NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI SPECIAL BENCH
(Video Conference)
PRESENT: Dr. VENKATA RAMAKRISHNA BADARINATH NANDULA – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 02.02.2024 AT 04.00 P.M.

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
TCP(IB)/32/7/AMR/ 2019	Main Case	7 of IBC	Axis Bank Ltd Vs Sevenhills Healthcare Pvt Ltd
	IA(IBC)/10/2023	U/S 60(5) of the IBC, 2016	Abhilash Lal, Resolution Professional of Seven Hills Healthcare Pvt Ltd. Vs. Municipal Corporation of Greater Mumbai and Committee of Creditors.
	IA(IBC)/159/2023	60(5) of IBC	Municipal Corporation of Greater Mumbai Vs. Mr. Abhilash Lal, RP of M/s Seven Hills Healthcare Private Limited
	IA(IBC)/228/2023	Rule 11 of NCLT Rules, 2016	Mr. Abhilash Lal, RP of Seven Hills Healthcare Pvt ltd Vs. Municipal Corporation of Greater Mumbai
	IA(IBC)/(PLAN)/1 /2024	U/s 30(6) & 31(1) of IBC, 2016 U/Reg 36B(6A) of IBBI (Insolvency Resolution Process for corporate Persons) Reg 2016	Mr. Abhilash Lal, RP of Seven Hills Healthcare Private Limited Vs COC (Through JM Financial Asset Reconstruction Company Limited)

ORDER

IA(IBC)/10/2023: Mr. S. Niranjan Reddy along with Mr. Siddharth Ranade, Mr. Prakshal Jain, Mr. Kaazvin Kapadia, Mr. Vishal Pathak, Ms. Ananya Bajpai, Ld. Counsels for the Applicant & Mr. Varun Byreddy, Mr. Yugal Jain, Mr. Aditi Tomar, Mr. Aditya Bhupathiraju, Ld. Counsels for R1 & Mr. R. Shankaranayanan, Mr. Hafeez Patanwala, Mr. Avinash Krishnan Ravi, Ms. Palak Nenwani, Ld. Counsels for the CoC present. The matter reopened for clarifications. List the matter on 09.02.2024.

IA(IBC)/159/2023: Mr. Varun Byreddy, Mr. Yugal Jain, Mr. Aditi Tomar, Mr. Aditya Bhupathiraju, Ld. Counsel for the MCGM and Mr. R. Shankaranayanan, Mr. Hafeez Patanwala, Mr. Avinash Krishnan Ravi, Ms. Palak Nenwani, Ld. Counsels for the CoC & Mr. S. Niranjan Reddy along with Mr. Siddharth Ranade, Mr. Prakashal Jain, Mr. Kaazvin Kapadia, Mr. Vishal Pathak, Ms. Ananya Bajpai for the RP present. Orders pronounced, in result the Application i.e. IA(IBC)/159/2023 is dismissed.

Sd/-

Uday (PS)

IA(IBC)/228/2023: Mr. S. Niranjan Reddy along with Mr. Siddharth Ranade, Mr. Prakshal Jain, Mr. Kaazvin Kapadia, Mr. Vishal Pathak, Ms. Ananya Bajpai for RP & Mr. Varun Byreddy, Mr. Yugal Jain, Mr. Aditi Tomar, Mr. Aditya Bhupathiraju, Ld. Counsel for MCGM present. The matter reopened for clarifications. List the matter on 09.02.2024.

IA(IBC)/(PLAN)/1/2024: Mr. S. Niranjan Reddy along with Mr. Siddharth Ranade, Mr. Prakshal Jain, Mr. Kaazvin Kapadia, Mr. Vishal Pathak, Ms. Ananya Bajpai for RP and Mr. Rishika Kumar, Mr. Hafeez Patanwala and Ms. Palak Nenwani appearing for CoC present. For hearing, list the matter on 09.02.2024.

Sd/-

MEMBER JUDICIAL

Uday (PS)

IN THE NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH

I.A .159/2023 in TCP (IB)NO.32/7/AMR/2019

UNDER SECTION 60(5) OF THE IB CODE, 2016 READ WITH RULE 11 OF THE NATIONAL COMPANY LAW TRIBUNAL RULES, 2016.

In the matter of
M/S SevenHills Healthcare Private Limited

Between:
Municipal Corporation of Greater Mumbai
5, Mahapalika Marg, Dhobi Talao, Chattrapati Shivaji Terminus Area, Fort, Mumbai – 400 001.
….. **Applicant**

AND

1. **Mr. Abhilash Lal**
Resolution Professional of
Seven hills Healthcare Private Limited
C-192, Belvedere Towers DLF Phase II
Gurgaon – 122022

Sd/-

2. **Committee of Creditors**
(Through JM Financial Assets Reconstruction Company Limited)

.....Respondents

ORDER DATED: 02.02.2024

Coram:
Dr. VENKATA RAMAKRISHNA BADARINATH NANDULA MEMBER, JUDICIAL

Parties/Counsels present:

For the Applicant:	Mr. Vivek Reddy, Senior Counsel with Mr. Soummo Biswas, Mr. Varun Byreddy, Mr. Yugal Jain, Mr Aditi Tomar and Mr. Aditya Bhupatiraju, Counsels.
For Respondent : No.1/ RP.	Mr. S. Niranjan Reddy, Ld. Sr. Counsel along with Mr. Siddarth Ranade, Mr. Kaazvin Kapadia, Mr. Prakshal Jain, Mr. Vishal Pathak and Ananya Bajpai, Counsels.
For Respondent : No.2/ CoC	Mr. R. Sankamarayanan, Ld. Sr. Counsel along with Mr. Avinash Krishnan Ravi, Mr. Hafeeez Patanwala and Ms. Palak Nenwani, Counsels.

ORDER

(Per: Dr. VENKATA RAMAKRISHNA BADARINATH NANDULA MEMBER, (JUDICIAL)

Sd/-

Under consideration is the Interlocutory Application, filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016, by the Municipal Corporation of the Greater Mumbai ("MCGM/Applicant") seeking ***exclusion*** of land owned by it being situate in Sy. Nos.155(pt), 156 (pt), 162 (pt) to 168 (pt) of Municipal K/East Ward in the Village Marol, Andheri (East), Mumbai ("BMC Land/Subject Land") along with the Seven Hills Hospital constructed and operating on BMC Land **("Subject Hospital/Mumbai Hospital")** from Corporate Insolvency Resolution Process("**CIRP**") of Seven Hills Healthcare Private Limited **("Corporate Debtor/CD").**

Sd/-

2. The Applicant contends that:

2.1 Pursuant to a Tender process initiated by the Applicant for the development of the BMC Land, the Seven Hills Healthcare Private Limited i.e., CD was selected as the successful bidder in the year 2004. By way of Letter of Possession dated 12th July, 2004, the CD was put in possession of the BMC Land on an 'as is where is' basis to commence the construction of a hospital on the BMC Land. Subsequently, the CD and the Applicant formalized their agreement through a Contract Agreement, wherein the CD undertook the responsibility to develop and operate a hospital on the BMC Land and provide healthcare services.

Sd/-

2.2 The Contract Agreement stipulated obligations for the corporate debtor, including completing the Subject Hospital within 60 months (excluding monsoon) as per Clause 15(a)(iv). Additionally, the corporate debtor was required to reserve twenty percent of the total beds and outpatient department facilities for Municipal Employees, Counsellors, and citizens of Mumbai with orange and yellow ration cards as per Clause 27(b). To fulfil this reservation obligation, the CD and the Applicant executed a Memorandum of Understanding (MOU) dated December 13, 2013, outlining the in-principle understanding regarding the implementation of the 20% bed reservation commitments.

Sd/-

2.3 The corporate debtor failure to fulfil payment obligations as outlined in Clause 15(a)(vi) regarding Lease rent and Clause 19(b) concerning taxes triggered various provisions within the Contract Agreement. These include termination and possession takeover under Clause 26(K), a penalty equivalent to 25% of Lease Rent for payment delays as per Clause 15(e)(i), interest on rent in arrears at 15% per annum as per Clause 19(e), and the application of interest at the same rate on overdue payments under Clause 19(s).

2.4 The corporate debtor was indisputably in breach of several obligations outlined in both the Contract Agreement and the MOU. These breaches included the failure to complete the Subject Hospital, establish the

Sd/-

agreed-upon bed capacity (with only 306 beds instead of the contracted 1500 beds), and comply with the reservation of 20% of the beds as stipulated. The Applicant issued multiple show cause notices to the CD on May 9, 2014, June 20, 2014, September 3, 2017, April 17, 2016, and August 28, 2017, concerning these breaches. Since the CD did not take corrective measures to rectify the breaches, a final show cause notice was issued on January 23, 2018 ("Final Show Cause Notice") as to why the Contract Agreement and MOU should not be terminated due to repeated breaches. As of March 13, 2018, the CD was in default under the Contract Agreement and MOU for various amounts ("Pre-CIRP Dues").

Sd/-

Particulars	Outstanding Amount
Penalty under the Contract Agreement	92,92,32,382/-
Property Tax	47,96,91,508/-
Grand Total	140,88,23,890/-

2.5 Prior to the expiration of the cure period outlined in the Final Show Cause Notice, pursuant to an application filed by Axis Bank Limited under Section 7 of the Insolvency and Bankruptcy Code, 2016 **("IBC"),** Corporate Insolvency Resolution Process (**"CIRP"**) was initiated by National Company Law Tribunal, Amaravati (then NCLT, Hyderabad) **("NCLT Amaravati")** in respect of the CD vide order dated 13th March, 2018. Following this initiation, the Respondent was duly appointed as the Resolution Professional (RP) of the CD in accordance with the provisions of the IBC.

Sd/-

2.6 The Applicant had in fact filed an Application before the NCLT, seeking its Impleadment in the Admission Petition filed by Axis Bank Limited. The said Application was allowed by the NCLT. Subsequently, in accordance with the provisions of the Code, the Applicant submitted a claim pertaining to its pre-CIRP dues before the R1. However, the R1 erroneously classified the claim as contingent and, as a result, the claim has not been admitted.

2.7 During the first round of the Corporate Insolvency Resolution Process (CIRP) of the corporate debtor, the Committee of Creditors (CoC) approved the Resolution Plan submitted by Dr. Shetty's New Medical Centre Private Limited. Subsequently, Dr. Shetty's New Medical

Sd/-

Centre Private Limited filed an application before the National Company Law Tribunal (NCLT) seeking approval of the Resolution Plan as approved by the CoC. However, the Applicant objected to this Resolution Plan before the NCLT, citing non-compliance with the requirements of the Mumbai Municipal Corporation Act, 1888 (MMC Act) concerning the BMC Land. Despite the Applicant's objections, the NCLT and later the National Company Law Appellate Tribunal (NCLAT), through orders dated July 26, 2019, and August 7, 2019, respectively, approved the Resolution Plan submitted by Dr. Shetty's New Medical Centre Private Limited, dismissing the Applicant's concerns regarding the treatment of the BMC Land.

