration’ for such Projects, falling further, into separate categories, by their very nature and the said documents, refer to ‘Sushant Megapolis Township’ and not ‘Sushant Megapolis Project’.

53. It is the contention of the ‘Respondent’, that each such `Project’, as `differently registered’ with the ‘RERA’, 2016, was `approved, through `sanctioned plans’, relating to the `respective Projects’, as issued by the ‘Competent Authority’, in this regard.

54. The Learned Counsel for the Respondent, submits that contrary to the Appellant’s contentions, even if the ‘Adjudicating Authority / Tribunal’, had relied upon the explanation to Section 3 of the RERA Act, 2016, for suggesting the definition of the `Real Estate Project’, as defined under Section 2(zn) of the RERA Act, 2016, for the purpose of the I & B Code, 2016, the ‘said act was not questioned’, in terms of the settled position of Law that, when such has been the `intent of the Legislature’, as provided for, in the I & B Code, 2016 and RERA Act, 2016.

Respondent’s Decisions:

55. The Learned Counsel for the Respondent / Corporate Debtor, refers to the decision of the Hon’ble Supreme Court in Manish Kumar v. Union of India

(2021) Page 1 at Spl Pgs: 43 & 57 wherein, at Paragraph Nos. 8, 47 & 48, it is observed as under:

> *8. ``Under the second proviso, a new threshold has been declared for an allottee to move an application under Section 7 for triggering the insolvency resolution process under the Code. The threshold is the requirement that there should be at least 100 allottees to support the application or 10 per cent of the total allottees whichever is less. Moreover, they should belong to the same project. Almost all (except in two petitions), the petitioners also had under the erstwhile regime which permitted even a single allottee to move an application under Section 7 filed petitions singly or with less than the number required under the proviso and they are visited with the provisions of the third proviso as per which such of those applications under section 7 which had not been admitted would stand withdrawn within 30 days, if the newly declared threshold of 100 allottees or 10 per cent of the allottee whichever is lower was not garnered by the applicant/applicants.''*
>
> *47. It was submitted that the right to file an application under Section 7 is a statutory right and it can be conditioned. Reliance is placed on judgment of this Court in Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad and others 26. There is no inherent or absolute right to file an application under Section 7 of the Code. The Legislature is well within its power to impose conditions for the exercise of such statutory rights. It is further contended that the third proviso 23 (1985) 4 SCC 369 24 (1985) 1 SCC 523 25 (2009) 13 SCC 165 26 (1999) 4 SCC 468 inserted in Section 7(1) does not affect any vested right of the creditors who have already filed applications for initiating CIRP. A vested right has been the subject matter of several decisions. In this regard reliance is placed on the following judgments:*
>
> > *i. Howrah Municipal Corporation v. Ganges Rope Co. Ltd. (2004) 1 SCC 663;*
> >
> > *ii. ArcelorMittal India (P) Ltd v. Satish Kumar Gupta (2019) 2 SCC 1;*

iii. Swiss Ribbons Pvt Ltd v. Union of India (2019) 4 SCC 17;

iv. Karnail Kaur v. State of Punjab (2015) 3 SCC 206;

v. Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta (2020) 8 SCC 531

48. It was submitted that the mere right to take advantage of a statute is not a vested right. In this regard, the following case law is relied upon:

i. Director of Public Works v. Ho Po Sang 1961 AC 901;

ii. M.S. Shivananda v. Karnataka SRTC (1980) 1 SCC 149;

iii. Lalji Raja and Sons v. Hansraj Nathuram (1971) 1 SCC 721;

iv. Kanaya Ram v. Rajender Kumar (1985) 1 SCC 436

56. The Learned Counsel for the Respondent, cites the aforesaid decision of the Hon'ble Supreme Court in Manish Kumar's case (2021) 5 SCC Page 1 at Spl Pg: 80, wherein, at Paragraph 107, it is observed as under:

``2 (d) `Allottee', in relation to a `real estate project', means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent.''

57. The Learned Counsel for the Respondent, relies on the decision of the Hon'ble Supreme Court in Manish Kumar's case (2001) 5 SCC Page 1 at Spl Pgs: 93 & 94, wherein, at Paragraph Nos. 147 & 148, it is observed as under:

147. ``For appreciating the meaning of the word 'allottee', for the purpose of the Code, undoubtedly, it is necessary to travel to Section 2(d) and 2(zn)of RERA for the reason that in Section 5(8)(f) of the Code, the following Explanation was inserted by Act 26 of 2018 w.e.f. 06.06.2018. This provision has been upheld by this Court in Pioneer Urban Land & Infrastructure Ltd. v. Union of India (2019) 8 SCC 416:

"5(8)(f) xxx xxx xxx Explanation.—For the purposes of this sub-clause,—

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

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016;"

148. Real estate project may relate to plots, apartments, or buildings or plots/apartments and plots/buildings. As far as the expression 'allottee' is concerned, since the Code in the Explanation to Section 5(8)(f), incorporates the definition of the word 'allottee' in RERA, for the purpose of the provisos in question, we must necessarily seek light only from the expression 'allottee' defined in Section 2(d) of RERA.''

58. The Learned Counsel for the Respondent, adverts to decision of the Hon'ble Supreme Court in Manish Kumar's case, reported in (2021) 5 SCC Page 1 at Spl Pg: 93, wherein, at Paragraph Nos. 146, it is observed as under:

146. ``'Building' has been defined as including any structure or erection or part of any structure and intended to be used for residential or commercial purposes, inter alia. Thus, an allotment under RERA can be in relation to a plot, an apartment or a building. In other words, a project, would be in relation to plots, apartments or buildings. It could

also be for a composite one for plots and apartments or for plots and buildings. We have noticed the expansive definition of the word apartment and flats are comprehended within the definition of the word apartment. We have also noticed in this regard, the definition of the word apartment, in the Delhi Apartment Ownership Act, 1986. We have also seen that under the Delhi Apartment Ownership Act, allottee has been defined in relation to an apartment to mean the person to whom such apartment has been allotted, sold or otherwise transferred by the promoter.''

59. The Learned Counsel for the Respondent, refers to the decision of the Hon'ble Supreme Court in Manish Kumar's case, reported in (2021) 5 SCC Page 1 at Spl Pg: 94 to 98, wherein, at Paragraph Nos. 149.1, 151, 152, 153, 154 & 157, it is observed as under:

149.1 ``An allottee may be an allottee of a plot or an apartment or a building. A real estate project may relate to plots or apartments or buildings.''

151. ..... The task of ascertaining who will be an allottee as also the question as to what will be the total number of allottees and therefore what would constitute one-tenth of total number of allottees must depend upon the nature of the real estate project in question. It will depend on what is offered by the promoter under the project. It may be real estate project which seeks to develop a building and sale of the building. It may be a project for the construction of apartments with the agreements to convey the undivided interest of land also. It may be a project which envisages converting an existing building or a part into an apartment. It may be a project for merely development of land into plots and sale of the plotted land as such. It may be also that the same person may also develop either apartments or building to be sold. In this regard we may remember the explanation in Section 2(zk) (vi)defining the word 'promoter'. The said section reads as under:

"(zk) "promoter" means,— (i) xxx xxx xxx (ii) xxx xxx xxx (iii) xxx xxx xxx (iv) xxx xxx xxx (v) xxx xxx xxx (vi) such other person who constructs any building or apartment for sale to the general public.