Sd/-

2.8 Subsequently, aggrieved by the orders of the NCLT and NCLAT, the Applicant filed an appeal before the Hon'ble Supreme Court. In an order dated November 15, 2019, the Hon'ble Supreme Court observed that Section 238 of the Insolvency and Bankruptcy Code (IBC) cannot override the Applicant's right and public duty to control and regulate how its properties, being public properties, are dealt with. Consequently, the orders passed by the NCLT Mumbai and the NCLAT were set aside by the Hon'ble Supreme Court.

2.9 Meanwhile, due to the onset of COVID-19 in March 2020, the Applicant, in its role as a public and civil institution, was faced with the challenge of dealing with the pandemic and safeguarding the welfare of its citizens.

Sd/-

The Applicant was empowered by Notification No. CORONA- 2020/ CR- 58/ Arogya-5 **("Covid Notification")** issued by the Public Health Department of the Government of Maharashtra and provisions of the MMC Act, read with Disaster Management Act, 2005 and Epidemic Diseases Act, 1897. The Subject Hospital was identified as one of the facilities which could be used as a quarantine centre and COVID-19 treatment hospital. Since the R1/ CD did not have the required funds to keep the Subject Hospital Operational or infuse any further funds, the Applicant infused funds from time to time to keep the Subject Hospital operational and running, and to expand the capacity of the subject Hospital as per the need of the city's health infrastructure requirement, and to upgrade the standard of treatment.

Sd/-

2.10 That the present application is filed by the Applicant seeking a declaration from this Hon'ble Tribunal that the Subject Hospital ought to be excluded from the CIRP of the Corporate Debtor, on the following Grounds :

2.11 The Applicant has invested significant sums of money in the funding, management, operation and supervision of the Subject Hospital. Since the Subject Hospital had discontinued its functioning, and the Applicant provided its own funds to restart services at the Subject Hospital from March 2020 to November 2022. These payments include certain expenditure towards activities which were completed by/to the account of CD

Sd/-

under the Contract Agreement, the Applicant incurred the following expenses:

S.No.	Particulars (As on 30 November, 2022)	Amounts
1.	Payments towards the salaries of the working employees and support staff of the Hospital. (Through the Applicant's Agency – Rs.31.83 Crores)	Rs.460.36 Cr.
2.	Capital Expenditure towards critical healthcare supplies, equipment and services [Including an initial investment by the Applicant of Rs.38.76 Crores to increase the bed strength from 306 to 1850 beds including 300 ICU beds (which had to be originally set up by the Corporate Debtor under the Contract Agreement)]	Rs.103.94 Cr.
	Total	Rs.564.30 Cr.

Sd/-

2.12 In addition to the investments made by Applicant, the CD has also defaulted on the payment of the penalty under the Contract Agreement and interest arising from payment of default of the penalty of Contract Agreement mentioned as Pre-CIRP Dues (supra). The payments have not been secured in any manner by the Respondent under the CIRP of the CD. The total monies invested by the Applicant into keeping Subject Hospital running and operational are public monies.

2.13 The Applicant has a public duty concerning the BMC Land, which is a public property. Pursuant to Section 61(gg) of the MMC Act, the Applicant is obligated to take all possible lawful measures, including establishing and maintaining public hospitals and

Sd/-

dispensaries, for public medical relief. Section 63 of the MMC Act grants the Applicant discretion in providing for such matters. Additionally, Section 63A allows the Applicant to discharge its functions either directly or through an agency. Therefore, it is imperative that the BMC Land be utilized or transferred to the Applicant to secure the outstanding dues owed to the Applicant and ensure the functioning of the Subject Hospital. This public duty of the Applicant was affirmed by the Hon'ble Supreme Court in its order dated November 15, 2019, in the case of Municipal Corporation of Greater Mumbai v. Abhilash Lal & Ors. (Civil Appeal No. 6350 of 2019) during the current CIRP of the CD. The Supreme Court allowed the appeal filed by the Applicant concerning the Resolution Plan's treatment of the BMC Land,

Sd/-

emphasizing the Applicant's authority over the land and its importance in fulfilling public duties.

2.14 The Contract Agreement explicitly states that in the event of termination, the Mumbai Hospital would revert to the Applicant. Clause 26(K) of the Contract Agreement grants the Applicant the right to terminate the agreement in case of any breach by the corporate debtor, allowing for the forfeiture of all deposits, premiums, fees, and charges paid by the corporate debtor, and expressly permitting the takeover of the Subject Hospital. Given the CD's breach of multiple provisions of the Contract Agreement, the Applicant has the right to terminate the agreement and take possession of the Subject Hospital.

Sd/-

To exercise this legal right, the Subject Hospital must be excluded from the ongoing CIRP of the corporate debtor.

3. The 1st Respondent in its COUNTER states that:

3.1 The Respondents have their rights over the superstructure and Subject Land of the Mumbai Hospital as per the Contract Agreement. They argue that any rights belonging to the corporate debtor should be included in the CIRP due to the moratorium imposed under Section 14 of the Insolvency and Bankruptcy Code. Excluding the Mumbai Hospital from SevenHills' assets would violate the Code's provisions aimed at maintaining the status quo. The moratorium's purpose is to preserve the existing state of affairs during CIRP initiation, even extending to

Sd/-

property recovery efforts by owners or lessors when occupied by the Corporate Debtor. Any action by the Applicant to terminate the Contract Agreement, purportedly leading to the Mumbai Hospital's exclusion, is prohibited during the CD's CIRP.

3.2 To construct the Subject Hospital, CD has created a mortgage in respect of the Subject Hospital in favour of its lenders, who have lent funds on the strength of such security interests created after the Applicant having granted its licence and consent to assignment by way of a mortgage in 2006. The lenders of CD were induced to lend substantial amounts to CD on the assurance that their rights being specifically protected under the Contract Agreement and the draft Lease Deed. The lenders of CD

Sd/-

cannot, be deprived of their legitimate dues which are expected to be satisfied upon the successful resolution of SevenHills.

3.3 The reliefs as sought by Applicant in the application are entirely contrary to the representation made by and assurances held out by Applicant during the COC meetings, having led the RP as well as the CoC to believe that the Subject Hospital would be part of the assets of CD in the CIRP and that the benefit of the Contract Agreement would be available to the successful resolution applicant as and when a resolution plan is approved by this Hon'ble Tribunal. The principle of estoppel and/or promissory estoppel would bind the

Sd/-

Applicant and prevent it from acting contrary thereto or inconsistent therewith in the present case.

3.4 Any expenses incurred by the Applicant in respect of the Mumbai Hospital, since COVID-19 cannot entitle the Applicant to seek an exclusion of the Hospital as an asset of CD. All the employees and staff at the Mumbai Hospital continues to be employed by CD and not by the Applicant. The Applicant has only one assigned representative who is directly involved in the Hospital's operation. While the salaries of these employees and staff have been funded by the Applicant during this period, all the payments of the Mumbai Hospital are routed through CD's Bank account and require the approval of the RP. In addition, RP oversees all compliance-related activities

Sd/-

at the hospital, including corporate and medico-legal compliances. The Mumbai Hospital is being utilized by the Applicant subsequent to it having invoked the provisions of Disaster Management Act, 2005("DM Act") in its capacity as a statutory authority in discharge of public duties, with the cooperation of the RP and CD's employees. Therefore, any such costs incurred by the Applicant cannot be said to have been incurred for running CD as a going concern, and would not qualify as CIRP costs under the provision of the Code. In fact, CD is entitled to compensation under Section 66 of the DM Act and RP has issued notice to the Applicant on 18.03.2023, claiming such compensation. The sudden change in the Applicant's stance and its last minute challenge to the SNMC Resolution Plan has extended the

Sd/-

CIRP of CD. Further, SNMC Resolution plan provided for 100% discharge of Applicant's claims under the Contract Agreement and unconditional adherence to the terms of the Contract Agreement by the resolution applicant. Further, since March 2020, owing to the utilisation of the Mumbai Hospital by the Applicant as a COVID-19 facility has deprived CD of a revenue stream from Mumbai Hospital.

3.5 The Applicant's 'Public Duty' to deal with the Applicant's land ought not to extend to the Mumbai hospital in the present case. The functioning of the Mumbai Hospital has been sought to be secured by the Applicant so that the Mumbai Hospital is not 'shut down'. The continuation of the CIRP is likely to result in a

Sd/-

successful resolution of CD and in turn 'secure the functions" of the Mumbai Hospital. In respect to applicant wanting to 'secure its dues', the applicant dues will be paid in accordance with the provisions of the Code and stands secure to the extend valid and applicable. With reference to the Supreme Court Judgement, it is submitted that the Judgement was passed in the context of creation of a fresh interest of the MCGM Land under a resolution plan, in view of Section 92 of the MMC Act. In this context, the Hon'ble Supreme Court held that the resolution plan which provided for creation of fresh interest in respect of MCGM Land, could not have been approved by this Hon'ble Tribunal without prior approval of the MCGM in terms of Section 92 of the MMC Act. The Applicant's public duties under the MMC Act were

Sd/-

also upheld by the Hon'ble Supreme Court in this limited context.

4. REJOINDER filed by the applicant to the counter of the 1st respondent states that:

4.1 The Respondent has no subsisting right in the Land or the super structure. The Contract Agreement was not simpliciter agreement to lease. The agreement was for a public private partnership and an agreement to lease was one of the part of that partnership The Applicant has placed certain new information in order to appreciate the terms of the contract and the public private partnership at large.

4.2 As per Clause 15(a) of the Contract Agreement, parties were obligated to enter into a lease agreement upon

Sd/-

the project's completion. However, the Contract Agreement itself is not a lease agreement and does not confer ownership or leasehold rights to the CD. The parties agreed to execute a lease agreement for a duration of 60 years upon fulfilling certain conditions, including completing the Mumbai Hospital's construction. Nevertheless, the CD failed to meet the construction deadline and continuously breached various Contract Agreement terms, preventing the execution of a lease agreement. It is essential to highlight that under Clause 6.2.6 of the Tender Document and Clause 19(J) of the Contract Agreement, it was a crucial condition of the public-private partnership that if the CD failed to complete the Mumbai Hospital's construction within the specified timeframe or violated any construction or

Sd/-

operational terms, the project works (i.e., the constructed superstructure) would vest in the Applicant at no cost. Vesting is not contingent on Contract Agreement termination but is an automatic consequence triggered by breaching agreed terms. Thus, the corporate debtors claim of ownership rights in the superstructure is unfounded and misleading, lacking basis in both the case's facts and applicable law.

4.3 The license for possession conferred on the Corporate Debtor as per the terms of the Letter of Possession and the Contract Agreement has become infructuous. The said license was granted for specific purpose of completing the construction of the Mumbai Hospital and operating the Mumbai Hospital till

Sd/-

completion of the construction. That the CD failed to complete construction of the Mumbai Hospital as per the agreed terms. That the Applicant was forced to take over operations at the Mumbai Hospital given the need of the city for robust health infrastructure due to the onset of COVID-19 in March 2020, when the Respondent expressed reservations for running the operations at the Mumbai Hospitals due to lack of funds and working inadequacy. The Applicant worked tirelessly and restarted operations at the Mumbai Hospitals, and expanded its capacity in accordance with its potential and completed the incomplete construction of the Mumbai Hospital and there is no incomplete construction work, and therefore the possession granted to the CD by way of the letter of possession and the Contract Agreement has

Sd/-

automatically expired. There is no subsisting right of possession available with CD which it can transfer.

4.4 The Applicant has the right to take over the Subject Hospital under the Contract Agreement and the BMC Act, and it has been authorized to take over the Mumbai Hospital as per the resolution passed on January 7, 2020 by the Applicant, in accordance with the BMC Act and observations of the Supreme Court. The Hon'ble Supreme Court in its Judgment dated November 15, 2019 observed that the Applicant has a right to develop the land in a manner it chooses and had recognised that a separate approval may be forthcoming under BMC Act for separate scheme formulated by the Applicant.

Sd/-

4.5 The Applicant is not bound by the financing or the security arrangement entered between the CD and its lenders, and it has no obligations towards the Lenders of the CD. First NOC was issued on January 4, 2006 ("2006 NOC'') Second NOC was issued on July 6, 2010("2010 NOC"). In furtherance of the 2006 NOC and the 2010 NOC, the Corporate Debtor had availed the loan from the lenders for the purpose of construction of the Mumbai Hospital. However, when the CD approached the Applicant for additional NOC in 2011 for creating mortgage for an additional loan from Axis Bank Limited, the Applicant expressed reservation and did not issue NOC. High Court of Bombay discussed the issue in detail, and directed the Applicant to give a NOC to the CD to use the BMC Land to secure loans taken from

Sd/-

lenders, without prejudice to the Applicant's right to maintain the BMC Land. The Applicant issued an additional NOC on December 3, 2011 ("2011 NOC). This NOC was in accordance with the order of the High Court of Bombay and was in line with High Court's observations. In 2011 NOC it is clearly stated that lenders have no recourse to the Applicant, or the BMC Land or the Mumbai Hospital. The Applicant in 2011 NOC had also highlighted that 2006 NOC and 2010 NOC were illegal and are not binding on the Applicant. Therefore, the Lenders of the CD have no recourse against the Applicant, and the Applicant's rights to terminate the Contract Agreement or takeover the Mumbai Hospital cannot be unfairly obstructed because of financing and

Sd/-

security arrangement between the Corporate Debtor and its lenders.

4.6 That the R1 is abusing the protection granted to the CD under CIRP and the situation created because of COVID-19 to gain unjust commercial gain. The R1 reply highlights that R1 had received expression of interest to participate in resolution process from 25 potential resolution applicants while highlighting the same, R1 failed to highlight reason behind such renewed interest in the CD. The Applicant was forced to spend significant resources for completing the incomplete construction and to overhaul the operations at the Mumbai Hospital feasible, viable and safe. The Applicant made significant efforts in renewing multiple licenses which had expired.

Sd/-

It spend significant resources in restarting the services. The R1 has been citing the moratorium to argue against the termination of the Contract Agreement, and has been using terms of the Contract Agreement for its benefit, but has been violated its obligations under the Contract Agreement.

4.7 The management and the operations at the Mumbai Hospitals are being managed and supervised, funded by the Applicant. The R1 has acknowledged in the reply that its role has been limited to releasing authority to the bank accounts of the CD. The mere fact that the Applicant is using CD's accounts doesn't reflect that the management and the supervision of Mumbai Hospital has been with the R1. The releasing authority has been the R1 because the

Sd/-

CD is undergoing CIRP. The Applicant took over the Mumbai Hospital in the extreme critical time, operations and management of the Mumbai Hospital is being funded, operated, supervised and Managed by the Applicant. The recruitment of the new employees, assignment of roles for existing employees, management of all vendors, procurement of goods, use of services, regular operations and maintenance at the Mumbai Hospital etc. is done with the sanction of the Applicant. In fact till December 2022 the R1 also admitted and conveyed to all stakeholders, including employees, that operations at the Mumbai Hospital is being run on overall supervision of the Applicant.

Sd/-

4.8 The reply of the Respondent with respect to the moratorium is invalid and was denied by the Applicant and stated that the protection of moratorium offered under section 14 of IBC is not applicable in the present case in light of arguments highlighted in the application.

4.9 The CD has other Hospital in Visakhapatnam and exclusion of the Mumbai Hospital from the CIRP of CD will not lead to corporate death of CD and the CD will still continue as a going concern. Before the Applicant took over the operations at Mumbai Hospital, the Mumbai Hospital was not being run as a going concern. Majority of the services were shut, almost all employees were put on unpaid leave.

Sd/-

4.10 The contentions of R1 that the Applicant should be estopped from asking exclusion of the Mumbai Hospital because of the applicability of principle of estoppel are denied. The Applicant submits that IBC lays down an exhaustive procedure for conducting a resolution, and the respondent has been conducting the resolution process of the CD in accordance with the procedure. R1 has not taken any steps out of ordinary, basis conduct of the Applicant. Further, the Applicant has no voting rights in the CoC, and only gets invited to the meetings of CoC as observer.

4.11 With respect to the claims for the penalty under the Contract Agreement and the property tax, on one hand the R1 has categorised all claims made by the Applicant

Sd/-

as 'disputed', on the other hand R1 has made partial payment towards the outstanding property tax during CIRP period. The R1 had arrived on the conclusion that Applicants clam in relation to penalty under the Contract Agreement and Property Tax are legitimate. However, he failed to correct its classification for the period prior to the insolvency commencement date, and failed to clearly recognise for the same in the CIRP costs for the period after commencement of insolvency.

5. SUR-REJOINDER by the 1st respondent in response to the rejoinder filed by the Applicant States that:

5.1 The claimed vesting of the Mumbai Hospital in favour of the Applicant cannot occur as asserted. According to Clause 26(k) of the Contract Agreement,

Sd/-

the Applicant must issue a notice for cure in case of a CD breach, and termination can only happen upon failure to rectify the breach. Since the Contract Agreement remains un-terminated and the Mumbai Hospital is still in the CD's possession, automatic vesting cannot occur. Clause 19(j) must be read in conjunction with Section 26(k)'s two-month notice requirement for breach cure to avoid rendering the Contract Agreement scheme futile. The ongoing property tax payment by the CD indicates the continued obligations of both parties under the Contract Agreement. Additionally, the Cure Period did not expire due to the Hon'ble Tribunal's order, preventing automatic vesting. Moreover, as the CD is undergoing CIRP, recovery of its assets is prohibited under the Moratorium

Sd/-

imposed by Section 14 of the Code, thus excluding the Mumbai Hospital from the CIRP asset pool.

5.2 The Applicant has actively suppressed the Corporation's resolutions for taking over the Mumbai Hospital. A resolution was passed on 7 January 2020 for taking over the Mumbai Hospital. However, it is submitted that such a decision was never disclosed the applicant and/or its representative to the R1 and/or the CoC. Contrarily, the Applicant's representative, during the subsequent CoC meetings, has maintained the stance of cooperating with the CIRP without ever disclosing about issuance of Corporation Resolution

Sd/-

5.3 The Applicant has been utilising the resources of Mumbai Hospital solely under the provisions of Disaster Management Act (DM Act) read with COVID Notification and Epidemic Diseases Act, 1897. It is denied that the Applicant took over the operations of the Mumbai Hospital due to incomplete construction and/or under any of the provisions of the Contract Agreement. The Applicant was only using the resources of the Mumbai Hospital for running a dedicated COVID centre under the provisions of DM Act, which is evident from the COVID Notification and correspondence between the applicant and R1.

5.4 While the Supreme Court judgment allowed the Applicant to deal with its properties as per Section 92 and

Sd/-

92A of the MMC Act. It is submitted that the said decision was purely in relation to the creation of fresh interest over its properties. Further, Hon'ble Supreme Court had directed that approval of MCGM will be sought before getting any resolution plan approved by the Adjudicating Authority. The Applicant has time and again, through its representative, assured RP & CoC in various CoC meetings that the Applicant is in support of the CIRP of the CD.

6. The 2nd Respondents in its COUNTER contends that:

6.1 This Bench vide orders dated 16th October 2023 has allowed the Intervention petition No. 3 of 2023 filed by the Committee of Creditors (CoC) through JM Financial

Sd/-

Asset Reconstruction Company Limited, and pursuant there to the CoC, has been impleaded as Respondent No.2. The 2nd respondent while reiterating the averments made by R1 in its counter and sur-rejoinder, contends that;

6.2 A valid mortgage rights were established in favour of the corporate debtors lenders as per the Contract Agreement. Clause 5 permitted the corporate debtor to create a mortgage/charge over the Subject Land and structures to raise financial assistance, with NOCs issued by the Applicant. Clause 23 automatically vests CD's rights and obligations in case of merger or takeover. Clause 19.1(J) specifies that project work vests with the Applicant subject to the lenders' mortgage. Clause 26

Sd/-

ensures CD's leasehold rights go to lenders during the loan's subsistence. Therefore, the Applicant cannot seek exclusion as it contradicts its own NOCs and covenants under the Contract Agreement.

6.3 The Applicant is misinterpreting the Supreme Court Order to suit its own convenience, the Supreme Court has set aside the NCLT order approving the Earlier Resolution Plan only on one count that the resolution plan could not have sought to alter the rights and interest of the Applicant unilaterally without Applicant's approval in terms of Section 92 and 92A of MMC Act. In fact, in para 29 of Supreme Court order, the Supreme Court has clarified that it is only dealing with the MCGM's objection on creation of fresh charge/interests on its

Sd/-

lands, without an approval under Section 92 and 92A of the MMC Act. The Hon'ble Supreme Court did not observe that the CD/its lenders do not have any right in the Subject Hospital or, that RP could not have included Subject Hospital in the CIRP of the CD. By not doing this, the Hon'ble Supreme Court has effectively given its imprimatur for the CIRP to proceed and for a resolution plan to be chosen by the CoC in accordance with the applicable law, subject only to the approval by the Applicant in terms of 92 and 92A of the MMC Act.