Explanation.— For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different person, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified under this Act or the rules and regulations made thereunder;"

152. Therefore, a conspectus of the provisions would show that having regard to the legislative intention the term 'allottees' as defined in Section 2(d) must be understood undoubtedly on its own terms predominantly. But at the same time the other provisions which form part of the Act and therefore the scheme must also be borne in mind. The Argument that the definition of 'allottee' suffers from over inclusiveness and under inclusiveness needs to be considered. Under inclusiveness and over inclusiveness are aspects of the guarantee under Article 14. Equals must be treated equally. Unequals must not be treated equally. What constitutes reasonable classification must depend upon the facts of each case, the context provided by the statute, the existence of intelligible differentia which has led to the grouping of the persons or things as a class and the leaving out of those who do not share the intelligible differentia. No doubt it must bear rational nexus to the objects sought to be achieved.

153. Coming to the definition of the word 'allottee' it appears to be split up into three categories broadly, they are-plot, apartment and buildings.

154. Be that as it may, as we have noticed the question must be decided with reference to real nature of the real estate project in which the applicant is an allottee.

157. ……. This is as what is relevant under the impugned provisos read with Section 5(8)(f) explanation and section 2 (d) of RERA read with Section 11(1)(b) and the rules made thereunder is the 'booking' of apartments or plots ……..''.

60. The Learned Counsel for the Respondent, relies on the decision of the Hon'ble Supreme Court in Manish Kumar's case (2021) 5 CC Page 1 at Spl Pg: 104, wherein, at Paragraph Nos. 176 & 177, it is observed as under:

> *176. `` We have referred to the definition of the word 'allotee' in Section 2(d) of the RERA. In regard to a real estate project, all persons, who are treated as allottees, as per the definition of allottee would be entitled to be treated as allottees, for the purpose of Section 5(8)(f) (Explanation) and also, for the purpose of the impugned provisos. All that is required is that the allottees must relate to same real estate project. In other words, if a Promoter has a different real estate project, be it in relation to apartments, in the case an application under Section 7, those would not be reckoned in computing one-tenth as well as the total allotments.*
>
> *177. ……. The connection with the same real estate project is crucial to the determination of the critical mass, which Legislature has in mind, as a part of its scheme, to streamline the working of the Code. If it is to embrace the total number of allottees of all projects, which a Promoter of a real estate project, may be having, in one sense, it will make the task of the applicant himself, more cumbersome.''*

61. The Learned Counsel for the Respondent, cites the decision in Veena Parakh Parth Infratech (P) Ltd. (2023) SCC OnLine SCC 1387, wherein at Paragraphs 23 & 24, it is observed as under:

> *23. `` ……. in terms of the Explanation in sub-Section 7(1), a financial debt need not be owed to the applicant and as joint application by more than one applicant was and is contemplated, the resultant position would be that any number of applicants, without any amount being due to them, could move an application under Section 7, provided that they are financial creditors and there is a default in a sum of Rs.1 crore even if the said amount is owed to none of the applicants but to any another financial creditor. This position has not undergone any change even with*

the insertion of the provisos. In other words, even though the provisos require that in the case of a real estate project, being conducted by a corporate debtor, an application can be filed by either one hundred allottees or allottees constituting one-tenth of the allottees, whichever is less, if they are able to establish a default in regard to a financial creditor and it is not necessary that there must be default qua any of the applicants.

24. Therefore, it is pertinent to state that Section 7(1) of the Code, 2016 mandates the Financial Creditors, who are allottees under a Real Estate Project, to file an Application for initiating CIRP against the Corporate Debtor jointly by not less than 100 of such allottees under the same Real Estate Project or not less than 10% of the total number of such allottees under the same Real Estate Project, whichever is less.''

62. The Learned Counsel for the Respondent, falls back upon the `Order' of this `Tribunal' in Mist Direct Sales (P) Ltd. v. Nitin Batra, wherein, at Paragraph Nos. 9, 14 & 27, it is observed as under:

9. ``Three main questions which arise for consideration in this Appeal are:-

(i) Whether the joint application under Section 7 against 'Anand Infoedge Pvt. Ltd.', 'Mist Avenue' and 'Mist Direct' is maintainable? Three Respondents - Appellants herein being separate corporate entities.

(ii)Whether Section 7 Application filed by the allottees fulfils the threshold as prescribed under the IBC?

(iii) Whether while scrutinizing the claims of each applicants of joint application filed under Section 7, it has to be established that the financial debt exist against each applicant in which default has been committed and the claim of the applicants is not barred by limitation and applicants fulfil all eligibility of valid allottee who is entitled to file Section 7 application?

14. When we look into the sequence of the facts and material on record, it is clear that the project is one namely— 'Festival City' in which project under first Collaboration Agreement w.e.f. 26.10.2012, 'Mist Avenue' undertook to develop the project and allotted the units to the allottees including the Applicants who are Respondents herein. After cancellation of first Collaboration Agreement and entering into second Collaboration Agreement, on same date, the second Collaboration Agreement, 'Mist Direct' issued letter to allottees informing allottees that now 'Mist Direct' has taken charge of the inventories already sold and has received all documents together with the account of money paid by allottees. It is useful to extract the letter dated 02.12.2017 issued by 'Mist Direct' to all allottees, which is to the following effect:-

"MIST DIRECT SALES PRIVATE LIMITED
Registered office: Grg. No. 1 Gole market, Bhagat Singh Marg. New Delhi -110001
CIN: U70101DL2013PTC253541
PAN-AAICM6219N
Email-customercare@mistavenue.co.in

Date-02-Dec-17

To

Mr. Gaurav Bhardwaj
FLAT No. 615, Supertech Avant
GARDE, Plot No. 1, Sec-5, Vaishali Ghaziabad

Subject: important Communication

Dear Customer,

At the outset we wish to thank you all for your support and patronage with which the Festival City' (Project) is coming up inspite of various challenges/delays caused in obtaining various permissions and approvals (since obtained by the Company).

We were monitoring the progress of the Project closely with an intention to expedite the same to ensure delivering of your Unit(s) as early as possible inspite of the many speed breakers/disturbances. We found that there was need for

strengthening the process. If necessary reorganizing the Project implementation plan.

We are happy to inform you that erstwhile Management for various reasons ultimately we decided to bring us as new and efficient implementing partner so that our esteemed buyers may be delivered their Units as early as possible.

Accordingly, the arrangements of Anand Infoedge Private Ltd. ('AIPL') with earlier collaborator (Mist Avenue Private Ltd) were cancelled in entirety and a new arrangement was entered with us on 27th July 2017. We have now taken charge of the project for early implementation. Our esteemed allottees/buyers shall be provided the Services in best possible manner.

We wish to inform you that we have also taken charge of the inventories already sold by the earlier company and have received all your papers/documents together with the account of money paid by you under the assignment arrangements made for the said purpose.

We solicit your cooperation and patronage and to bless us to achieve the target much before the schedule date.

With warm personal regards.
Yours Truly

For Mist Direct Sales Private Ltd.