6.4 The Applicant cannot unilaterally invalidate or revoke its earlier NOCs without due process of law, especially when third-party rights are involved. In compliance with the Bombay High Court Interim Order

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dated November 9, 2011, the Applicant issued a NOC dated December 3, 2011, but attempted to disclaim the validity of earlier NOCs. Subsequently, the Applicant withdrew the 2011 NOC as recorded in the Hon'ble Bombay High Court's order. Another NOC dated February 15, 2012, was issued by the Applicant, which did not disregard the validity of earlier NOCs. Following the issuance of the 2012 NOC, disputes between the CD and the Applicant were settled via a Memorandum of Understanding dated December 13, 2013, leading to the withdrawal of the Bombay High Court Writ petition. Consequently, the 2006 and 2010 NOCs remain valid, subsisting, and binding on the Applicant. The observation of the Bombay High Court in the Interim Order dated November 9, 2011, stating that the superstructure is

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owned by the CD, still holds ground and remains valid and subsisting, considering the dismissal of the SLP filed by the Applicant

6.5 The payments made by the Applicant were in discharge of its public duties and cannot be considered as investments. These payments were made to convert the Subject Hospital into a dedicated Covid Hospital, as required by the DM Act, and were not for the benefit of the CD or pursuant to any Contract Agreement with the Applicant. While the Applicant seeks exclusion of the Subject Hospital from the CD's CIRP due to its public expenditure, it has also sought reimbursement from the Maharashtra Government for these expenses, as reported in a Times of India article dated March 1, 2022. This

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reimbursement request includes the payments made for the Subject Hospital. The CD should not bear the liability incurred by the Applicant in fulfilling its public duties, which were not related to the contractual agreement between the CD and the Applicant. On one hand, the Applicant is contending that there is no leasehold rights created in favour of CD since there is no formal Lease deed is executed and on the other hand, the applicant has filed its claim before the RP claiming lease rents from 2013 including penalties. The Applicant has also filed an application seeking classification of its clam (on basis of lease rents) as a financial debt. The applicant cannot be permitted to blow hot and cold at the same breath.

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6.6 The CIRP is being conducted in strict compliance with the Supreme Court order and the Applicant will have opportunity to consider the resolution plan at the time of granting approval. In the Invitation for the expression of interest dated 6th January 2023, it is specifically mentioned the observation of the Supreme Court and further request for resolution plans (RFRP) also stipulates that Prospective Resolution Applicant (PRAs) would have to obtain necessary approval of the Applicant. The RFRP already been issued and pursuant thereto, PRAs would approach the Applicant to understand the requirements of the Applicants so that same can be assessed and incorporated in their respective resolution plan. Subsequently, the resolution plan will also be sent to the Applicant for the approval under section 92 and

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92A of the MMC Act, in accordance with the SC order. The Applicant will have ample opportunity to scrutinise the resolution plan that may be submitted by the PRAs to ensure its rights are protected.

7. REJOINDER filed by the Applicant to the Counter filed by the 2nd respondent states that:

7.1 That the 2nd respondent ("Lender") does not have any subsisting rights in the BMC Land or the superstructure. R2 has failed to elaborate on the nature and the scope of the rights and has not produced any finance documents or security documents to elaborate on its claim. It has claimed that valid mortgage was created,

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but it has failed to point to underline security interest on which mortgage was created.

7.2 The Lenders and the Applicant have not entered into any agreement and the Lenders are not party to the Contract Agreement. The mortgage was created over future/potential leasehold interest of the CD, which never fructified. Security interest was created in year 2006 by the CD. In year 2006 the CD only had a limited right of potentially acquiring the leasehold rights. There was no super structure in the year 2006. CD had opted to demolish the earlier superstructure on the Subject Land and rebuild as per its proposal. Thus, the CD could have only created the security interest on the future leasehold rights. Security interest could not have been created over

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rights which CD itself did not have and which were non-existing at the time of creation of the Security Interest. The Lenders has acknowledged that the security interest was only created on the leasehold rights in several documents, including First Supplemental Inter-Se Agreement dated 29th September 2006. R2 accepted the security interest after being fully aware that security interest offered is future contingent interest. However, the CD failed to fulfil the terms and conditions for entering into a lease agreement, and the agreement to lease was never converted into a lease agreement, as a result the CD failed to acquire leasehold rights, and in absence of the leasehold rights, security interest created over leasehold rights has worked itself out.

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7.3 The NOCs issued by the Applicant were conditional on compliance of the terms of the Contract Agreement by the CD failing to perform and observe the covenants under the Contract Agreement, the conditions which were prescribed in the 2006 NOC and 2010 NOC remained unfulfilled and therefore any security interest created in favour of the R2 on the basis of conditional 2006 and 2010 NOC worked itself out.

7.4 The Contract Agreement did not confer any rights on the Lenders. Clause 5 and Clause 17 of the Contract Agreement merely provided that the CD could create security interest subject to express consent of the Applicant, and subject to the terms and conditions of the consent. In view of this conditions in the Contract

Agreement, CD had reached out to Applicant from time to time to seek its consent. Further, the language of the clause expressly provided that the consent of the Applicant will be subject to the terms and conditions of the consent. The IC Resolution and MCGM Corporation Resolution dated 12 February 2004 ("2004 Corporation Resolution") were for approving the execution of the Contract Agreement, and were not for granting the consent for creation of the security interest. The annexures to the IC Resolution and 2004 Corporation Resolution, among other things also specified that the Applicant is not responsible for arranging funds and prescribes consequence of failure by CD in fulfilling its obligations.

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7.5 Lenders continued to enhance loan amount despite the 2011-NOC and 2012-NOC which were issued without prejudice to the rights and contentions of the Applicant pursuant to the Bombay HC order. Despite being aware of the issues raised in the proceedings before the Bombay HC and issuance of the 2011 NOC and 2012 NOC by the Applicant, from the period of 2011 till 2015, new lenders were inducted in the consortium and the loan amounts were further enhanced. Further, approximately 76% of the loan granted by the erstwhile lenders to Corporate Debtor was assigned to JM Financial Asset Reconstruction Company ("JM Finance ARC") in 2017 and 2018. The assignment agreement specifically acknowledged that the lease agreement is yet to be executed by the Applicant due to non-payment of lease

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rent and property taxes. It further acknowledged that the security is created over the leasehold rights, despite acknowledging the fact that there is no lease deed, for conferring such leasehold rights on the Corporate Debtor. The lenders of the Corporate Debtor were fully aware of the conditional nature of the 2006 NOC and that the 2012 NOC was issued without prejudice to the rights and contents of the Applicant, still they took the commercial risk which went sour, and now they are misusing the Insolvency and Bankruptcy Code, 2016 ("Code") to claim interest in the asset where none exist.

7.6 The mortgage created by deposit of title deed in favour of lenders is invalid under provisions of Transfer

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of Property Act, 1882, as mortgage on future leasehold rights have been created by way of deposit of title deeds, which is not valid. The CD attempted to create mortgage by way of deposit of title deeds without actually depositing the title deeds.

7.7 The 2006-NOC and 2010-NOC were issued without corporation resolution as required under Section 92 (c) of the MMC Act, and therefore not binding on the MCGM. Section 92 of the Mumbai Municipal Corporation Act, 1888 ("MMC Act") prescribes procedure governing disposal of the MCGM's property. As per subsection (c), with the sanction of the corporation (i.e., elected body) the Commissioner may lease, sell or otherwise convey

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any immovable property belonging to the corporation. It is submitted that as the 2006 NOC and 2010 NOC were issued by the Commissioner without corporation resolution as required under section 92(c), such NOC are not binding on the Applicant.

7.8 Vesting of superstructure is independent of termination of Contract Agreement, which automatically triggers from the date of breach of the agreed terms. The cure period as prescribed under Clause 26(k) of the Contract Agreement is in relation to termination of the Contract Agreement and does not apply to vesting which automatically triggers from the date of the breach of the agreed terms. The superstructure vested in the Applicant

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from the date of the breach of the Contract Agreement i.e. on 24 April 2013 when the CD failed to complete the project within time specified under the Contract Agreement. Thus, the submissions by the R2 that CD has subsisting interest in the Subject Land and Mumbai Hospital is misplaced and does not have any merits in law.

7.9 The contentions of R/2 that the Hon'ble High Court of Bombay recognized the rights of the CD under doctrine of dual ownership, the superstructure is owned by the CD are misplaced and invalid. When the Bombay HC Order was pronounced i.e. on 9 November 2011, the project period was still continuing and it was only on 24th April, 2013 that the CD lost its rights and interest in the

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superstructure. Thus, when the Hon'ble High Court of Bombay observed that the superstructure belonged to the CD, it was in the specific context of rights of CD during the project period and the observation does not hold true today, as the project period has expired. Pursuant to Clause 19(j) of the Contract Agreement, rights on the superstructure have vested in the Applicant.

7.9 The contentions of the R/2 that pursuant to the 2012 NOC, the CD and the Applicant settled their disputes and entered into a MOU dated 13 December 2013 in view of this settlement, the Corporate Debtor withdrew the Writ Petitions are denied. It is submitted that there were two

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issues before the Hon'ble High Court of Bombay, namely:

(i) Failure of Corporate Debtor to provide free medicines/treatment to 20% of the economically weak patients as per Contract Agreement; and

(ii) denial of NOC by the Applicant for raising finance from Axis Bank Limited.

The Settlement pursuant to which MOU was entered into was only in relation to reserving 20% beds for economically weaker section of the society and not in relation to the conceding on validity/invalidity of NOCs.

7.10 The contention of the Respondents that the Applicant cannot be permitted to take contrary stand and

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therefore estopped from seeking exclusion of the Mumbai Hospital is invalid and principle of estoppel is not applicable in present case. This ground was raised by the Respondents in the Hon'ble Supreme Court. After due consideration and review of the conduct of the parties, Hon'ble Supreme Court had dismissed the objections. Despite the dismissal by the Supreme Court, R/2 raised the same contention. The representative of CoC meetings has merely participated in the CoC meetings as an observer and has no voting rights. Without prejudice, the Applicant has assured its cooperation in completing the resolution process, however its assurance cannot be termed as waiver of its rights to protect its contours of the applicable law and continues to do the same. The Applicant which acts on the basis of the resolution passed

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by the elected body in accordance with procedure prescribed under the MMC Act, cannot be bound by the representation of representative of the Applicant absence such resolution.

7.11 The contention of the R/2 that the Mumbai Hospital constitute assets within the meaning of Section 18(f) and Section 25(2) are incorrect, as per Explanation of Section 18, assets owned by third party in possession of Corporate Debtor held under contract agreement are specifically excluded for assets of Corporate Debtor to be included in the information memorandum.

8. In the light of the contest as afore mentioned, the points that emerges for my consideration are:

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POINTS:

(1) Whether the rights conferred/flown in favour of the corporate debtor and the lenders under the contract agreement in respect of MCGM's land and the super structure built there in, does not constitute "asset" within the meaning of Section 18(f) and Section 25(2)(a) of I&B Code? *if so*, inclusion of the same in the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor by the resolution professional is sustainable?

(2) Whether breach of subject contract agreement by corporate debtor automatically *vests* the superstructure raised by the corporate debtor in MCGM, even while the contract agreement is in *force*, and when the Corporate Debtor is undergoing CIRP?

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9. I have heard, Shri Vivek Reddy, learned Senior Counsel for applicant; Shri S. Niranjan Reddy, learned Senior Counsel for 1st respondent / Resolution Professional, and Shri R. Sankaran Narayanan, learned Senior Counsel for 2nd respondent / Committee of Creditors. Perused the record, the written submissions and the case law.

POINT (1) :

> Whether the rights conferred/flown in favour of the corporate debtor and the lenders under the contract agreement in respect of MCGM's land and the super structure built there in, does not constitute "asset" within the meaning of Section 18(f) and Section 25(2)(a) of I&B Code? *if so*, inclusion of the same in the Corporate Insolvency Resolution Process

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(CIRP) of the Corporate Debtor by the resolution professional is sustainable?

10. ***The crux of the submissions.***

10 (I). Mr. Vivek Reddy, the Learned Senior Counsel for the Applicant, placing reliance, inter alia, on various terms and conditions of the Contract Agreement entered between the applicant and the corporate debtor dated 20/12/ 2005, the correspondence between the Applicant and the corporate debtor, besides on the ruling of Supreme Court, in the matter between MCGM v. Abhilash Lal, (2020) 13 SCC 234, vehemently, contended that neither the contract agreement dated 20/12/2005 whereunder the land of 77055 sq. mtrs, building, drains, paths etc ,in Andheri, Mumbai, herein

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after referred to as "MCGM Land", which absolutely belongs to Municipal Corporation of Greater Mumbai, for short 'MCGM', was agreed to be leased out to the corporate debtor, besides the 'super structure' built there in by the corporate debtor to run a hospital, herein after referred as 'Mumbai Hospital', will not convey/confer any right or interest in respect of the MCGM's land and the superstructure there on, in favour of the corporate debtor, and as such, inclusion of the said assets in the Request for Resolution Plan, herein after referred to as 'RFRP', for the insolvency resolution of the corporate debtor by the resolution professional, is unsustainable and untenable both under the law and on facts, hence sought for the exclusion of said properties from the RFRP of CD. In his endeavour to buttress the afore stat

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contentions, Learned Senior Counsel has primarily contended that:

10 (II). The corporate debtor holds no rights over the superstructure, namely, the Mumbai Hospital, as according to the Ld. Sr. Counsel the Contract Agreement, supra, between the applicant and the corporate debtor, explicitly vests ownership of the superstructure in MCGM, as expressed in Clause 19(J) of Contract Agreement (supra), which is as below,

> *"19(J): SHCL shall develop the plot for sanctioned user and obtain B.C.C. from E.E.B.P or any other Competent Authority appointed by the Commissioner. In case of failure in completing the Project within the time period for any breach of SHCL, the EMD as well as deposit, fees, premium paid while approval to the plans, lease rent, if any paid till that time shall be forfeited by the owner and the project work as completed shall vest with the Corporation free of cost subject to the mortgage in favour of the Lenders. The Owner shall not be liable to pay compensation or damage to SHCL. However, in case of situation beyond control of SHCL and Force Majeure, the Commissioner, may consider the extension of time, on submission of the unconditional request to that effect by SHCL."*

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10 (III) According to the Ld. Sr. Counsel, it is clear from the above clause that, the said clause per se, did not confer any right or interest in respect of the MCGM's land and the superstructure there on, in favour of the corporate debtor.

10 (IV) Ld. Sr. Counsel further contends that, Hon'ble Supreme Court in MCGM, supra. quantified the rights enjoyed by the CD after examining the various clauses in the Contract Agreement, and found that the Contract Agreement dated 20.12.2005 is only an *agreement to enter into a lease*, *not a lease itself* and *only conferred a right of specific performance on the CD* as on the date of the agreement, hence the *inclusion* of MCGM's land and Mumbai Hospital' in the RFRP by t

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RP and the CoC of the CD is in complete *violation* of the above ruling of Hon'ble Supreme court. In support of this submission Ld. Sr. Counsel relied on *paragraph 36* of the said judgment, wherein it was held that,

> "*36. It is evident from a plain reading of Section 92(c), that the Commissioner (of MCGM) is empowered to, with the sanction of the corporation, "lease, sell or otherwise convey any immovable property belonging to the corporation." It is not in dispute that the original contract entered into on 20122005 contemplated the fulfilment of some important conditions, including firstly, the completion of the hospital project within a time frame; and secondly, timely payment of annual lease rentals. It is a matter of record that the hospital project was scheduled to be completed by 24th April, 2013. MCGM cites Clause 15(g) of the contract to urge that within a month of this event, i.e. completion of the hospital, a lease deed had to be executed. This event never took place. Therefore, the terms of the contract remained, in the opinion of the court, an agreement to enter into a lease; it did not per se confer any right or interest, except that in the event of MCGM's failure or omission to register the lease (in the event SevenHills had complied with its obligations under the contract), it could be sued for specific performance of the agreement, and compelled to execute a lease deed. That event did not occur; Seven Hills did not complete construction of the 1600 bed hospital. Apparently, it did not even fulfil its commitment, or pay annual lease rentals. In these circumstances, MCGM was constrained to issue a show cause notice before the insolvency resolution process began, and before the moratorium was declared by NCLT on 13th March, 2018. According to MCGM, in terms of Clause 26 (of the contract) even the agreement stood terminated due to default by Sev*

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> *Hills. This court does not propose to comment on that issue, as that is contentious and no finding has been recorded by either the adjudicating authority or the NCLAT."*

10 (V) Ld. Sr. Counsel further contended that the RP cannot seek to convey "a higher set of rights" than what Hon'ble SC expressly recognised to be the rights of the CD, in re, MCGM, supra. Ld. Sr. Counsel further contends that, since the CD failed to complete construction and fulfil its obligations under the Contract Agreement, even the limited right to sue for "specific performance" cannot be enforced/extinguished. According to the Ld. Sr. Counsel, the CD's rights are in the nature of a licence and Hon'ble Supreme Court, has held that a mere licence does not create any specific interest in immovable property. Therefore, the CD has neither ownership rights nor any leasehold rights.

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10 (VI) Ld. Sr. Counsel, also contended that, in the light of the finding of Hon'ble Supreme Court in re, MCGM, supra, that the CD has no interest in the property, this Tribunal has no jurisdiction to deal the subject assets.

10 (VII) Ld. Sr. Counsel contends that, MCGM has a statutory mandate under the MMC Act, to take all actions necessary to protect public health in Mumbai, and inclusion of the Mumbai Hospital in the CIRP of the CD by RP, since will prevent MCGM from fulfilling its statutory functions under the MMC Act, the same in the public interest requires to be delated from the RFRP.

10 (VIII) As regards the 'mortgage rights' claimed by the Lenders as well as by the corporate debtor, Ld

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Senior Counsel contends that the mortgage has originated from prospective leasehold rights that never materialized, as such the mortgage claimed the by CD is not legally enforceable against MCGM. Ld. Sr. Counsel also contended that MCGM lacks the authority to mortgage its properties hence the mortgage is invalid. As regards No Objection Certificate (NOC), issued in this regard, Ld. Sr. Counsel contends that, the Applicant issued conditional NOCs, i.e. subject to the CD's compliance with the terms of the Contract Agreement. However, since the CD failed to complete the project within the stipulated time and breached other terms of the Contract Agreement as well, the NOCs ceased to be operative. Therefore, according to the Ld. Sr. Counsel, the lenders have assumed the risk

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that the mortgage would be subject to the CD's compliance with the Contract Agreement.

11. In support of this plea, Ld. Sr. Counsel relied on the following rulings;

(i) ***Revenue Authority v. Sudarsanam Picture, 1967 SCC OnLine Mad 88*** that security cannot be created over rights which are non-existent at the time of creation of the mortgage. The relevant para is reproduced hereunder:

> *"The word "conveyance" is used in this definition in a wide sense so as to include sale, mortgage, charge, lease etc. As will be seen presently it is settled law that while a transfer of property may take place not only in the present, but also in the future, the property must be in existence at the time of the transfer, for an instrument to be a deed of transfer. The words "in present or in future" in the definition, it is manifest, qualify the word "convey" immediately preceding "property" and not the word "property". The conveyance may be in present or in future, but the conveyance should be of property in existence. A purported transfer of property, not in existence at the time of the contract, can only operate as a contract to be performed in future."*

12. In re MCGM, Supra, relied on para 39 of the said judgment which held that 'Nothing in the Contract Agreement can override this statutory requirement under the MMC Act,' therefore, even the mortgage is not valid.

> *"39. The principle that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all, articulated in Nazir Ahmad v. King Emperor [Nazir Ahmad v. King Emperor, 1936 SCC OnLine PC 41 : (1935-36) 63 IA 372 : AIR 1936 PC 253 (2)], has found widespread acceptance. In the context of this case, it means that if alienation or creation of any interest in respect of MCGM's properties is* ***contemplated*** *in the statute through a particular manner, that end can be achieved only through the prescribed mode, or not at all."*

13. Mr. S. Niranjan Reddy, Ld. Sr. Counsel, for the 1st respondent/ resolution professional, while *refuting* the aforementioned contentions of the Applicant, at the outset, contended :

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(a) That the corporate debtor owns the superstructure of the Mumbai Hospital, besides possesses variety of 'rights' & 'interests' in respect of MCGM Land where the super structure has been raised by the CD, and any right favouring the CD requires to be included in the CIRP as per the provisions of the I&B Code, as such exclusion of the above properties from the RFRP if allowed, would amount to violation of I&B Code.