(CRM TEAM)"

27. We in the present case are concerned with the Second Proviso which provides that an Application for initiating Corporate Insolvency Resolution Process against the corporate debtor shall be filed jointly by not less than 100 of such allottees under the same real estate project or not less than 10 % of the total number of such allottees under the same real estate whichever is less. The present is a case where all the allottees that is applicants under Section 7 were allottees of same real estate project that is Festival City which project was being developed on Plot

No. 1, Sector 139, NOIDA of land allotted to Anand Infoedge Pvt. Ltd. by lease deed dated 21st August, 2008 on land admeasuring 1,00,980 sq.m.''

63. The Learned Counsel for the Respondent, adverts to the decision in Naresh Kumar Agarwal v. SNG Real Estate Pvt. Ltd. (2023) SCC OnLine NCLT, 1390, wherein, at Paragraph No. 12, it is observed as under:

12. `` The Corporate Debtor has contended that the Applicant does not meet the minimum threshold criteria under Section 7 of the Code, being the allottee as per the provisions of the RERA Act. It has been brought on record that as per the available information on web portal of RERA, the said project has 38 flats, 2 stilt floors, 1 club house and 2 commercial units, therefore the said petition deserves to be dismissed in light of 1st and 3rd proviso of Section 7(1) of IBC, 2016. Also, as per the Tripartite Agreement, the Applicant has already subrogated his all right in favour of SBI. According to clause 2, 4, 13 & 18 of the agreement, in the event of default by the Applicant, SBI may at its discretion enforce the security, in furtherance of which the SBI has already on 19.10.2019, in the capacity of creditor, had already proceeded against the Corporate Debtor by filing an Original Application No. 1356/2019 (recovery suit) and claiming the security interest over the flats of the Applicant. Therefore, SBI is in the shoe of creditor standing against the Corporate Debtor for same set of debt before the DRT against which the Applicant is also claiming amount due under Section 7 of this Application. 4.3. It is submitted that no cause of action survives in favour of the Applicant and the Corporate Debtor is entitled to recover the amount of Rs. 1,30,15,711/- (Rupees One Crore Thirty Lakhs Fifteen Thousand Seven Hundred and Eleven Only) towards the Flat Nos. 302 & 303 for the balance sale consideration. 5. The Applicant also preferred Written Submissions vide Diary No. 2885/2023 dated 05.12.2023 wherein it has been contended that the Financial Creditor entered into three MOUs with the Corporate Debtor dated 04.11.2016 for Flat No. 302, 303 and 304 in the project named SUNRISERS for aggregate sale amount of Rs. 1,85,33,317/- (One Crore Eighty-Five Lakhs Thirty-Three Thousand

Three Hundred and Seventeen Only), Rs. 1,83,42,394/- (Rupees One Crore Eighty-Three Lakhs Forty- Two Thousand Three Hundred and Ninety-Four Only) and Rs. 1,87,54,895/- (Rupees One Crore Eighty-Seven Lakhs Fifty-Four Thousand Eight Hundred and Ninety-Five Only). As per the MOUs an advance of Rs. 1,00,000/- (Rupees One Lakh) for each flat was paid by the Financial Creditor and respective Loan amount against the three flats i.e. Flat No. 302, 303 and 304 was paid by availing loan facility from SBI. In consonance with the RoI clause in the MOU, it has been submitted that the Applicant is an investor in the present set of circumstances.''

64. The Learned Counsel for the Respondent, relies on the decision of the Hon'ble Supreme Court in BPTP Spacio Park Serene Flat Allottees Welfare Association (Bawa v. Sudhansu Tripathi – 2023, SCC Online SC 1184, wherein, at Paragraph 9, it is observed as under:

9. ``In order to restore the appeal before the NCLAT, this Court must be satisfied that the appellant is in a position to meet the threshold requirement which is imposed by the terms of Section 7 for the initiation of the CIRP. Absent that demonstration, we are not inclined to allow the appeal at the behest of the appellant and restore the proceedings, the effect of which would be to revive the CIRP against the company. In the event that the appellant seeks to invoke the jurisdiction of the NCLT in terms of the provisions of Section 7 of the IBC, the appellant would be at liberty to do so in which case, the observations in the present order will not stand in its way as any adjudication on the merits or maintainability of such an application. The order of the NCLAT dated 13 December 2022 disposing of the appeal filed by the appellant, namely, Company Appeal (AT) (Insolvency) No 1392 of 2022 shall not come in the way of the appellant in taking recourse to its remedies before the NCLT in fresh proceedings, if so advised. In the alternative, since the appellant has a consent decree of the NCDRC, it would be at liberty to execute it in

accordance with law. The execution proceedings before the NCDRC are expedited and may be taken up for early disposal.''

Appellant / Petitioner(s) Contents in Company Petition:

65. Before the 'Adjudicating Authority', `National Company Law Tribunal', Principal Bench, New Delhi, the 'Appellant / Financial Creditor / Applicant', along with 151 other 'Financial Creditors / Applicants', had filed C.P.(IB) No. 596 (PB) / 2021 wherein, under Part II Column, the 'Respondent / M/s. Ansal Hi-Tech Township Limited, is described as the 'Corporate Debtor' and in Part IV of the main `Company Petition', the Total Amount of Debt, was mentioned as Rs.41,81,90,116/- (Rupees Forty One Crores, Eighty One Lakhs Ninety Thousand One Hundred and Sixteen only) along with interest @ 18% per annum as on 15th March 2021'. Further, it was averred that the 'interest amount', is now statutorily payable, under the Estate (Regulation and Development) Act, 2016 from the `date of Deposit'.

66. Besides the above, it was averred in main CP (IB) No. 596(PB)/2021 by the 'Appellant / Petitioner', and other 'Petitioners' that `they are the 'Financial Creditors / Homebuyers / Allottees', who have purchased residential units / plots / apartments / parcel of land, in the project "SUSHANT MEGAPOLIS' (hereinafter referred as "the Project"), being developed by the 'Corporate Debtor', namely `M/s ANSAL HITECH TOWNSHIPS LTD.'

67. As a matter of fact, the 'Appellant', and other 'Petitioners / Financial Creditors', before the `Adjudicating Authority / Tribunal', under Part IV of the main CP (IB) No. 596 (PB) / 2021, had mentioned that the 'Government of State of Uttar Pradesh', selected `M/s. Uttam Steel & Associates (Consortium)' for the development of `Hi-Tech Township', at the location, near Dadri Town, adjoining Greater Noida, Uttar Pradesh, in accordance of the HI-Tech Township Policy, dated 22.11.2003. As per the scheduled development activities, the Project, would comprise of various Row Houses / Flats / Floors, Villas / Bungalows, High-rise Apartments, School / Educational Institutions / Hospitals / Health Centres, Corporate Parks, Commercial and Retail Centres, etc. on the Project Property. On 13.12.2006, a detailed `Project Report', was submitted by the aforesaid consortium for development of the Hi-Tech Township to the Bulandsahar Development Authority, comprising of the 2504 Acres of Land, i.e., 'schedule property'. The aforesaid consortium formed a `Special Purpose Vehicle Company' (`SPV'), namely `M/s. Ansal Hitech Townships Ltd.' for the execution, marketing and sale of the project. Further, the recitals of the similar to nearly identical worded Arrangements (Allotment Agreements), entered with the `Financial Creditors / Allottees', state that the `SPV Company', is the one responsible to allot and construct the units of different specifications and sizes to the allottees, in accordance of its own terms along with authorization to carry out and complete the internal and external development of various services as

per government policies, etc. That the 'scheduled property' on which the 'Corporate Debtor' has been authorized to develop the real-estate project "MEGAPOLIS" upon, has been specifically denoted and termed as 'the project' by the 'Corporate Debtor'.