(b) That the Applicant has selectively relied on the few observations made by Hon'ble SC in re, MCGM, supra, and sought for the exclusion of MCGM land and the super structure raised therein by the corporate debtor. According to the Ld. Sr. Counsel, Hon'ble SC never considered the is

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whether or not the Mumbai Hospital land and the super structure raised therein are to be included or excluded from the insolvency resolution of the corporate debtor, as the Hon'ble Supreme Court only considered the need to comply the procedure mandated under Section 92 & 92A of the BMC Act, while giving approval to the resolution plan concerning the assets of the MCGM.

(c) That the corporate debtor retains ownership of the superstructure of the Mumbai Hospital. Therefore, the exclusion of the Mumbai Hospital from the CIRP is unwarranted. He invoked the legal doctrine of dual ownership recognized in India, wherein ownership of the superstructure on

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leased land remains with the lessee unless explicitly stated otherwise in the contract.

14. In support of his contention, Mr. S. Niranjan Reddy, Ld. Sr. Counsel, for the 1st respondent relied on the following rulings:

(i) K.A. Dhairyawan (Dr) v. J.R. Thakur (AIR1958 SCR 789), where in it was held that,

> *"The various clauses of the lease in the present case make a clear distinction between the demised premises and the building, by using the words " demised premises including the building to be erected thereon It was, however, urged on behalf of the respondents that cl. I of the lease indicated that what was demised by the lease was not only the land but also the building to be constructed thereon, because the opening words of el. I make it clear that in consideration of the expenses to be incurred by the lessees in erection and completion of the building and the rent reserved the lessors demised to the lessees the land mentioned in the Schedule. The important words in this clause were " to hold the premises" and not to hold the demised premises. The word " premises " covered both the land and the building to be erected thereon…………… If the ownership in the building*

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was intended to be with the lessors, there was no occasion for providing that the lessees would get no compensation when the building was handed over. This provision rather suggests that the ownership in the building was with the lessees.

(ii) Prema and Ors. v. Diocese of Mangalore and Ors. by the Hon'ble High Court of Karnataka, wherein it was held that :

> "*30. The next contention raised by the learned senior advocate is with regard to the dual ownership over the land and the superstructure. when the appellants are successful in proving that they are the owners of the superstructure in question and when they admit the ownership of the respondent-plaintiff over the land, definitely it is nothing but dual ownership. The co-ordinate Bench of this Court in M/s.Lakshmi Enterprises (supra) had an occasion to deal with the question of dual ownership where the petitioner therein claimed to have built a building on the land leased in his favour and claimed the ownership over the building under the doctrine of dual ownership. This Court referring to the decision of Privy Council in Narayan Das Khetty Vs Jatindra Nath Roy Chowdary and others6, held that unlike in England, in India there can be dual ownership, in the sense, that the land may belong to one person and the building thereon may belong to another person. This Court referring to its earlier decisions and also the decision of the Hon'ble AIR 1927 privy council 135 Apex Court came to the conclusion that by virtue of doctrine of dual ownership, the petitioner therein has became the owner of the building.*"

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15. Mr. R. Sankarnarayanan, Ld. Sr. Counsel for the 2nd respondent/COC, while supporting the submissions made on behalf of the 1st respondent, additionally, contended that:

(a) A valid and irrevocable mortgage rights over the Mumbai Hospital and the MCGM Land have been created in favour of the lenders of the corporate debtor in terms of the Contract Agreement with the prior consent of Applicant. According to the Ld. Sr. Counsel, these 'indefeasible' and 'independent' 'bundle of rights' over the Mumbai Hospital including the MCGM Land constitute "property" within the meaning of the expression under Section 3(27) of IB Code and as the "property' in normal

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parlance is also called as "asset" the same certainly constitute the 'assets' of the corporate debtor within the meaning of Section 18(f) and Section 25(2)(a) of I&B Code.

(b) In support of this plea, Ld. Sr. Counsel relied on Victory Iron Works Ltd. vs Jitendra Lohia , 2023 Live Law (SC), wherein it was held that,

> *"38. The main ground of attack of the appellants to the impugned orders of the NCLT and NCLAT is that by virtue of the Explanation under Section 18 of the Code and also by virtue of the judicial pronouncements, the disputes between the Corporate Debtor and the third-party lessee/licensee are not amenable to the jurisdiction of the authorities under the Code.*
>
> *39. But as rightly pointed out by the learned counsel for the Resolution Professional, the Explanation under Section 18 begins with a caveat namely "for the purposes of this Section". Therefore, the exclusion of assets owned by a third-party, but in the possession of the Corporate Debtor held under contractual arrangements, from the definition of the expression "assets", is limited to Section 18. In other words, the Explanation under Section 18 does not extend to Section 25.*

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> *40. It must be mentioned here that the Explanation was originally limited to "the sub-section" but by Act 26 of 2018, the word "sub-section" was substituted by the word "section". Therefore, the Explanation under Section 18 will not provide an escape route for the appellants. In any case, the bundle of rights and interests created in favour of the Corporate Debtor may even tantamount to creation of an implied agency under Chapter-X of the Indian Contract Act, 1872 and such agency may not even be amenable to termination in view of Section 202 of the said Act, since the creation of the same in favour of the Corporate Debtor was coupled with flow of consideration."*

16. Ld. Sr. Counsel for the CoC further contended that Applicant has made a false representation, with an aim to mislead this Tribunal, by claiming that they have revoked the 2006 NOC by its subsequent NOC dated 3rd December 2011, even while being in complete knowledge that the so-called revocation of 2011 NOC was on account of amicable settlement of all the purported issues /disputes the applicant had with the CD by way of MOU dated 13th December 2013.

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17. ANALYSIS

A comprehensive **'analysis'** of the contractual rights that exist within the Contract Agreement dated 20/12/005, since *essential* to determine the **'rights'** of the corporate debtor regarding the MCGM land and Mumbai Hospital, and their relevance to the ongoing CIRP of the corporate debtor, before I proceed to discuss the point, I wish to usefully refer the relevant **clauses** of the Contract Agreement, whereunder certain rights and obligations between the parties have been created, besides the applicable **provisions of I&B code**, extracted hereunder.

Clause 5:

> *"The Owner hereby agrees to permit and allow the SHCL on the terms and conditions to be approved by the Owner which permission/approval shall not be unreasonably withheld, to mortgage and/or create charge on the Schedule Property and/or SHCL's leasehold right thereon with or without the Buildings on the Schedule Property during the lease period*

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or prior thereto i.e. during the project period) in any manner whatsoever either in whole or in part as SHCL may require form time to time to the satisfaction of the lenders, for the purpose of raising financial assistance from the Financial Institutions/Banks/NBFCs/Co-operative Societies/ Trust/ HUF/Proprietary Firm and any other lending individuals/institutions, whether incorporated or not, for any purpose for and in connection with the said Project including for the purpose of commencing carrying out and completing the construction of the Building/s. setting up of Hospital, Medical Educational institutions commercial and other establishments within the Frame work of Development Control Regulations in force, in such buildings, their running, maintenance, renovation, reconstruction etc. For this purpose, the SHCL shall have to apply for permission to mortgage and/or create charge to Municipal commissioner two months advance and if the approval is not received within two months from the date of receipt of such a request by the Commissioner, it will be deemed as approval and SHCL shall be at liberty to create the mortgage of the Schedule Property in favour of the lenders without any recourse to the owner."

Clause 6:

"the SHCL shall be entitled to develop the Schedule Property as a multi super specialty Hospital and run the same either by keeping existing building by raising additional floors over the existing building of the Cancer Hospital altogether verifying the structural capacity of the same or propose altogether new building and construct new building or buildings thereon under its control and supervision by utilizing maximum permissible FSI and by securing approval of the plans as per rules, on the terms and conditions mentioned in the Letter of intent dated 31st March 2004."

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Clause 14 (b):

"The SHCL shall be allowed to assign transfer or hand over or sublet the possession of the said Schedule Property duly constructed on the plot of land or any part thereof to any other organization with the permission of the Commissioner, SHCL shall have to apply for permission to Municipal commissioner two months in advance, which permission shall not be unreasonably withheld and if the approval is not received within two months from the date of receipt of such a request by the Commissioner, it shall be deemed as approved."

Clause 14 (c):

"SHCL shall run the proposed Hospital which shall be under the entire control of SHCL, SHCL shall appoint the required staff in various categories so as to run it as General Hospital Super-Specialist Hospital and the management of the same will be under the control of SHCL."

Clause 17

"The SHCL is hereby allowed to sublease, mortgage and create a charge on the said plot and buildings either in part of in total to the satisfaction of lenders for the purpose of raising financial assistance to commence, progress, complete, commission and run the hospital complex and other commercial activities during the Pendency of the lease period, from the financial institutions/FIIS/Banks/Mutual funds/Cooperative Societies, Trusts/individuals/HUFs/Partnership firms, other lending institutions and lenders of any constitution for the said Project with the prior permission of the commissioner, which permission shall not be unreasonably withheld, during the Project period and /or during the subsistence of the lease and the Owner shall be kept informed of such deals aft

permission by the Commissioner and SHCL shall file relevant documentary evidence to that effect for record of the owner. The permission which shall be granted by the Owner to SHCL to mortgage the Schedule Property in favour of the lender (s) for raising finance will remain irrevocable and irreversible during the tenure of the Project period and lease period except when the contract is terminated."

Relevant sections of the I&B Code, 2016:

Section 18(1)(f) of the Code:

"Duties of interim resolution professional.
18. (1) The interim resolution professional shall perform the following duties, namely: -

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

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Explanation. —For the purposes of this sub-section, the term "assets" shall not include the following, namely: —

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

Section 25(2)(a):

"Duties of resolution professional.
25(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: —
(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;"

Section 3(37):

"3(37). words and expressions used but not defined in this Code but defined in the Indian Contract Act, 1872, the Indian Partnership Act, 1932, the Securities Contact (Regulation) Act, 1956, the Securities Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Limited Liability Partnership Act, 2008 and the Companies Act, 2013, shall have the meanings respectively assigned to them in those Acts."

Section 3(27):

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> *"3. Definitions. —In this Code, unless the context otherwise requires,— xxx*
> ***(27) "property"** includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property."*

18. On a bare perusal of the clauses in the contract agreement as above mentioned, it is evident that under the above contract the corporate debtor possesses *a variety of rights, encompassing developmental rights, the right to mortgage, the right to operate the hospital and the prerogative to sublet.* To be precise, Clause 5 of the Contract Agreement delineates the corporate debtor's right to mortgage and/or create a charge on the Schedule Property (including the Mumbai Hospital) with the approval of MCGM for the purpose of raising financial assistance. Clause 6 provides the corporate debtor with

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the entitlement to develop the Schedule Property as a multi super specialty Hospital and operate the same. Clause 14(b) and Clause 17 grant the corporate debtor the right to sublease, right to mortgage, and right to create *charge* on the Property referred in the schedule of the Contract Agreement, for the purpose of raising financial assistance and carrying out commercial activities.

19. It is pertinent here in to note that, in terms of section 18(1) (f) of I&B Code, the *interim resolution* professional shall, take control and custody of any **'asset'** over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor. It is pertinent to note that the word **"asset"** referred in Sections 18(1)(f) or 25(2) (a) of I&B Code 2016, is not ***defined*** either in

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Section 3 or in Section 5 or in Section 79 of I&B Code, even though Section 79(14) defines the expression "***excluded assets".*** It is also essential herein to note that, the Explanation under Section 18 of I&B Code, *excludes* the *assets owned by a third party* in the possession of the Corporate Debtor held under contractual arrangements from the purview of the definition of the term "assets" within the meaning of Section 18 of the Code. On this aspect Hon'ble Supreme Court *in re*, Victory Iron Works, *supra*, held that,

> *"40. It must be mentioned here that the Explanation was originally limited to "the sub-section" but by Act 26 of 2018, the word "sub-section" was substituted by the word "section". Therefore, the Explanation under Section 18 will not provide an escape route for the appellants. In any case, the bundle of rights and interests created in favour of the Corporate Debtor may even tantamount to creation of an implied agency under Chapter-X of the Indian Contract Act, 1872 and such agency may not even be amenable to termination in view of Section 202 of the said Act, since the creation of the same ir*

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favour of the Corporate Debtor was coupled with flow of consideration". (Emphasis supplied)

Section 3(27) of the I&B Code, which *defines* the word "property" is as follows:

> *"3(27) "property" includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property."*

Section 3(37) of I&B Code, states that,

> *"the words and expressions used but not defined in this Code but defined in the Indian Contract Act, 1872 (9 of 1872), the Indian Partnership Act, 1932 (9 of 1932), the Securities Contract (Regulation) Act, 1956 (42 of 1956), the Securities Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993), The Limited Liability Partnership Act, 2008 (Act 6 of 2009)The Companies Act, 2013 (Act 18 of 2013), shall have the meanings respectively assigned to them in those Acts."*

20. On the aspect whether or not a 'developmental right' in favour of the corporate debtor over an

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'immovable property' owned by a third party, can be considered as an **'asset'** within the meaning of section 18(1)(f) and section 25(2)(a) of I&B Code, 2016, Hon'ble Supreme Court of India, in *Victory Iron Works vs. Jitendra Lohia & Ors 2023 SCC OnLine SC 260,* after having referred to the *following documents* in paragraph 30 of its order,

> *"30. The documents to which useful reference can be made are: (i) MoU dated 24.01.2008; (ii) Shareholders Agreement dated 24.01.2008; (iii) Sale Certificate dated 29.01.2008; (iv)* ***Development Agreement*** *dated 16.06.2008; (v) Memorandum Recording Possession dated 02.03.2010 executed by the shareholders of Energy Properties; (vi) Memorandum Recording possession dated 24.06.2010 executed by Energy Properties and (vii) Leave and License Agreement dated 19.08.2011. Let us now see the story as revealed by each of these documents."* (Emphasis supplied)

In paragraph 39 of its order held that:

> *"39. Therefore, it is not very difficult to conclude, that a bundle of rights and interests were created in favour of the Corporate Debtor, by a series of documents such as (i) the MoU dated 24.01.2008; (ii) the shareholders agreement*

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*dated 24.01.2008; (iii) the flow of the consideration from the Corporate Debtor to the UCO Bank and to Energy Properties; (iv) the Development Agreement dated 16.06.2008; (v) the **Memorandum** Recording Possession dated 02.03.2010 executed by the original shareholders of Energy Properties; (vi) the **Memorandum** Recording Possession dated 24.06.2010 executed by Energy Properties in favour of the Corporate Debtor; and (vii) the Leave and License Agreement primarily executed by the Corporate Debtor in favour of Victory, which was merely confirmed by Energy Properties as a confirming party. Some of these bundles of rights and interests, partake the character and shade of ownership rights. Therefore, these rights and interests in the immovable property are definitely liable to be included by the Resolution Professional in the Information Memorandum and the Resolution Professional is duty bound under Section 25(2)(a) to take custody."* (Emphasis supplied)

21. Thus, it is overwhelmingly clear that, ***developmental rights in the immovable property are definitely liable to be included by the Resolution Professional in the Information Memorandum and the Resolution Professional is duty bound under Section 25(2)(a) to take custody of the same.***

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In the same ruling it is further held that,

> *"35. Therefore, the development rights created in favour of the Corporate Debtor constitute "property" within the meaning of the expression under Section 3(27) of IBC. At the cost of repetition, it must be recapitulated that the definition of the expression "property" under Section 3(27) includes "every description of interest, including present or future or vested or contingent interest arising out of or incidental to property". Since the expression "asset" in common parlance denotes "property of any kind", the bundle of rights that the Corporate Debtor has over the property in question would constitute "asset" within the meaning of Section 18(f) and Section 25(2)(a) of IBC.* (emphasis supplied)

22. Since much of a muchness to *Victory Iron Works, supra,* the subject contract agreement indisputably provides for ***rights encompassing developmental rights, the right to mortgage, the right to be in possession and operate the hospital and the prerogative to sublet***, it can unhesitatingly be said that these ***'rights' constitute "property" of the corporate debtor*** within the meaning of the expression under Section 3(27) of I&B Code and

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since the expression "asset" in common parlance also denotes **"property of any kind"**, as held in paragraph 35 of the ruling in Victory Iron Works, the ***above bundle of rights*** that the Corporate Debtor has over the properties, *namely,* MCMG land and the Superstructure raised by the corporate debtor therein, would constitute **"asset"** within the meaning of Section 18(f) and Section 25(2)(a) of I&B Code.

23. Having thus said, it goes without saying that, the resolution professional is duty bound to *protect and preserve* these 'assets' in the RFRP, under Section 25(2)(a) of I&B Code, for the due resolution of the insolvency of the corporate debtor

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24. However, Mr. Vivek Reddy, the Ld. Sr. Counsel for the applicant mainly relying on the observation '*the corporate debtor doesn't have any rights over MCGM Land or its superstructure, except to seek specific performance of contact*', by Hon'ble Supreme Court, in paragraph 36 of the order *in re*, MCGM Vs Abhilash Lal, sturdily contended that, the so called claim of 'assets', since is based on the very same 'MCGM Land' and 'the Superstructure' in which property Hon'ble Supreme Court held that the corporate debtor doesn't have any right, except the right to seek specific performance, the claim of exitance of 'asset' within the meaning of section 3 (27) of the I&B Code, apart from being *unfounded* is '*non est'*, in the eye of law, *besides* inclusion of the same in the RFRP, tantamount to violation of the ruling *in re*

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MCMG, and as such the resolution professional be directed to exclude the same from the RFRP.

25. Since above submission of the Ld. Sr. Counsel is based on the observations of Hon'ble Supreme Court, contained in paragraph 36 of the order *in re*, MCGM Vs Abhilash Lal, for better appreciation of this contention, I would like to first refer to paragraph 36 of the order, which is extracted herein below.

> *"36. It is evident from a plain reading of Section 92(c), that the Commissioner (of MCGM) is empowered to, with the sanction of the corporation, "lease, sell or otherwise convey any immovable property belonging to the corporation." It is not in dispute that the original contract entered into on 20-12-2005 contemplated the fulfilment of some important conditions, including firstly, the completion of the hospital project within a time frame; and secondly, timely payment of annual lease rentals. It is a matter of record that the hospital project was scheduled to be completed by 24th April, 2013. MCGM cites Clause 15(g) of the contract to urge that within a month of this event, i.e. completion of the hospital, a lease deed had to be executed. This event never took place. Therefore, the terms of the contract remained, in the opinion of the court, an agreement to enter into a lease; it did not per se confer any right or interest, except that in the event of MCGM's failure or omission to register the lease (in the event Seven Hills had complie*

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with its obligations under the contract), it could be sued for specific performance of the agreement, and compelled to execute a lease deed. That event did not occur; Seven Hills did not complete construction of the 1600 bed hospital. Apparently, it did not even fulfill its commitment, or pay annual lease rentals. In these circumstances, MCGM was constrained to issue a show cause notice before the insolvency resolution process began, and before the moratorium was declared by NCLT on 13th March, 2018. According to MCGM, in terms of Clause 26 (of the contract), even the agreement stood terminated due to default by Seven Hills. This court does not propose to comment on that issue, as that is contentious and no finding has been recorded by either the adjudicating authority or the NCLAT."

Hon'ble Supreme Court, in paragraph 36 of the very same ruling, held that:

"Seven Hills did not complete construction of the 1600 bed hospital. Apparently, it did not even fulfill its commitment, or pay annual lease rentals. In these circumstances, MCGM was constrained to issue a show cause notice before the insolvency resolution process began, and before the moratorium was declared by NCLT on 13th March, 2018. According to MCGM, in terms of Clause 26 (of the contract), even the agreement stood terminated due to default by SevenHills. This court does not propose to comment on that issue, as that is contentious and no finding has been recorded by either the adjudicating authority or the NCLAT."
(Emphasis is supplied)

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A bare perusal of the 'conclusion' part of paragraph 36 *supra,* makes it clear that the finding that, the corporate debtor 'did not have any right, except the right to seek specific performance', was not **'conclusive'**, in view of the following observations.

> *"In these circumstances, MCGM was constrained to issue a show cause notice before the insolvency resolution process began, and before the moratorium was declared by NCLT on 13th March, 2018. According to MCGM, in terms of Clause 26 (of the contract), even the agreement stood terminated due to default by Seven Hills. This court does not propose to comment on that issue, as that is contentious and no finding has been recorded by either the adjudicating authority or the NCLAT".*

26. That apart, it is also important to note that, Hon'ble Supreme Court, in the above ruling, was *primarily* concerned with 'examining' the 'procedural methodologies' employed by this Tribunal and Hon'ble NCLAT, while the *dismissing* MCGM's objection

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regarding the lawful treatment of its property. This view of mine is fortified by the observations made in para 29 of the Order, which is as below.