68. According to the 'Appellant', the 'Respondent / Corporate Debtor', had 'invited Applications', inter alia, for allotment of residential units in the project 'SUSHANT MEGAPOLIS', also known as 'MEGAPOLIS', comprising of `Plots' / `Builtup Plots' / `Row Houses' / `Flats' / `Floors', `Villas' / `Bungalows', `High-rise Apartments', under `various allocated sites', inclusive of the project. That the 'Applicants' herein are 'Allottees', in the same Real Estate Project 'MEGAPOLIS', being developed by the 'Corporate Debtor' and therefore, fall under the requisite ambit of the provisos of the amended Section 7(1) of the I & B Code 2016, pertaining to the minimum threshold requirement of `atleast 100 Allottees', to support the `Application' or `10% of the Total Allottees', whichever is less, belonging to the `same Real Estate project'.

69. Further, the 'Financial Creditors / Petitioners', being impressed by the highly alluring and attractive promises, made by the 'Corporate Debtor', had opted for respective residential units / plots / apartments in the project (hereinafter referred as 'Residential Unit') and that the 'Corporate Debtor', had executed `Allotment / Allottee(s) Arrangement Agreements', with the 'Financial Creditors', containing totally arbitrary and one-sided terms. Also that

as per terms of the Agreement, the time for handing over possession of the allotted unit `from 42 months to 3 years', from the `Date of Sanction of the Layout plan of the Allotted Unit' and other contingent dependent aspects, varying from the type of Allotted Residential Unit'. That apart, according to the 'Appellant', 'No definite time frame', for `delivering possession of the Residential Units to the Allottees', was `not incorporated in the Agreements.'

70. As per the `Appellant's Claim', the 'Total Sum', to be claimed, in 'Default' in the main `Company Petition', was Rs.41,81,90,116/-, as on 15.03.2021.

Features of Reply of the Respondent / Corporate Debtor:

71. The Respondent / Corporate Debtor in its `Reply', to CP (IB) No. 596 (PB) / 2021 (On the File of the `Adjudicating Authority' / `Tribunal'), had mentioned that the `Alleged Financial Creditors', are the `Home Buyers / Investors', claiming to have purchased Residential Flats / Plots in the `Township Project', developed by the `Corporate Debtor', under the banner of `Sushant Megapolis', situated near two Dadri, adjoining Greater Noida, Uttar Pradesh.

72. According to the Respondent / Corporate Debtor, the `Financial Creditors', had considered and agreed to purchase the Residential Units and

Plots, since, the `Corporate Debtor / Respondent', had guaranteed and assured the timely physical possession of the Flats / Villas / Plots in the `Megapolis Township Project'. Later, the Applicants, made individual investment in the respective Units of various Projects of the said Township and entered into Builder Buyer Agreements with the Respondent / Company.

73. It is represented on behalf of the Respondent / Corporate Debtor, the `License' to develop `Sushant Megapolis Township', was awarded to the Respondent / Company on 26.11.2006, by the `Uttar Pradesh Government', under the `Uttar Pradesh Hi-Tech Townships Policy'. In fact, under the UP Hi-tech Policy, Private Investments were invited for the development `Hi-Tech Townships', with word class infrastructure, including facilities for living, working as well as recreation. Accordingly, the Respondent / Corporate Debtor, started developing `Sushant Megapolis', as a `Township', comprising of various Projects in form of Group Housing Projects, Plotted Developments, Commercial Projects, Recreation Centres as well as built ups.

74. The Respondent / Corporate Debtor, points out that since the Township involved acquisition of large chunks of lands, the Government, had an important role and responsibility in providing support to the `Developers', as well as maintaining `Law and Order', but the Township was phased with a violent resistance, from the Farmers of the Area which caused delay in construction. Subsequently, the Project was further delayed, due to a `Stay

Order', passed by the `National Green Tribunal'. In fact, due to the reasons which were totally out of control of the Respondent / Company, the Township's Project got delayed and the onset of Covid-19 and delays in the timely payments by the `Allottees' of various Projects, further brought the construction to a complete halt.

75. According to the Respondent /Corporate Debtor, the significant construction was carried out, across all the Projects of the Township and many Housing as well as Commercial Projects were already at an `advance stage of construction'. The possession was handed over to `Multiple Allottees' of the various Group Housing Project and well as Commercial Projects, and if the Respondent / Company is forced into `Insolvency Proceedings', the whole Project and its future will be jeopardised.

76. It is represented on behalf of the Respondent / Corporate Debtor that the main CP (IB) No. 596 (PB) / 2021, was filed with a `mischievous endeavour', on the part of `some of the Applicants', to extract money, from the Respondent / Company, when they are not even `Genuine Bona fide Home Buyers'.

77. Furthermore, the main CP (IB) No. 596 (PB) / 2021, filed by the `Petitioners', is to be dismissed `ipso facto', in the teeth of Section 3 of the I & B Code (Amendment Act 2020) whereby, Section 7 of the I & B Code, 2016, was amended and by virtue of the Amended Section 7 of the `Code', the

`Adjudicating Authority' / Tribunal', `ought to dismiss an `Application', if the Application was not foiled by at least, `100 Allottees' or `10% of the Total Allottees' of the same `Real Estate Project'.

78. In fact, the `Petitioners' do not satisfy the required criteria, as they do not constitute either `100 Allottees' or `10% of the `Total Allottees' of the same `Real Estate Project'. The `Petitioners', had failed to disclose, that they were the `Allottees' of different `Housing and Commercial Project of the Township', and had filed the `Petition', together with, to simply meet the `threshold of 100 Allottees'. The Chart, depicting the Projectwise break-up of the Petitioners, is mentioned as under:

S.No.	*Name / Category of Project*	*Total No. of Units*	*Total No. of Sold Units*	*Total No. of Applicants to the present Petition*
1	*EWS Apartments*	*1600*	*1546*	*1*
2	*LIG Apartments*	*720*	*566*	*3*
3	*Fairway Group Housing*	*932*	*600*	*30*
4	*Aastha Pride Group Housing*	*784*	*245*	*5*
5	*Aastha Uday Group Housing*	*984*	*70*	*1*
6	*Residential Plots*	*5775*	*1956*	*38*
7	*Built-up (Independent Floors)*	*1133*	*372*	*10*
8	*Sushant Square (Commercial)*	*203*	*100*	*0*
9	*Paradise Crystal Group Housing*	*940*	*162*	*11*
10	*TOTAL*	*13071*	*5617*	*99*

79. It is the stand of the Respondent / Corporate Debtor, that the `Sushant Megapolis' Township, consists of `Multiple Residential' and `Commercial Real Estate Project', and all the `sub-projects', which are `independent of each other' and are being developed and sold as `separate Projects', within the Township are separately registered under `RERA' with separate RERA Registration Numbers. Each Sub Project, is further divided into `multiple flats' with `different completion Schedules'.

80. The plea of the Respondent / Corporate Debtor, the Appellant / Petitioner, belong to `separate Projects' of the `Township', who is to `Qualify', for `100 Allottees' or `10% of the Total Allottees', of the same `Real Restate Project', at the `Threshold', as mandated by the `I & B Code, 2016'. In reality, the `100 Allottees Threshold', is not met, even for the `Single Real Estate Project', from the entire `Township'. Under the circumstances, the main CP (IB) No. 596 (PB) / 2021, filed before the `Adjudicating Authority' /Tribunal', ought to be dismissed, in `limine',

81. According to the Respondent / Corporate Debtor, approximately 50 Petitioners to the main CP (IB) No. 596 (PB) / 2021, are `Co-Applicants' or `Third Applicants' for a `Single Unit'. Such `joint Applicants / Petitioners', were represented as `Different Allottees', to simply fulfill the requisite `number of 100 Allottees'.

82. The Learned Counsel for the Respondent / Corporate Debtor, refers to the Order of the Hon'ble Supreme Court of India, dated 19.01.2021, in the matter of Manish Kumar v. Union of India (vide WP (C) No. 26 / 2020), wherein, it is held that `one unit equals to one Allottees', even though, the said `Unit', is jointly held. In fact, the relevant extract of the aforesaid decision of Hon'ble Supreme Court, at Paragraph 147, is as under:

> *147. ``As far as the situation projected about, there being no clarity regarding whether, if there is a joint allotment of an apartment to more than one person, is it to be taken as only one allottee or as many allottees as there are joint allottees, it would appear to us, on a proper understanding of the definition of the word 'allottee' in Section 2(d) and the object, for which the requirement of hundred allottees or one-tenth has been put, and also, not being oblivious to Section 399(2) of the Companies Act, 1956, as also the Explanation in Section 244(1) of the Companies Act, 2013, in the case of a joint allotment of an apartment, plot or a building to more than one person, the allotment can only be treated as a single allotment. This for the reason that the object of the Statute, admittedly, is to ensure that there is a critical mass of persons (allottees), who agree that the time is ripe to invoke the Code and to submit to the inexorable processes under the Code, with all its attendant perils. The object of maintaining speed in the CIRP and also the balancing of interest of all the stakeholders, would be promoted by the view that as in the case of the Companies Acts, 1956 and 2013, that for the purpose of complying with the impugned provisos in Section 7(1), while the allottee can be of any of the categories, fulfilling the description of an allottee in Section 2(d) of RERA, as interpreted earlier by us joint allottees of a single apartment, will be treated as only one allottee. Any other view can lead to clear abuse and defeating of the object of the Code. If, for instance, a single apartment is taken in the name of hundred persons, a single allottee, who in turn comprise of relatives or family members or friends, can move an application, even though the position ante would be restored, which means that only the allottee qua one*

apartment, plot or building, is before the Authority and it would not really represent a critical mass of the allottees in the real estate project concerned. Therefore, we have no hesitation in rejecting the contentions of the petitioner on having made the said interpretation.''

83. The Learned Counsel for the Respondent / Corporate Debtor, points out that the Hon'ble Supreme Court of India, in the matter of Pioneer Urban Land Infrastructure Ltd. v. Union of India, reported in (2019) 8 SCC at Page 416, had laid down the criteria that an `Allottee', who himself `Defaulted on Payments', can prefer an `Application', under Section 7 of the I & B Code, 2016, before the `Adjudicating Authority' / `Tribunal'. As a matter of fact that over `79 Allottees', had defaulted in `their payments of dues', and hence, will not be eligible, to prefer an `Application', under Section 7 of the `Code', against the `Respondent / Corporate Debtor'.

84. According to the Respondent / Corporate Debtor, it filed a `Writ Petition' (MISC Bench No. 4924 of 2024 – Court No.3, vide Annexure A4, Page 46 of the Respondent / Corporate Debtor's Appeal Paper Book), before the Hon'ble Allahabad High Court', Lucknow Bench, seeking directions to the Administration, to take action, in compliance against the `Farmers', who were disrupting the `construction activity'. Indeed, the Hon'ble High Court, Lucknow Bench, was pleased to pass an `Order', dated 18.06.2014, in directing the `Local Administration', to ensure a peaceful atmosphere for the `Construction work' of the `Township', can be carried out, but the

`Administration', had failed to take any such steps, which resulted in disruption, of the `Construction Activity'.

85. It is the version of the Respondent / Corporate Debtor, that the `Landowners' of the notified `Township Area', had defaulted in their deal of Selling the Land to the Respondent, causing further delay in the construction of the said `Project'. Later, the Project further delay, due to a `Stay Order', passed by the `National Green Tribunal', in Akash Vashishta & Anr. v. Union of India (vide OA No.121 / 2013), wherein a `Stay Order', was passed on the construction of the `Township', upon false allegations that the `Respondent Developer', had `reclaimed and encroached upon wet lands', and further, `carried out Construction on such Land'. Finally, the `Stay Order' in MA No. 1121 /2016 in OA No.121 /2013, was vacated by the `National Green Tribunal', on 12.09.2017 (after a gap of four years), which caused a `delay', in completing the `Project'.

86. The Respondent / Corporate Debtor, points out that the `License' for developing the Township, was granted on 26.11.2006, by the Uttar Pradesh Government with the Construction site, to be completed on 25.11.2016. However, due to the unforeseen delay, caused by the reason(s) beyond the Respondent / Corporate Debtor's control, the `Township Construction', was not to be completed, within the `stipulated deadline'. Also that, from the Year 2016, the Respondent / Company's multiple requests for the deadline extension, to

complete the Construction, but, could not receive the `Requisite Extension', as the `High Power Committee Meeting' of the `Uttar Pradesh Government', could not take place till 2020, thus resulting in `substantial delays'.

87. According to the Respondent / Corporate Debtor, that the request for extension of Hi-tech License, was only granted in 2020, when the `Meeting of the `High Power Committee', took place and that the `Respondent / Company', had carried out the `Construction' at `full phase', till the `onset of Covid-19', which stopped, all `Construction Activities'. Further, in the wake of `Covid-19', the `Lock downs', had resulted in the `Migration of Labour Workers', due to which, `No Construction', could take place.

88. The Learned Counsel for the Respondent / Corporate Debtor, points out that the `Lockdown', had caused an `erosion of the Customer base', and the consequent demand break down, due to which, the `Customers' started `defaulting', on their `Instalments' and the `potential buyers', had decided against investing in the `Project'.

89. The Learned Counsel for the Respondent / Corporate Debtor submits that the Respondent / Company, despite all the hurdles in the `Project', beyond its control, had endeavoured to `settle the Customers', with an `alternate properties', in its ` Group Companies', and the `Properties' of its `Associates'

and other `Builders'. The Respondent / Corporate Debtor, had already settled about 1000 such Allottees, with `alternate properties, at alternate Projects'.

90. It is represented by the Respondent / Corporate Debtor, that a `Single Layout Plan' for the `Hybrid Project - Sushant Megapolis / Megapolis ', was submitted by the Respondent, `for sanction by the `Competent Authority', as all the `Sub-Projects', were situated within the same `Township' and `securing sanction for every Sub-Project', would consume time, `resulting in Delay', in regard to the `Construction of the Township'.

91. In this connection, on the side of the Respondent / Corporate Debtor, a reference is made to Section 3 (1) of The Real Estate (Regulation and Development) Act, 2016 (16 of 2016), under the `Heading' `Prior registration of real estate project with Real Estate Regulatory Authority', which reads as under:

> *(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority', established under this Act.*
>
> *Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act.*
>
> ……
>
> …….