> *"29. In this case, it is not the provisions of the IBC which this court has to primarily deal with; it is rather whether the process and procedure adopted by the NCLT and later the NCLAT, in overruling MCGM's concerns and objections with regard to the treatment of its property (i.e. the lands) is in accordance with law"*

27. It is pertinent to note that, even while observing that, *"Therefore, the terms of the contract remained, in the opinion of the court, an agreement to enter into a lease; it did not per se, confer any right or interest, except that in the event of MCGM's failure or omission to register the lease (in the event Seven Hills had complied with its obligations under the contract), it could be sued for specific performance of the agreement, and compelled to execute a lease deed,"* Hon'ble Supreme Court, did not

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deal with or comment on the lenders **'mortgage right'** which existed/emanated under the very same contract agreement. It is *trite* to say, that the *ratio* of a case has to be deduced from its facts, the reasons the court gave for reaching its decision, and the decision itself. The facts of the present case, unlike *in re*, MCGM vs Abhilash Lal, present a *different factual matrix*. To wit/repeat, in pursuance of the right to **'mortgage'** the MCMG land and the *super structure* to be raised therein, for raising finance during the 'project completion period' i.e. even before entering into a formal lease between the applicant and the corporate debtor, the lenders have claimed mortgage over MCGM land and the superstructure raised therein by the corporate debtor. Thus, a third party, *namely*, ***lender's right*** in the above properties has clearly emerged. In m

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discussion in the preceding paragraphs, relying on the ruling *in re*, Victory Iron Works, *supra,* I have held that the "mortgage' right constitute "property" within the meaning of the expression under Section 3(27) of IB Code. Even, for argument sake, if I accept the above submission of the Ld. Sr. Counsel for the applicant, yet the said finding applies, ***only to the 'rights of the corporate debtor' as against the applicant,*** and ***not against the lenders***, in as much as the Hon'ble Supreme Court, **only dealt with the breach obligations under the contract agreement by the corporate debtor towards the applicant besides the remedy if any, to the corporate debtor** under the said contract agreement as against the applicant. Hon'ble Supreme Court neither discussed nor dealt with the third parties/lenders

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mortgage rights under the very same contract agreement which it found to have been breached by the corporate debtor, as is evident from the observations in para graph 36, extracted here under.

> *"It is a matter of record that the hospital project was scheduled to be completed by 24th April, 2013. MCGM cites Clause 15(g) of the contract to urge that within a month of this event, i.e. completion of the hospital, a lease deed had to be executed. This event never took place. Therefore, the terms of the contract remained, in the opinion of the court, an agreement to enter into a lease; it did not per se confer any right or interest, except that in the event of MCGM's failure or omission to register the lease (in the event Seven Hills had complied with its obligations under the contract), it could be sued for specific performance of the agreement, and compelled to execute a lease deed".*

Therefore, extending /applying a finding rendered basing on the facts and 'rights' concerning *exclusively* to the corporate debtor, to the third party lenders, in order to 'crush' the lenders *legitimate* right to get included the MCMG land and the structure built therein in the ongoing

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resolution process of the corporate debtor, which right undoubtedly emanated under the very same contract agreement, in my considered opinion amount to carrying out a task which Hon'ble Supreme Court *neither* intended nor meant in its order, *supra*, besides impermissible.

Therefore, in the light on my discussion as above, I am not willing to *concur* with the submission of the Ld. Sr. Counsel for the applicant, that inclusion of the MCGM land and the Superstructure raised therein in the RFRP, is in violation of the order of Hon'ble Supreme Court, *supra*, in untenable and unacceptable both on facts as well as on law.

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As regards the other contention that, in the light of the following observations in para 47 of the ruling in re, MCGM,

> *"47. In the opinion of this court, Section 238 cannot be read as overriding the MCGM's right – indeed its public duty to control and regulate how its properties are to be dealt with. That exists in Sections 92 and 92A of the MMC Act. This court is of opinion that Section 238 could be of importance when the properties and assets are of a debtor and not when a third party like the MCGM is involved. Therefore, in the absence of approval in terms of Section 92 and 92A of the MMC Act, the adjudicating authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands. No doubt, the resolution plans talk of seeking MCGM's approval; they also acknowledge the liabilities of the corporate debtor; equally, however, there are proposals which envision the creation of charge or securities in respect of MCGM's properties. Nevertheless, the authorities under the Code could not have precluded the control that MCGM undoubtedly has, under law, to deal with its properties and the land in question which undeniably are public properties. The resolution plan therefore, would be a serious impediment to 53 MCGM's independent plans to ensure that public health amenities are developed in the manner it chooses, and for which fresh approval under the MMC Act may be forthcoming for a separate scheme formulated by that corporation (MCGM)."*

It is quite clear that sections 92 and 92A of the BMC Act, *prevail* over section 238 of I&B Code, is concerned Sd/-

indeed, the Judgment upheld that primacy of Section 92 of the MMC Act over Section 238 of the IBC. However, a holistic examination of the facts that lead to the passing of the said judgement, *namely* the failure on the part of the corporate debtor in complying the terms and conditions of the contract agreement and the consequences thereof on the rights of the corporate debtor under the said contract agreement *alone* were considered and the rights of the lender Banks which have lent public money to the corporate debtor were not at all dealt with, while making the said observation. That apart, *in re,* MCGM, the primary ground for *dismissal* of the Resolution Plan earlier approved by this Tribunal and also by Hon'ble NCLT, *stemmed* from the resolution professional's *failure* to obtain requisite approvals from

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the Applicant as *mandated by Sections 92 and 92A of BMC Act*. Furthermore, the ruling is *conspicuously,* silent on *exclusion* of Mumbai Hospital from the CIRP or the entitlements concerning the superstructure. Pertinently, Section 92 of BMC Act, only outlines the stipulated procedure for the disposal of MCGM's properties, highlighting the imperative need of prior approval of the Corporation for leasing or establishing any other interest. Even in the event that a resolution plan is accepted by this Tribunal, wherein the subject property forms a part thereof, it is *imperative* to highlight that, in light of MCGM, *supra,* the acceptance of such a plan would ***remain conditional upon the subsequent acceptance by MCGM.*** So much so, inclusion of the assets of the corporate debtor in the RFRP of the corporate debtor wil

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no way 'undermine' the 'supremacy' of sections 92 and 92A of BMC Act.

28. Here it also pertinent to note that, the applicant under the contract agreement enabled creation of 'mortgage' 'charge' over both MCGM land and the superstructure raised therein, in favour of the lenders of the corporate debtor for availing financial assistance by the corporate debtor. The Lenders Banks which have rendered financial assistance to the corporate debtor, have invoked the provisions of IB Code, seeking initiation of corporate insolvency resolution process against the borrower/corporate debtor, as the corporate debtor/borrower *defaulted* in repayment of their debt. The money that was lent by the 2nd respondent was

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undoubtedly the **public money** and the lender banks have a **duty to recover** the same till the last pie. The lenders herein have strongly, asserted that they are the secured creditors by virtue of their 'mortgage right' in the property of the applicant i.e. MCMG land as well as of the corporate debtor i.e. the super structure raised there in by the corporate debtor. Therefore, the **'public duty' of the** lenders to recover the debt by exercising all their legitimate rights not only against the borrower but also on the property mortgaged for the due discharge of the debt by the corporate debtor and thus, protect the **'Public interest'** cannot be merely over looked.

29. In fact, Hon'ble Supreme Court, in paragraph 47 of the order in MCGM v Abhilash Lal, supra, clearl

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emphasised not only about *public duty* but also about the need to protect the property rights of **third parties**, as is event from the following observations,

> *"**in the opinion of this court, Section 238 cannot be read** asoverr iding the MCGM's right indeed its **public duty** to controland reg ulate how its properties are to be dealt with. That exists inSections 92 and 92A of the MMC Act. This court is of opinion thatSection 238 could be of importance when the **properties and assets**are of a debtor and **not when a third party** like the MCGM is involved*".

Here, I wish to clarify that, my discussion above is *confined* to the limited aspect of finding how far the decision rendered in re, MCGM (supra), by Hon'ble Supreme Court, basing on the facts of that particular case can be extended to a third party and deprive the third party its legitimate rights under a contract agreement, and not to enter into any discussion on whether or not the judgement in, MCGM v Abhilash Lal, in the light of the

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ruling in *Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund,* delivered by the three Judge Bench of Hon'ble Supreme Court, on November 23, 2021, i.e. *subsequent* to the Judgement in re, MCGM, wherein it was held that; *"The position of law that the IB Code shall override all other laws as provided under Section 238 of the IB Code needs no elaboration",* can be followed or not, in this case.

Therefore, in the light of my discussion as above and by drawing on the insights from the Victory Iron Works, supra, I have no hesitating in holding that, the rights possessed by the Corporate Debtor including the possession, developmental rights etc., and the mortgage right of the lenders under the contract agreement in

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respect of MCGM land and the superstructure raised there in, are 'Assets' within the meaning of Section 18 (1) (f) and Section 25 (2) (a) of I&B Code, hence under law the same are required to be considered essential components in the CIRP of the Corporate Debtor enabling a thorough and equitable resolution process, adhering to the established legal framework and ensuring a just outcome for all the stake holders.

30. Hence, I hereby reject the prayer of the applicant to exclude the above stated 'assets' from the RFRP for resolution of the insolvency of the corporate debtor.

The point is answered accordingly.

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POINT (2) :

Whether breach of subject contract agreement by corporate debtor automatically *vests* the superstructure raised by the corporate debtor in MCGM, even while the contract agreement is in *force*, and when the Corporate Debtor is undergoing CIRP?

31. It is not in dispute that the Contract agreement, as of the commencement of the CIRP of the Corporate Debtor on 13th March 2018, was valid, in subsisting. This Tribunal vide order in IA dated 12th January 2023 had granted *interim stay* of termination of contract agreement and the said order is in force since then. Subsequently, the Resolution Professional/ R1 filed IA 10 /2023 for, inter alia, restraining MCGM from taking any coercive

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measures under the Agreement including terminating the Agreement and/or taking possession of the Subject Hospital., which is heard and orders are reserved. The *factual matrix* of this application as well as IA 10/2023 *besides* the law, relied on in both these applications, in so far as the same relates to the effect of termination of contract agreement being common, I prefer to deal with this point, comprehensively in IA 10/2023.

The Point is answered accordingly.

32. Therefore, in the light of my discussion above and taking the submissions of the learned counsels representing both the sides besides the case law, into consideration, I am of the considered view that the

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present application is devoid of merit and is liable to be dismissed. Therefore, this application is hereby dismissed. However, without costs.

33. In the result this Application is dismissed without costs.

Sd/-

DR.VENKATA RAMAKRISHNA BADARINATH NANDULA
MEMBER (JUDICIAL)

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