……..

Explanation. – For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a standalone real estate project, and the promoter shall obtain registration under this Act for each phase separately''.

92. The contention of the Learned Counsel for the Respondent / Corporate Debtor is that, the Respondent / Company, was required by the provisions of `RERA', to register each sub-project separately, as the `Township', was being developed in a phased manner and therefore, each and every phase, was considered as a `stand-alone Real Estate Project'. As such, all the sub-projects which are independent of each other and are being developed and sold as separate Projects, within the `Township' or `separately registered', under `RERA' with separate `RERA Registration Numbers'. In fact, the `Appellant' and `other Petitioners', were aware about the requirement of separate Registration of each sub-project under `RERA'.

93. On behalf of the Respondent / Corporate Debtor, it is pointed out that Section 5(8)(f) of the I & B Code, 2016, provides the definition, whereby, the purview of the `Financial Debt' is mentioned, in the teeth of definition of `Allottee' and the `Real Estate Project', and the same is as follows:

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

[1][Explanation. - For the purposes of this sub-clause, - (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);''

94. At this stage, the Respondent / Corporate Debtor's side, points out Sections 2(d) & 2(zn) of `RERA', 2016, defining the term `Allottee' and the `Real Estate Project', which proceeds to the following effect:

``At this juncture, this `Tribunal' points out that the Section 2 (d) of the `Real Estate (Regulation & Development) Act, 2016, defines `Allottee', in relation to a `Real Estate Project', means the person to whom a plot, apartment or buildings, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent.''

(zn) ``real estate project' means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenance belonging thereto;''

95. The Learned Counsel for the Respondent / Corporate Debtor contends that the `Adjudicating Authority' / `Tribunal', is not a `Recovery Forum', but,

only a `Resolution Forum'. As a matter of fact, the Hon'ble Supreme Court in the matter of Swiss Ribbons Private Limited & Anr. v. Union of India & Ors., reported in (2019) 4 SCC at Page 17, had observed that the I & B Code, 2016, is a beneficial legislation which puts the Corporate Debtor, back on its feet and not being a `Recovery Legislation' for `Creditors'.

96. According to the Respondent / Corporate Debtor, Section 65 (1) of the I & B Code, 2016, discourages the use of the I & B Code, 2016, as a `Recovery Mechanism', and even, Section 65 of the `Code', prescribes a `penalty', for those who initiate the `Corporate Insolvency Resolution Process' or `Liquidation', `Fraudulently' or with a `Malicious Intent'. The Appellant (Petitioner), and the other Petitioners, who initiated the `Malicious Proceedings' in CP (IB) No. 596 (PB) /2021 (on the File of the `Adjudicating Authority' / `Tribunal'), ought to be `Punished', for filing a `Malicious Petition', as per Section 65 of the I & B Code, 2016.

97. According to the Respondent / Corporate Debtor, it remains a `Financial Sound Entity', overall, which only faced `slight bumps', due to a `slump' in the Markets, in the wake of Covid-19. As such, the `Corporate Insolvency Resolution Process', is to be initiated, such `Proceedings', ought to be limited just to the `Megapolis Township Project' of the `Corporate Debtor', and not the `Corporate Debtor', in its `Entirety', as per `Order', dated 04.02.2020 of this

`Tribunal', in `Flat Buyers Association Winter Hills v. Umang Realtech Pvt. Ltd.' (vide Comp App (AT) (INS) 926 / 2019).

Gist of Appellant's Rejoinder:

98. The Appellant, in his `Rejoinder' (on his behalf / Home Buyers), in the instant `Appeal', had averred that the entire `Project' i.e., `Hi-tech City / Township `Megapolis' is a single `Real Estate Project', as per Section 7 of the `Code' and hence, the CP (IB) No. 596 (PB) / 2021, filed by the Appellant and other Petitioners / Home Buyers / Financial Creditors in class, in accordance with Section 7 of the I & B Code, 2016 and deserves to be admitted.

99. According to the Appellant / 1st Petitioner, the Respondent / Corporate Debtor, was not correct in taking a plea of `Force Majeure', against an `Application', filed under Section 7 of the I & B Code, 2016. In fact, the Learned Counsel for the Appellant refers to the Judgment, dated 11.05.2023 of the Hon'ble Supreme Court in the matter of M. Suresh Kumar Reddy v. Canara Bank & Ors., (vide Civil Appeal No. 7121 / 2022), wherein, at Paragraph 10, it is observed and held as under:

> *10. ``Thus once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the application under Section 7. Default is defined under sub-section 12 of Section 3 of the IB Code which reads thus:*
>
> > *``3. Definitions: - In this Code, unless the context otherwise requires,-*
> >
> > *.. .. ..*

> *(12 ``default'' means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be;''*
>
> *Thus, even the non-payment of a part of debt when it becomes due and payable will amount to default on the part of a Corporate Debtor. In such a case, an order of admission under Section 7 of the IB Code must follow. If the NCLT finds that there is a debt, but it has not become due and payable, the application under Section 7 can be rejected. Otherwise, there is no ground available to reject the application.''*

and contends that the `Adjudicating Authority' / `Tribunal', had committed an `error', in passing the `Impugned Order' in CP (IB) No. 596 (PB) / 2021, on the file of the `Adjudicating Authority' / `Tribunal'.

100. According to the Appellant / Petitioner (himself and other Petitioners), had entered into a `Buyer / Building Agreement(s)' with the `Respondent / Corporate Debtor' and it is understood, that along with their respective `Units / Plots', the `Allottees', shall have the access to the surrounding facilities. Resultantly, the `Allottees', make a total payment that encompasses both their unit and the development of the surrounding areas, ensuring a well-developed and habitable society for them to reside in.

101. The stand of the Appellant is that, in cases where a Builder / Developer, can secure different `RERA Registrations', for `different parts of a particular project', such as `different Registrations', for `specific Apartments or Buildings', developed at different timelines, it becomes challenging for an `Allottee', to peacefully `reside' in the said `Project', even after making substantial payments, since the other part of the `Project', is still being

developed and this situation, shall result in the `Respondent / Corporate Debtor', remaining in `Default', in terms of the decision in Pioneer Urban Land and Infrastructure v. Union of India, reported in 2019 SCC OnLine SC 1005), as such, the `Impugned Order', passed by the `Adjudicating Authority' / `Tribunal', is `incorrect', because of the `wrong interpretation of Section 7 read with explanation provided in Section 3 of the `Code'.

102. The Appellant's version, in the instant case is that, the complete `Township', which is divided into several sub-projects, `remains incomplete', for a `long period of time'. Therefore, it is necessary the `Corporate Insolvency Resolution Process', may be initiated against the complete township, being a `Single Project', in terms of the `Sanction Plan', as obtained, from the `Uttar Pradesh RERA website', letter received from the `Environment Impact Assessment Authority'.

103. The Appellant relies upon the Judgment of this `Tribunal', dated 08.04.2021 in Mr. Ambika Prasad Sharma, Erstwhile Director of Horizon Buildcon Pvt. Ltd., Rajasthan v. Horizon Buildcon Pvt. Ltd., & Anr., wherein, it is held that `the contention of the Corporate Debtor that the `Real Estate Project', could not be completed on account of `Force Majeure', is untenable in `Law'.

104. The Appellant cites the `Order' of the `Adjudicating Authority' / `Tribunal', in Atul Rajwadkar, Liquidator for Gupta Infrastructure (India) Pvt. Ltd. (vide IA No. 20 / 2021 in CP (IB) No. 1397 / MB / 2017), wherein, it is held that `Application' of the `Force Majeure Clause', would require an incisive Judicial enquiry, it would not be possible for `Adjudicating Authority', to go there into by in a summary proceeding. As such, the plea of `Force Majeure', taken on behalf of the Respondent / Corporate Debtor that in not providing the possession of Units, is an `incorrect' one.

105. The Appellant, adverts to the `Judgment' dated 29.05.2020 of the Hon'ble High Court of Delhi in Halliburton Offshore Services Inc. v. Vedanta Limited & Anr. [vide OMP (I) (Comm.) No. 88 / 2020], wherein, it is observed that `every breach or non-performance', cannot be justified or excused merely on the invocation of Covid-19 as a `Force Majeure' condition. Further, it is observed that `the particular Court would have to assess the conduct of the Parties prior to the outbreak and whether, genuinely, a Party was prevented or is able to justify its non-performance due to the epidemic / pandemic.

106. It is projected on the side of the Appellant / Petitioner, that the `Appellant / Petitioner' in `Section 7 Application of the I & B Code, 2016, (filed before the `Adjudicating Authority' / `Tribunal'), has only made the `Co-Allottees', as Parties, to the said `Application'. But, the Chart of the Allottees, filed before the `Adjudicating Authority' / `Tribunal' (vide Annexure A-8 of the Appeal Paper

Book at Page 337) consists of `107 Unit Holders' / `Allottees', who had preferred the `Application'.

Analysis:

107. At the outset, this `Tribunal' points out that according to the Appellant / Petitioner, in view of the fact that the Respondent / Corporate Debtor, had committed `Default' concerning the `Financial Debt', as per Section 5 (8) (f) Explanation (i) of the I & B Code, 2016, the Section 7 Application in CP (IB) No. 596 / 2021 (filed by the Appellant / Petitioner & Other Petitioners), before the `Adjudicating Authority / Tribunal', being `endorsed, by more than One Hundred Allottees', by the same `Real Estate Project' of the `Respondent / Corporate Debtor', and the `Default Sum', being in excess of Rs. 1 Crore (vide Section 4 (1) of the I & B Code, 2016), is to be admitted, against the `Respondent / Corporate Debtor', by initiating the `Corporate Insolvency Resolution Process'.

108. In the instant case, the `Appellant / Petitioner', takes a stand that in the Order dated 09.05.2022 of the National Consumer Disputes Redressal Commission (vide Consumer Complaint No. 1951 of 2016), the plea of the Respondent / Corporate Debtor `ascribing reasons', in regard to the delay, relating to the time, when the `Respondent / Corporate Debtor', accepted the bookings from the `Allottees', and regularly raised demands and accepted

`amounts', from the `Allottees', were `rejected', a clear adverse circumstance, against the `Respondent / Corporate Debtor', all the more, when the outbreak of `Pandemic – Covid-19', came after a decade.

109. At this stage, it is worthwhile for this `Tribunal', to make a pertinent mention that the Respondent / Corporate Debtor', had furnished a `Chart', before the `Adjudicating Authority' / `Tribunal' (vide Respondent's Reply at Paragraph No. 78 of this Judgment, mentioned Supra).

110. Apart from that, according to the Respondent / Corporate Debtor, the `Home Buyers List', being the `Joint Holders', but, represented as different `Allottees', in the present case (vide Annexure R1 - Page 46 of the Appellant's Appeal Paper Book), is as follows:

S.No.	*CUSTOMER NAME*	*APPLICANT DETAIL*
8	*PRIYA SHRIVASTAVA*	*CO APPLICANT*
10	*SMITA SHRIVASTAVA*	*CO APPLICANT*
12	*ARCHANA TIWARI*	*CO APPLICANT*
16	*ANIL KUMAR*	*CO APPLICANT*
18	*NEHA KHANNA*	*CO APPLICANT*
20	*SONKAR ANUPAM AMRITLAL*	*CO APPLICANT*
25	*RUCHI SHUKLA (RUSHI SHUKLA IN NCLT)*	*CO APPLICANT*
30	*RAMA MEHRA*	*CO APPLICANT*
31	*AVINASH MEHRA*	*THIRD APPLICANT*
34	*PUNEET JAIN*	*CO APPLICANT*
36	*GAURAV GOEL*	*CO APPLICANT*
39	*NUPUR RUDRABHATLS*	*CO APPLICANT*
41	*PREETI ARORA*	*CO APPLICANT*
42	*SANTOSH KUMARI ARORA*	*THIRD APPLICANT*
44	*SHIVANGI SINGH*	*CO APPLICANT*
45	*DR. HIMANGI SINGH*	*THIRD APPLICANT*
47	*SHRUTI GAUR*	*CO APPLICANT*
50	*PRAVINA VERMA*	*CO APPLICANT*

53	*POONAM SRIVASTAVA*	*CO APPLICANT*
55	*EMA DWIVEDI*	*CO APPLICANT*
58	*ARUNA UPADHYAY*	*CO APPLICANT*
60	*HARSHIT MITTAL*	*CO APPLICANT*
65	*MRIDU SHARMA*	*CO APPLICANT*
69	*AMITABH TRIVEDY*	*CO APPLICANT*
71	*RAKESH KUMAR*	*CO APPLICANT*
73	*SAURABH GARG*	*CO APPLICANT*
76	*MEGHA BELSARE*	*CO APPLICANT*
80	*DEEPIKA BHATIA*	*CO APPLICANT*
83	*DR. SANJEEV JAIN*	*CO APPLICANT*
85	*USHA RAWAT*	*CO APPLICANT*
87	*PRASHANT SHARMA*	*CO APPLICANT*
89	*SHAYOK BURMAN*	*CO APPLICANT*
92	*DHATRI VERMA*	*CO APPLICANT*
94	*JAYA RAMKUMAR*	*CO APPLICANT*
96	*NIVEDITA PANDEY*	*CO APPLICANT*
102	*MANISHA RAI*	*CO APPLICANT*
107	*SUMAN SAINI*	*CO APPLICANT*
109	*ASHRU KANA CHOWDHURY*	*CO APPLICANT*
117	*PARUL MAKKAR*	*CO APPLICANT*
121	*VINOD SABHARWAL*	*CO APPLICANT*
123	*VIDYAWATI TRIPATHI*	*CO APPLICANT*
125	*HARSH MALHOTRA*	*CO APPLICANT*
127	*SURUCHI KHANNA*	*CO APPLICANT*
130	*SANGEETA MITTAL*	*CO APPLICANT*
132	*PRASHANT KUMAR BAGGA*	*CO APPLICANT*
138	*ROOPAM BHATIA*	*CO APPLICANT*
141	*KULJIT SOOD*	*CO APPLICANT*
144	*AMRITA PANDEY*	*CO APPLICANT*
149	*NISHA AGARWAL*	*CO APPLICANT*
152	*ANIL AHLUWALIA*	*CO APPLICANT*

111. The emphatic stand of the Respondent / Corporate Debtor is that `Sushant Megapolis' Township, comprise of `Multiple Commercial Real Estate Projects', all the sub-projects are independent of each other, and were being developed and sold as separate Projects, within the Township. Moreover, they were `Registered', under RERA Act, 2016, with different `RERA Registration Numbers'. As a matter of fact, `each Project', is further divided into `Multiple

phases, with different complete Schedules' (vide observation Para 8 (2) of the Impugned Order of the `Adjudicating Authority' / `Tribunal' – RERA Registration details `Sushant Megapolis', at Page 48 of the Appellant's Appeal Paper Book).

112. Indeed, as per definition Section 5(8)(f) explanation (ii) of the I & B Code, 2016, the expressions ``allottee'' and ``real estate project'' shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016, (16 of 2016).

113. As a matter of fact, Section 5 (8) (f) & (i) of the I & B Code, 2016, defines `Financial Debt', meaning `A debt along with Interest, if any, which is disbursed against the consideration for the time value of Money and includes;

> ``Any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing.
>
> `[Explanation. – For the purposes of this sub-clause,-
>
> (i) Any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.''

114. Section 7 of the I & B Code, 2016, provides for an initiation of `Corporate Insolvency Resolution Process', by `Financial Creditor'. The two

essential features of an `Admission' of an `Application', under Section 7 of the `Code' are (a) Existence of Debt and (b) Default.

115. In fact, an `Adjudicating Authority' / Tribunal's jurisdiction is restricted to determine, whether the `Application' is complete and whether, there is any `Debt' and `Default', as per decision in Dr. H.N. Nagaraj vs. Edelweiss Asset Reconstruction Company Ltd., reported in (2018) 148 SCL 447 (NCLAT).

116. It is to be remembered that an `Adjudicating Authority' / `Tribunal', is not deciding a `Money Claim'. Further, an ``Adjudicating Authority' / `Tribunal', is not a `Civil Court', to decide the aspect of `Violation of Contract', between the `Parties'.

117. The `proceedings', under the I & B Code, 2016, are not a `Litigation', to be decided by a `Court of Law'. It is not the `Property', which is at the base of the `Code'. It is the `Liquidity', which is the foundation for triggering the `Corporate Insolvency Resolution Process'.

118. No wonder, an `Adjudicating Authority' / `Tribunal', is not constituted for the `Recovery of Debt'. It is not out of place for this `Tribunal', to make a significant mention that the provisions of `RERA', are beneficial to the `Home Buyers' and are meant to protect them, from any `Deviant' / `Fraudulent Action'.

119. A mere perusal of Section 3 (1) Explanation of the `Real Estate (Regulation & Development) Act, 2016', under the caption `Prior registration of real estate project with Real Estate Regulatory Authority', points out that where the `real estate project', is to be developed in phases, `every such phases', shall be considered a `standalone real estate project', and the `Promoter', shall obtain Registration, under this Act, for `each phase', separately.

120. In the instant case, the Respondent / Corporate Debtor, had executed, at least `Three kinds of Agreements, with the `Petitioners' (before the `Adjudicating Authority' / `Tribunal') (a) `Plot Allottee Agreement' (b) `Builtup Unit Allottee Agreement' and (c) `Apartment Allottee Agreement'.

121. One cannot ignore an important fact, that the second proviso to Section 7(1) of the I & B Code, 2016, mentions that ``for `financial creditors', who are `allottees', under a `real estate project', an `application', for initiating `Corporate Insolvency Resolution Process', against the `Corporate Debtor', shall be filed jointly by not less than one hundred of such `allottees', under the same real estate project or not less than ten percent of the total number of such allottees under the same real estate project, whichever is less''.

122. Therefore, in the present case on hand, the foremost aspect to be taken into account is the `RERA Registration' of the `Projects', of the `Corporate

Debtor', for ensuring the `initial limit' for `pressing into service' of the ingredients of Section 7 of the `Code'.

123. It cannot be forgotten that the Respondent / Corporate Debtor's Projects were of `different character', containing terms and conditions therein. Also that, in the instant case, it is a `Township' of more than 1500 Acres with `different type of developments' (Viz. `Plot, Apartments, Builtup Industrial and Commercial', etc.) with independent, `RERA' Registrations, and no phasewise Registrations.

124. Moreover, the present Township, comprises of `real estate projects' of different character, Viz. `Plots', `Apartments' (named `Fairway Apartments') in this case, `LIG EWS Builtup', etc., the said `Real Estate Projects', were given different Building Sanctioned Plans, having independent terms. In fact, for the said Sanctioned Plans, being the subject matter of `RERA' Registrations, secured for the said ongoing Projects, under the `Township', different `Approval Letters', for separate `Real Estate Projects', under this Township were issued.

125. The `Adjudicating Authority' / `Tribunal' in the `Impugned Order', dated 06.01.2023 in CP (IB) No. 596 (PB) / 2021 at Paragraph No. 9 (v), had mentioned that the Respondent / Corporate Debtor, had submitted RERA Registration details, comprising Twenty Five Projects, with `separate RERA

Registrations', and in the Company Petition, in regard to the `Nine Categories' of the Project, the breakup of the number of Applicants, was shown and in none of the Projects / Project Categories, the Applicants (Petitioners), fulfil the requirement of `Threshold Limit' of `10% or 100 persons', whichever is less.

126. At this juncture, this `Tribunal', worth recalls and recollects the expressions `allottee' and `real estate project', as per Section 5(8)(f) Explanation (ii) of the I & B Code, 2016, which unerringly points out that they shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation & Development Act), 2016 (16 of 2016).

127. In the present case, the Appellant / Petitioner and other Petitioners, who filed CP (IB) No. 596 (PB) / 2021, under Section 7 of the I & B Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, before the `Adjudicating Authority' / `Tribunal', for initiating `Corporate Insolvency Resolution Process', against the `Respondent / Corporate Debtor', are from `different numerous projects', and they have not established their case, as `Creditors of a class', concerning any `particular project', registered with `The Real Estate (Regulation & Development) Act, 2016' (16 of 2016), with a view to fulfil the requirement of `10% or 100 Allottees', as envisaged, as per Section 7 (1) of the I & B Code, 2016.

128. Be that as it may, in the light of the detailed foregoings, this `Tribunal', on a careful consideration of divergent contentions, advanced on either side, considering the facts and circumstances of the instant case, comes to an irresistible and consequent conclusion that the CP (IB) No. 596 (PB) / 2021, filed by the `Appellant / Petitioner' and other Petitioners, before the `Adjudicating Authority' / `NCLT', Principal Bench, New Delhi, is prima facie `not maintainable' in the `eye of Law'. Further, this `Tribunal', on going through the `Impugned Order', dated 06.01.2023 in CP (IB) No. 596 (PB) / 2021, passed by the `Adjudicating Authority' / `Tribunal', the views expressed in dismissing the CP (IB) No. 596 (PB) / 2021, is free from any `legal flaws'. Accordingly, the instant `Appeal' sans merits.

Result:

In fine, the instant Comp. App (AT) (INS.) No. 248 / 2023, is `Dismissed'. No costs. The connected pending `Interlocutory Applications', if any, are `Closed'.

[Justice M. Venugopal]
Member (Judicial)

[Mr. Arun Baroka]
Member (Technical)

01/ 04 / 2024
SR / MD